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THE
FEDERAL REPORTER.

VOLUME 94.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

JUNE—AUGUST, 1899.

ST. PAUL:
WEST PUBLISHING CO.
1899.

FEDERAL REPORTER, VOLUME 94.

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OF THE

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

SHEPARD v. TULARE IRR. DIST.

(Circuit Court, S. D. California. April 24, 1899.)

No. 859.

1. JURISDICTION OF FEDERAL COURTS—EXISTENCE OF DIFFERENT REMEDY IN STATE COURTS.

The fact that an original action for a mandamus will lie in the courts of the state against a municipal corporation or its officers to compel the payment of bonds issued by the corporation or the levy of a tax for their payment does not deprive the holder of such bonds of the right to maintain an action to recover judgment thereon in a federal court, where the requisite diversity of citizenship exists; a judgment being a necessary preliminary to the issuance of a writ of mandamus by such court, which only grants it in aid of an existing jurisdiction, and not as an original remedy.

2. MUNICIPAL BONDS—ACTIONS ON.

An action in a federal court against a municipal corporation to recover judgment on its bonds is not defeated by the fact that the bonds are payable only out of a special fund required to be created by the corporation, and which it has failed to provide, as if it be conceded that its primary liability is upon the contract to create the fund, and not upon the bonds, that obligation can only be enforced by mandamus, to which a judgment is a necessary prerequisite in a federal court.

3. IRRIGATION DISTRICT—ACTION ON COUPONS—DEMAND.

Where an irrigation district organized under the Wright act of California (St. Cal. 1887, p. 29 et seq.) has issued bonds, the coupons attached to which are payable under the law, and by their express terms, at the office of the treasurer of the district, on a failure to pay such coupons on presentation to the treasurer the holder is not required before bringing suit thereon to make a demand on the treasurer of the county in which the office of the directors is situated, although on the failure of the treasurer of the district to perform his duties in connection with the collection of the tax levied for the payment of the coupons such duties, under the law, devolve on the county treasurer.

4. MUNICIPAL BONDS—ACTIONS ON.

It is no defense to an action against a municipal corporation on its bonds that, if judgment should be obtained, no writ of mandate could be issued under the law to enforce its collection. Such question can only be considered after a judgment has been obtained.

5. SAME—BONA FIDE HOLDERS—EFFECT OF RECITALS.

In an action on municipal bonds, where the plaintiff alleges that he is a bona fide holder, and the bonds recite their issuance in conformity to law, it is not necessary that the facts showing the regularity and legality of their issuance should be alleged in the complaint.

On Demurrer to Complaint.

S. F. Leib, for plaintiff.

Calvin L. Russell, for defendant.

WELLBORN, District Judge. Plaintiff, who is a citizen and resident of the state of Michigan, sues to recover upon interest coupons issued by the defendant, an irrigation district created under a statute of the state of California, known as the "Wright Irrigation Act." The plaintiff alleges the due organization of said district, the issuance of the bonds to which said coupons were attached, and that the plaintiff is a bona fide holder thereof. Defendant has interposed a demurrer to the complaint, on the various grounds hereinafter noticed, and the present hearing is on said demurrer. Said act (St. Cal. 1887, p. 29 et seq.) contains, among others, the following provisions relating to bonds:

"Sec. 15. For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has been exhausted by expenditures herein authorized therefrom, and the board deem it necessary or expedient to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district in the amount as determined shall be issued. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued; and said election must be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers; provided, that no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words 'Bonds—Yes,' or 'Bonds—No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall cause bonds in said amount to be issued; if a majority of the votes cast at any bond election are 'Bonds—No,' the result of such election shall be so declared and entered of record. * * * The principal and interest shall be payable at the place designated therein. * * *

"Sec. 17. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided.

"Sec. 18. The assessor must, between the first Monday in March and the first Monday in June, in each year, assess all real property in the district, to the persons who own, claim, have the possession, or control thereof, at its full cash value. * * *

"Sec. 22. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of

ten years after the issuing of bonds, of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and shall constitute a special fund, to be called the 'Bond Fund of ——— Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases.

"Sec. 23. The assessment upon real property is a lien against the property assessed, from and after the first Monday in March for any year; and such lien is not removed until the assessments are paid or the property sold for the payment thereof."

Sections 24 to 33, inclusive, provide for the collection of assessments by the collector of the district, and for the payment over to the treasurer of the district of all moneys so collected. In section 34 occurs the following provision:

"Upon the presentation of the coupons due to the treasurer, he shall pay the same from said bond fund."

Defendant contends that all the officers of said district, except as otherwise alleged in the complaint, are presumed to have regularly performed their duties,—citing Code Civ. Proc. Cal. § 1963, subd. 15; and that, inasmuch as the only dereliction of duty charged in said complaint is against the treasurer, it must be assumed that the requisite assessments to pay the coupons sued on have been collected and placed in his hands for that purpose, and therefore that plaintiff has an adequate remedy by mandamus against the treasurer, available in the state courts, and, because of such remedy, cannot resort to an ordinary common-law action in the federal courts. This contention is fully met by the considerations that in the federal courts mandamus will not issue as an original, independent proceeding, but only in the exercise of a jurisdiction already acquired (*Bath Co. v. Amy*, 13 Wall. 244; *Greene Co. v. Daniel*, 102 U. S. 187; *Davenport v. Dodge Co.*, 105 U. S. 237; *Town of Queensbury v. Culver*, 19 Wall. 83; *Heine v. Commissioners*, Id. 655; *Waite v. City of Santa Cruz*, 89 Fed. 619), and the present action is to be regarded as one to establish the validity and amount of plaintiff's debt (2 Dill. Mun. Corp. § 856),—an initiatory step to mandamus.

The case of *Waite v. City of Santa Cruz*, *supra*, cannot be distinguished from the case at bar, since the law providing for the payment of the bonds involved in the former case (St. Cal. 1893, p. 59) is the same in principle as section 17 of the Wright act, hereinbefore

quoted; in other words, the bonds in both cases are payable out of special funds.

In *Heine v. Commissioners*, *supra*, the supreme court of the United States says:

"The question thus presented by the present case is not a new one in this court. It has been decided in numerous cases, founded on the refusal to pay corporation bonds, that the appropriate proceeding was to sue at law, and by a judgment of the court establish the validity of the claim and the amount due, and by the return of an ordinary execution ascertain that no property of the corporation could be found liable to such execution and sufficient to satisfy the judgment. Then, if the corporation had authority to levy and collect taxes for the payment of that debt, a mandamus would issue to compel them to raise by taxation the amount necessary to satisfy the debt."

In *Greene Co. v. Daniel*, *supra*, the same high authority speaks as follows:

"In the state courts, under the rule as stated in *Shinbone v. Randolph Co.*, 56 Ala. 183, and other cases, a mandamus would lie, without reducing the coupons to judgment, to compel the commissioner's court to levy and collect the taxes necessary to pay what was due. The rule is different, however, in the courts of the United States, where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary to support such a writ. The mandamus is in the nature of an execution to carry the judgment into effect. *Bath Co. v. Amy*, 13 Wall. 244; *Graham v. Norton*, 15 Wall. 427. A suit, therefore, to get judgment on the bonds or coupons is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not ousted simply because in the courts of the state a remedy may be afforded in another way."

To hold that, because mandamus is available in the first instance in the state court, but not in the federal court, therefore plaintiff must sue in the former, would be to hold, in effect, that federal jurisdiction can be ousted by state law, which we know is not the case. *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363; *Hyde v. Stone*, 20 How. 175; *Suydam v. Broadnax*, 14 Pet. 67; *Bank v. Vaiden*, 18 How. 503; *Reagan v. Trust Co.*, 154 U. S. 420, 14 Sup. Ct. 1062.

In *Hyde v. Stone*, 20 How. 175, the court says:

"But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the mode of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax*, 14 Pet. 67; *Bank v. Vaiden*, 18 How. 503."

Defendant also reaches the conclusion that mandamus is plaintiff's sole remedy by another line of reasoning, namely, that defendant's obligation is not a general obligation to pay, but only a special obligation to levy, collect, and disburse the annual assessments provided for in the foregoing sections of the Wright act, and therefore a common-law judgment, with the ordinary writ of execution, would sub-

ject the defendant to a more burdensome liability than its contract imposes. This argument, whatever may be the character or scope of defendant's obligation, is fully answered by what I have just said as to the federal procedure on mandamus, and the further consideration that a judgment, if obtained in the present action, will not enlarge or change said obligation, so far as concerns the fund out of which it is payable. *U. S. v. Macon Co.*, 99 U. S. 592; *Higgins v. Water Co.*, 118 Cal. 554, 45 Pac. 824, and 50 Pac. 670; *Buck v. City of Eureka*, 119 Cal. 46, 50 Pac. 1065.

Another contention of defendant, kindred to those already noticed, is that the coupons sued on are payable out of a special fund, and that the complaint is bad because of its failure to allege that there is money in that fund sufficient to pay said coupons,—citing, among others, the case of *Travelers' Ins. Co. v. City of Denver* (Colo. Sup.) 18 Pac. 558. The principle of that case, doubtless, is that the primary obligation of the city was to create a fund, and therefore, unless the fund was in existence, plaintiff had no remedy except to compel the officers of the corporation to perform their duties and create the fund. The court says:

"The city having contracted to take certain steps to create a proper fund for the payment of the cost of constructing the sewer, and a party contracting to do the work having contracted that payment therefor should be made out of the fund so to be created, it is evident that the city is not liable, in an action upon warrants drawn on that fund, without a showing that there is money in the fund to pay the same. The primary liability of the city is upon its contract to create a fund. *Bill v. City of Denver*, 29 Fed. 344."

In the last-named case defendant's contention is stated thus:

"It is insisted, on the part of the city, that its sole liability was the making of an assessment and levy upon this sewer district, and that, if it has failed to discharge that duty, the plaintiff's sole remedy is by mandamus proceedings to compel it to proceed therewith."

If it be conceded, which, however, I do not decide, that the last sentence above quoted from *Travelers' Ins. Co. v. City of Denver*, namely, "The primary liability of the city is upon its contract to create a fund," aptly characterizes the liability of the defendant herein, still the doctrine of that case, applicable where mandamus issues as an original, independent proceeding, cannot defeat the present action, for the reason already stated that, under federal practice, said action is prerequisite to a writ of mandate.

Defendant further contends that the complaint should have alleged a demand upon the treasurer of the county. Such a demand, I think, was unnecessary, in view of the facts that the law expressly requires and the bonds stipulate in terms for payment of the coupons at the office of the treasurer of the district. Defendant further contends that the present action cannot be maintained because the plaintiff, should he recover judgment herein, would not then be entitled to a writ of mandate. This contention, it seems to me, is without merit. As well might recovery on a promissory note, admittedly executed by a defendant, be resisted on the ground that he is insolvent, and therefore judgment against him would be ineffectual. Plaintiff's counsel suggests with much force that section 14 of the judiciary act of 1789, partially embodied in Rev. St. U. S. § 716, and which, as

construed by the supreme court in *Bath Co. v. Amy*, supra, and the other cases cited in same connection, authorizes mandamus only when ancillary to a jurisdiction already acquired, is similar in principle to the rule of equity practice which requires a creditor who desires to attack a conveyance for fraud to first reduce his claim to judgment,—citing *Kent v. Curtis*, 4 Mo. App. 121; *Estes v. Wilcox*, 67 N. Y. 266; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. Whether or not, under the circumstances of this case, the officers of the district are compellable to raise a fund with which to pay off plaintiff's coupons is a question to be determined after the plaintiff shall have obtained, if he does obtain, the judgment he seeks in this action.

With reference to the other objections to the complaint, that it fails to show legal notice of the election for the issuance of the bonds, and which of the bonds were exchanged for water rights and other properties, and which were sold for cash, it is only necessary to say that the complaint alleges that the plaintiff is a bona fide holder of the coupons, and that the bonds recite their issuance in conformity to law. *Lincoln v. Iron Co.*, 103 U. S. 412; *Provident Life & T. Co. v. Mercer Co.*, 170 U. S. 593, 18 Sup. Ct. 788; 15 Am. & Eng. Enc. Law, 1265; *Town of East Lincoln v. Davenport*, 94 U. S. 801; *Grand Chute v. Winegar*, 15 Wall. 355; *Mercer Co. v. Hackett*, 1 Wall. 93; *Town of Brooklyn v. Aetna Life Ins. Co.*, 99 U. S. 362; *Bernard's Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. 333. Demurrer overruled.

DULANEY v. SCUDDER et al.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1899.)

No. 694.

1. EQUITY—JURISDICTION.

A bill by the assignee of a contract with the government, who had completed the work thereunder, against the assignor, who was insolvent, and owed the assignee on account of the contract more than was due from the government, and who had filed objections with the government against payment to the assignee, to enjoin the assignor from collecting or receiving the money due for the work, and to settle, as between the parties, which had the better right to the fund, is within the cognizance of equity.

2. PARTIES.

The government is not a necessary party to a suit by the assignee of a contract with it against the assignor to enjoin his collecting or receiving the money due under it, and to settle as between the parties the better right to the fund.

3. UNITED STATES—CLAIMS AGAINST—ASSIGNMENT.

There is no claim against the United States, and therefore no assignment of it, within Rev. St. § 3477, declaring void all assignments of a claim against the United States, and all powers of attorney or other authorities for receiving payment of any such claim, unless made after issue of warrant for payment thereof, where one having a contract to do work for the United States, before doing any work under it, contracts with another to obtain advances with which to do the work, agreeing to make payment for the advances out of the moneys to be received from the government for the work, and executes a power of attorney to such other person, authorizing him to collect all money to become due on the contract with the government.

4. SAME—CONTRACTS—ASSIGNMENT.

Under Rev. St. § 3737, declaring that any assignment of a contract with the United States shall cause the annulment of the contract, so far as the United States are concerned, the government may treat it as annulled, or recognize the assignment.

5. EQUITY—MATTERS CONSIDERED.

The court having taken jurisdiction of a suit by the assignee of a contract with the United States against the assignor to enjoin the assignor from collecting or receiving the money due under it, properly ascertains the amount due complainant from defendant, and renders a personal decree against him for that sum.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Murray F. Smith, for appellant.

S. H. King, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. L. C. Dulaney, the appellant, made a written contract with an officer representing the United States, binding himself to construct certain levees. He agreed to furnish the labor and material, and to complete them in a manner satisfactory to the government. Dulaney was insolvent, and unable to carry out his agreement without assistance. On the 31st of March, 1894, to get the money and supplies to do the work, he made a contract with Scudder & Co. This contract is in writing, and by its terms Dulaney was to repay Scudder & Co. for the advances made to him, out of money he was to receive from the government for the work on the levees. With the contract, Dulaney executed a power of attorney to Scudder & Co. authorizing them to collect and receipt for all money to become due on Dulaney's contract with the government. The agreement referred to the power of attorney executed at the same time in these words: "In case the power of attorney executed by the said Dulaney shall not be satisfactory to the United States authorities, he agrees to execute such other or others as may be necessary to conform to the requirements of said authorities." The power of attorney was submitted to the government, and accepted as satisfactory, after requiring a change in the acknowledgment. The estimates, when due, while Dulaney had charge of the work, were paid to Scudder & Co. under this contract and power of attorney. In May, 1895, it became known to Scudder & Co. that Dulaney had failed to comply with the terms of his contract with the government, and that the government was about to annul the contract. Scudder & Co. had already made large advances to Dulaney. To avoid the loss of advances already made, Scudder & Co., on the 27th day of May, 1895, made another agreement with Dulaney. By this agreement Dulaney transferred certain personal property to Scudder & Co., and also assigned to them "all his rights and interest" in the contract which he had made with the government; Scudder & Co. agreeing to finish the work which Dulaney had, in the first instance, agreed to do. Scudder & Co. proceeded to finish the work, taking entire charge of it. As the work progressed, payments were made to them upon estimates made pursuant to the original contract between Dulaney and the gov-

ernment. When the work was finished, it was accepted by the government, and the estimate for the final payment was made; but, before it could be paid to Scudder & Co., Dulaney gave the government written notice that he had revoked his power of attorney, and objected to this final payment being made to Scudder & Co. The amount then due from the government on the work was about \$7,715, and Dulaney was, on account of these transactions, indebted to Scudder & Co. in a much larger sum. Dulaney continues insolvent, and the substantial subject of this litigation is the right to the money due for the work, and now held by the government. On the 27th of May, 1896, Scudder & Co. filed their bill in chancery against Dulaney, alleging the facts that we have briefly stated, and praying for general relief, and specially that Dulaney be perpetually enjoined from collecting or receiving the money due for this work. The circuit court overruled a demurrer to the bill, and on the final hearing enjoined Dulaney as prayed for; and also rendered a decree against Dulaney for the amount found to be due Scudder & Co. The cause is brought here by appeal, and it is urged that there is no equity in the bill, that the United States was a necessary party to the suit, and that sections 3477 and 3737 of the Revised Statutes of the United States make the dealings between the parties illegal, and that, therefore, the contracts between Dulaney and Scudder & Co. are against public policy, and void.

1. It is not necessary to examine the questions whether the bill contains equity as a bill for an accounting or as one to prevent a multiplicity of suits. Scudder & Co. had earned, and are certainly the equitable owners of, the fund in controversy, which is withheld by the government. The contract under which the work was done was originally with Dulaney. He is now claiming the fund, and has given notice to the government of the revocation of the power of attorney under which it was to have been paid to Scudder & Co. Dulaney is insolvent. Unless the government is bound by its dealings with Scudder & Co.,—a question not necessary to be decided,—it has the right to either recognize or reject the power of attorney of Dulaney and his contract with Scudder & Co. If Dulaney should receive the money, Scudder & Co. would be without remedy. The jurisdiction of equity for the protection of contract rights is not limited to the original parties to the agreement, but is often exercised in favor of their assignees. Under the circumstances of this case, the necessity of protecting the assignee by the writ of injunction is sufficient of itself to give equity jurisdiction. 2 High, Inj. (3d Ed.) § 1113. In *Milnor v. Metz*, 16 Pet. 221, the fund in controversy was in the treasury. The secretary refused to recognize the claim of either party, and waited for the conflicting claims to be adjusted by the courts. Metz filed his bill enjoining Milnor from receiving the money, and had a decree of perpetual injunction, which was affirmed by the supreme court. The case of *Phelps v. McDonald*, 99 U. S. 298-307, was a contest in equity as to the ownership of money which was not within the jurisdiction of the court. The court said, "Whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right." The allegations of the bill make a case within the jurisdiction of equity to enjoin

Dulaney, and to settle, as between the parties, which has the better right to the fund in controversy.

2. In this suit it was not necessary that the United States be made a party defendant. The United States cannot be sued except by their consent. The position could not be sustained that the complainants would be deprived of their equitable remedy by injunction against Dulaney, because the United States did not consent to be sued. In the case of *Milnor v. Metz*, supra, the United States was not made a party defendant; and in *Phelps v. McDonald*, supra, the court granted relief by a decree in personam, although the property involved was not in its territorial jurisdiction. The purpose of this suit was to settle the controversy between the parties to it, and the decree rendered is not binding on the United States, but would protect the government in disregarding the notice of Dulaney that he had revoked the power of attorney given to Scudder & Co.

3. There are two sections of the Revised Statutes that bear upon the defenses made, and they should be examined together. Section 3477 is as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. * * *

This section, it will be observed, relates to the transfers of any "claim" against the United States.

Section 3737 relates to the transfer of "contracts" and is as follows:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

These statutes have been often the subject of construction by the courts, and it has been uniformly held that their purpose is the protection of the United States. In *Hobbs v. McLean*, 117 U. S. 576, 6 Sup. Ct. 874, the court said:

"The sections under consideration were passed for the protection of the government. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed, and a settlement made."

In *Goodman v. Niblack*, 102 U. S. 560, Mr. Justice Miller, speaking for the court, after stating the mischiefs these statutes were intended to prevent, said:

"Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment."

There are many cases and opinions to the same effect. *Bailey v. U. S.*, 109 U. S. 432, 3 Sup. Ct. 272; 15 Op. Attys. Gen. 245; 16 Op.

Attys. Gen. 278. The intention of congress in enacting these statutes, and their purpose, should be kept in view while construing them. The record shows that Dulaney was insolvent when he made the contract with the government, and that he contracted with Scudder & Co. to obtain the advances before he had performed any work on his contract. When he made the contract of March 31, 1894, and executed the power of attorney, he had no claim against the government. He had done no work. In *Hobbs v. McLean*, supra, the court said:

"When those articles were signed, there was no claim against the government to be transferred. * * * What is a claim against the United States is well understood. It is a right to demand money from the United States. Peck acquired no claim in any sense until after he had made and performed wholly, or in part, his contract with the United States. Section 3477, Rev. St., it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the court of claims."

The arrangement, therefore, made by Dulaney with Scudder & Co. to obtain the means to carry out the former's contract with the government, was not the transfer of a claim within the meaning of section 3477, and does not violate the letter or spirit of that section. This agreement and power of attorney of March 31, 1894, are not made null and void, as between the parties to it, by the statute. On the 27th of May, 1895, another contract was made between Dulaney and Scudder & Co. By the terms of this contract, Dulaney transferred his interest in his government contract to Scudder & Co. The language used is:

"The said L. C. Dulaney does hereby transfer, assign, and set over to said parties of the second part (Scudder & Co.) his said contract, and all his rights and interests thereunder; the said parties of the second part agreeing and obligating themselves to complete said levee work according to the conditions of the said contract and requirements of the U. S. government."

Under this transfer, Scudder & Co. completed the work, received payments from the government on estimates, and now claim to own the amount due from the government for the work. This last agreement is the transfer of a contract, within the meaning of section 3737. Such transfers are not, by that section, declared null and void. The statute causes the "annulment of the contract * * * so transferred so far as the United States are concerned." It is intended, as we have shown, for the protection of the United States. The government was free to treat it as annulled, or to recognize the assignment. In *Burck v. Taylor*, 152 U. S. 648, 14 Sup. Ct. 701, commenting on this statute, the court said:

"The express declaration that, so far as the United States are concerned, a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government, in effect, by this section, said to every contractor, 'You may deal with your contract as you please, and as you may deal with any other property belonging to you, but, so far as we are concerned, you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.'"

The court having taken jurisdiction of the cause to settle this controversy as to the ownership of the fund, and to enjoin Dulaney from receiving it, it is a familiar principle that it should settle the whole matter. It was right, therefore, to ascertain the amount due the complainant from the defendant, and to render a personal decree for such sum. The decree of the circuit court is affirmed.

HUNTER v. CONRAD et al.

(Circuit Court, D. Rhode Island. April 7, 1899.)

No. 2,544.

1. MARRIED WOMEN—RESTRICTION ON POWER TO ANTICIPATE INCOME—EFFECT ON CONTRACTS.

Where a provision of a will that a married woman to whom the income from a trust fund was bequeathed for life should have no power to alienate or anticipate such income was valid under the laws of the state where the will was probated and the trust estate existed, though it was only so valid because of an exception to the general rule in favor of married women, a note made by the woman while still under coverture cannot be given effect as an anticipation and enforced against such income by a court of equity, on the ground that the note constituted a valid obligation under the laws of another state in which it was made, and might there have been so enforced, and that it had been reduced to judgment in the courts of a third state, nor because the defendant, after the giving of the note, became, and still remains, a feme sole, nor even because of a subsequent change in the laws governing the trust, not in terms made retroactive.

2. STATUTES—CONSTRUCTION—MARRIED WOMAN'S ACTS.

A change in the statutes of a state by which a married woman is given the same power to make contracts as though she were single, with the same rights and liabilities, in the absence of an authoritative construction by the state courts, will not be construed by a federal court of equity to abolish an exception in her favor, and place her within the general rule of the state which makes invalid restrictions on the power to anticipate or charge future income.

In Equity.

N. W. Littlefield, for complainant.

Francis Colwell and Walter H. Barney, for respondents.

BROWN, District Judge. This case is on demurrer to a creditors' bill seeking to charge trust funds in the hands of the trustees under the will of J. B. Barnaby, late of Providence, R. I. A judgment at law was obtained in the state of Montana against the respondent Mabel B. Conrad, daughter of said Barnaby, and her former husband, John H. Conrad, upon a promissory note made at Chicago, Ill., and signed by said Mabel B. Conrad and John H. Conrad & Co. (a firm composed of said John H. Conrad and S. C. Hunter). The note was dated March 12, 1893, and payable in four months. January 12, 1895, the respondent Mabel B. Conrad was divorced from her said husband, and since then has remained unmarried. On November 6, 1895, after the divorce, action was begun on the note in the state of Montana, due service being had in that state. March 23, 1896, judgment was

obtained. November 21, 1896, execution thereunder was returned unsatisfied.

The will, after placing property in the hands of trustees, provides:

"And, thirdly, all the residue of said net income of said trust estate and property to pay in equal shares, and in quarterly payments from the date of my death, to my said two daughters during their respective lives for their own sole and separate uses, and their personal receipts to be at all times sufficient discharge therefor; but neither of my said daughters shall have any power to assign or otherwise alienate or anticipate the same or any part thereof before the same becomes payable to her as aforesaid."

As Mrs. Conrad's interest in the trust fund is restricted to the income, and as she devises over place the corpus of the estate entirely out of her control, it seems clear that there is no ground for the creditors claiming more than the income.

The complainant relies upon *Tillinghast v. Bradford*, 5 R. I. 208. In this case, Ames, C. J., says:

"The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition, such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate,—alienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property—and, so far as subjectiveness to debts is concerned, to the honest policy of the law—as to be totally void, unless, indeed (which is not the case here), in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since *Brandon v. Robinson*, 18 Ves. 429; and, in application to such a case as this, is so honest and just that we would not change it if we could. Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit should be also amenable to the demands of justice."

In *Stone v. Westcott*, 18 R. I. 685, 29 Atl. 838, it was said:

"The question raised for decision is whether the respondent * * * has any right in the fund, or the income of it, which he can enforce against the executors. If so, his creditor can also enforce it, and the bill can be sustained; otherwise, it cannot."

See *Ryder v. Sisson*, 7 R. I. 341, 344; *Bank v. Chase*, 16 R. I. 37, 39, 12 Atl. 233. We cannot doubt that this has been regarded as the settled law of Rhode Island where the cestui que trust was not a married woman under coverture. In the present case, however, we have to consider whether this doctrine is applicable under circumstances novel in character. To the general rule of policy that makes invalid restraints on alienation there is a well-recognized exception in the case of a married woman. Gray, *Restr. Alien. Prop.* §§ 140–142, 269, 277. At the date of the execution of the will and of probate, Mrs. Conrad was under coverture. Though no Rhode Island case has been cited on the point I have no reason to doubt that in Rhode Island the exception in favor of married women existed, and that the restraints upon alienation and anticipation imposed by the will upon Mrs. Conrad were then valid. So, also, at the time of the execution of the note,

which does not appear to have been in any way for the benefit of her separate estate, she was under coverture. There was, then, nothing in the policy of the law invalidating the provision of the will that forbade this married woman to alienate or anticipate her separate estate. It would seem, therefore, that, though a married woman was *sui juris* in the state of Illinois at the date of making the note, she might under the law of Rhode Island be lawfully restrained from charging her equitable estate by her contracts.

The equity of the creditor, under the allegations of the present bill, rests upon a contract made by Mrs. Conrad at a time when she had no power, under the laws of Rhode Island, to charge her equitable estate. How is it possible to hold the restraint on alienation or anticipation valid at the time of making the note, and yet to hold that the making of the note did charge her equitable estate? The language of James, L. J., in *Pike v. Fitzgibbon*, 17 Ch. Div. 454, seems quite in point:

"Twist it in any way you like, the conclusion which the vice chancellor arrived at, and which we are asked to arrive at, is that a married woman restrained from anticipation can anticipate. That is the result, if it is put into plain English, because whether it is done by deed or by letter, or by the creation of a debt which in the result operates to charge the property, it is an anticipation of the property, by which the lady deprives herself of something which she would otherwise receive. That this is anticipating her future income would seem to me to be too plain a proposition to be seriously contested."

Cotton, L. J., said:

"Their contention must amount to this: that the married woman under the trusts of the will was prevented only from doing any act which would prevent her from enjoying during the coverture the income of this property, and that she could do acts even during coverture which might intercept the income of the property after the death of her husband. The express terms of the trust are that she shall have no power while under coverture to dispose of the property by way of anticipation. Would not a disposition to take effect after the death of her husband be an anticipation just as much as if it was to take place in the year after that in which the disposition was made? It is almost a *reductio ad absurdum* to say that, although she could not anticipate by an express charge on the property, yet she could dispose of it by way of anticipation by contracting during the coverture a debt not directly charging the property, but giving the plaintiffs a right to claim it."

See, also, *Roberts v. Watkins*, 46 Law J. Q. B. 552; *In re Sykes' Trusts*, 2 Johns. & H. 415.

It is contended by the complainant, however, that the following reasons prevent Mrs. Conrad from receiving the benefit of any exception to the rule stated in *Tillinghast v. Bradford*, *supra*: The note was made in the state of Illinois, and was a valid contract under the laws of that state, though contrary to the then existing policy of the state of Rhode Island. *Taylor v. Boardman*, 92 Ill. 566. At the date of the beginning of the action on the note, and at the date of recovery of judgment in the state of Montana, whereof Mrs. Conrad was then resident, a married woman was liable under the laws of Montana upon her promissory notes. Civ. Code Mont. § 256. The policy of the state of Rhode Island has been changed since the making of the note, and before the filing of the present bill, by statute passed May 26, 1893 (Pub. Laws R. I. c. 1204), providing:

"Any married woman may make any contract whatsoever, the same as if she were single and unmarried, and with the same rights and liabilities."

See, also, Acts 1895-96 R. I. c. 335.

In *Case v. Dodge*, 18 R. I. 661, 663, 29 Atl. 786, it was held:

"The policy of our law relating to married women having thus been changed, such a contract made elsewhere, though prior in date to the passage of the statute, would no longer contravene the policy of our law; and hence no reason would exist why an action on it should not be sustained."

Furthermore, when action was brought and judgment obtained, Mrs. Conrad was, by reason of the divorce, a feme sole. Conceding that Mrs. Conrad would now be liable at law in the state of Rhode Island upon the note and upon the judgment, does it follow that a court of equity must charge her estate, in spite of the valid restraint upon her power to alienate and anticipate, existing at the time of making the note? It seems evident that a restraint upon the feme's anticipation had for one of its purposes the exclusion of the influence of her husband, and to prevent him through that influence from inducing his wife to divest herself of her property, and place it at his disposal. *Lewin, Trusts*, *754. It may be argued that, because the legislature of the state of Rhode Island has seen fit to bestow upon a married woman the power to contract "as if she was single and unmarried and with the same rights and liabilities," and especially because of the repeal of section 4 of chapter 194 of the General Laws of Rhode Island, it was the legislative intent that a testator should no longer have the power to extend to a woman under coverture, and subject to her husband's influence, the protection of a restraint upon anticipation. We should not be justified, however, in attributing to the legislature an intent to make so radical a departure from a recognized equitable doctrine without more conclusive evidence. The enlargement of the wife's contractual power gives greater legal opportunities for the exercise of marital influence, but does not remove the former reasons for equitable support of restraints upon anticipation during coverture. It may be that public policy requires that the enlargement of a married woman's capacity to contract be accompanied by such an enlargement of the liability of her equitable estate as will abolish the exception in her favor, and place her within the general rules that make invalid restraints on alienation or anticipation. In the absence of clear evidence of such a local policy in statutes or in judicial decisions, we do not think a federal court, sitting in equity, would be justified in drawing questionable inferences as to the local policy, and in adopting as the law of this case what in no event could be considered as the established and settled law or policy of Rhode Island. Furthermore, even if we were satisfied that it was the legislative intent to abolish the exception in favor of married women, there would still remain the question whether a restraint upon anticipation, valid when created, valid when the note was made which is the basis of the complainant's right, should be invalidated by a legislative enactment which in terms refers only to the future capacity of a married woman to make contracts, and presumably was intended to be prospective only.

The complainant by his contract acquired no right to defeat the intention of the testator, or to appropriate the property which the testa-

tor wisely placed in trust for his daughter's support; nor is he defrauded of any right which his contract gave him by upholding this trust. *Nichols v. Eaton*, 91 U. S. 716, 726. While the argument for the complainant has been presented with such ability and learning as to entitle it to careful consideration, I am of the opinion that it cannot prevail, since the restraints imposed by the testator upon alienation or anticipation were valid; and to charge this trust estate upon a contract made by the testator's daughter while under such restraint would be to hold, in effect, that a married woman, though restrained from anticipation, could anticipate.

The demurrer is sustained.

HAYDEN v. BROWN et al.

(Circuit Court, D. Vermont. March 17, 1899.)

EQUITY JURISDICTION—RECEIVERS OF NATIONAL BANKS—SUIT TO RECOVER DIVIDENDS.

A receiver of an insolvent national bank may maintain a suit in equity in any district against all the stockholders within the court's jurisdiction to recover back unearned dividends received by them, and unlawfully paid from the bank's capital when insolvent, on the ground that it is a suit to follow trust funds.

In Equity.

Wilder L. Burnap, for plaintiff.

Daniel Roberts, for defendants.

WHEELER, District Judge. This suit is brought by the plaintiff, as receiver of the Capital National Bank of Lincoln, Neb., to recover back dividends paid to the defendants severally, as shareholders, from capital, and not from profits. It has been heard on amended pleadings. All of the points raised seem to be covered by *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60, on appeal from the circuit court of the district of Nebraska, except that the bank itself was in that district. Since this case was heard, a decree has been made in a suit against several persons for their respective shares in these same dividends, in the Southern district of New York, not reported, which was supposed to have been appealed from. A decision on appeal has been awaited here, but the decision of the circuit court appears to have been acquiesced in. Nothing appears to remain to be done here now but to follow those cases, from which the orator appears to be entitled to a decree against the defendants, respectively, for the amount of the face of the dividends respectively received by each within the period of the statute of limitations here set up. Decree for plaintiff against defendants, respectively, for dividends not barred by statute of limitations.

CENTRAL NAT. BANK OF CAMBRIDGE, OHIO, v. FITZGERALD et al.

(Circuit Court, D. Nebraska. May 15, 1899.)

1. EQUITY — LACHES — FAILURE OF CREDITORS TO CONTEST ALLOWANCES BY PROBATE COURT.

A court of equity will not grant relief to creditors of an estate against alleged extravagant allowances by a probate court to the family of the decedent or the attorneys for the estate, where it is not shown that the probate court was fraudulently imposed upon, or that the complainants were prevented by fraud from contesting the allowances in such court.

2. SAME—JURISDICTION—UNSETTLED ESTATE.

A court of equity is not precluded from entertaining a suit by creditors of an estate to set aside a payment by the administratrix to one creditor to the exclusion of the others, alleged to have been made through a fraudulent agreement between the favored creditor and the administratrix, because the estate is still unsettled, the pendency of the administration in the probate court being a matter for consideration only in relation to the disposition to be made of the fund in case of recovery.

3. JURISDICTION OF FEDERAL COURTS—PENDENCY OF ADMINISTRATION IN PROBATE COURT.

The fact that a transfer of property by an administratrix was made with the sanction of a state probate court, and that the estate is unsettled, and the administration still pending in such court, does not deprive a federal court of equity of jurisdiction of a suit to set aside such transfer on the ground of fraud, where the complainant is a citizen of another state, and the requisite amount is involved.¹

4. EQUITY—SUIT AGAINST ADMINISTRATRIX.

A bill by creditors of an estate against the administratrix and her attorney, alleging that the administratrix is the real owner of a claim against the estate, which has been in form transferred to her co-defendant, and that they have combined to subject property of the estate situated in another state to the payment of the claim to the exclusion of the other creditors, states a cause of action for equitable relief, as the administratrix, if in fact the owner of the claim, cannot properly represent the estate in proceedings relating to such claim.

5. SAME—MULTIFARIOUSNESS OF BILL.

A bill by creditors of an estate against the administratrix and two other defendants to set aside a transfer of property of the estate by the administratrix to one of her co-defendants as fraudulent, and which also seeks relief as to a separate transaction between the administratrix and the other co-defendant, in which the transferee of the property has no interest, is multifarious.

On Demurrer to Bill.

Burr & Burr, for complainant.

Harwood & Ames and James Manahan, for defendants.

SHIRAS, District Judge. The bill in this case was filed by the Central National Bank of Cambridge, Ohio, on its own behalf and on behalf of such other creditors of John Fitzgerald, now deceased, who may desire to participate in the benefits of the litigation, it being averred in the bill that the complainant is a creditor of the estate of John Fitzgerald; that Fitzgerald died in the city of Lincoln, Neb., on the 30th day of December, 1894, intestate; that early in 1895 letters of administration were duly issued by the county court of

¹ For jurisdiction of federal courts in probate matters, see note to *Barling v. Bank*, 1 C. C. A. 514.

Lancaster county, Neb., to Mary Fitzgerald, widow of the decedent, and that she is now acting as the administratrix of the estate of her late husband; that complainant, being a creditor of said John Fitzgerald, duly filed in the county court of Lancaster county its claim against the said estate, and the same was allowed in due form, and judgment thereon in favor of complainant and against Mary Fitzgerald, administratrix, was entered in the sum of \$5,103.33, and that the claim thus allowed remains wholly unpaid. The bill then proceeds to charge that the administratrix, in violation of her duty, has in several ways combined with the other defendants to defraud the creditors of the estate of John Fitzgerald, including complainant; that part of the assets of the estate consisted of a judgment in favor of John Fitzgerald against the Fitzgerald-Mallory Construction Company, amounting in all, including interest, to the sum of \$72,000; that by an arrangement and combination between the First National Bank of Lincoln, one of the defendants herein, and the administratrix, Mary Fitzgerald, the money realized on this judgment, being some \$72,000, was paid over to the First National Bank in payment of the claim held by the bank against the estate of John Fitzgerald, thereby giving the bank an unlawful preference over complainant and the other creditors of John Fitzgerald. It is also charged in the bill that during the lifetime of John Fitzgerald, he was appointed administrator of the estate of Edward L. Cagney, deceased, and in that capacity received some \$20,000, for which he had not accounted at the time of his death; that Mary Fitzgerald claimed to be entitled to this sum under a will executed by Cagney, which will was probated in the county court of Lancaster county, and thereupon she presented her claim against the estate of John Fitzgerald in said county court, and obtained an order declaring that John Fitzgerald held this sum in trust, and that her estate must account for the same as trust funds. It is further averred that Mary Fitzgerald thereupon assigned and transferred in form this claim thus allowed to her attorney, James Manahan, and that Manahan and Mrs. Fitzgerald have instituted proceedings in Cook county, Ill., to subject certain realty belonging to the estate of John Fitzgerald, and situated in Illinois, to the payment of this claim, intending thereby to secure the payment of the claim in full, and also to deprive the creditors of the Fitzgerald estate of any benefit from this property situated in Illinois. It is also charged in the bill that the estate of Fitzgerald is insolvent; that it has been largely absorbed by improvident allowances to the family; and that the complainant and the other creditors, unless aid is given them to reach the funds and property already described, will receive nothing upon their just claims. To this bill the defendants, including Mary Fitzgerald, the First National Bank of Lincoln, and James Manahan, interpose a demurrer on the grounds that this court is without jurisdiction in the premises, in that it appears that the estate of John Fitzgerald is yet in process of administration in the county court of Lancaster county, and that the complainant should apply to that court for relief against any wrongful acts of the administratrix; that the bill does not disclose a case for equitable relief; and that it is multifarious, in that it embraces distinct causes of action.

Upon the ground that this court is without jurisdiction for the reason that the administration of the estate of John Fitzgerald has not yet been closed, but is still in progress in the proper probate court, to wit, the county court of Lancaster county, I agree with the views advanced by counsel for defendants with regard to many of the general allegations of the bill, which charge that improvident allowances are being made to the widow and family of the deceased, and to the attorneys acting for the estate. It is open to complainant and the other creditors to contest these allowances in the probate court, and, if aggrieved by its judgment, a remedy is open by appeal to the supreme court of Nebraska. With respect to allowances of this character, in the absence of proof showing that the probate court was fraudulently imposed upon, or the creditors were fraudulently prevented from contesting the same in the probate court, a court of equity will not attempt to re-examine the allowances made by the probate court. *Smith v. Worthington*, 4 C. C. A. 130, 53 Fed. 977, and 10 U. S. App. 616. A court of equity, however, refuses to entertain a bill to relitigate such allowances, not upon the strict ground that it cannot take jurisdiction, because the matter of the estate is still pending in the probate court, but because the matter of these allowances was within the jurisdiction of that court, and it was open to the creditors to have made a contest in that court; and, if they neglect so to do, a court of equity, which aids the diligent, but not the negligent, for that reason refuses to act on behalf of the creditors. The bill demurred to is not, however, confined to this matter of allowances, but it expressly charges that by combined action between the administratrix and the First National Bank of Lincoln the latter, as a creditor of the estate, has received the sum of \$72,000, whereas the other creditors have received no dividend, and will not be paid any unless this and other transactions complained of are set aside. This money is not now in the possession of the probate court, and it is plain that the complainant and the other creditors can litigate with the First National Bank its right to retain this money, without in any just sense interfering with the possession of the probate court. The objection urged in support of the demurrer that this court cannot undertake the distribution of the estate of John Fitzgerald because that is a duty imposed upon the county court of Lancaster county is not a reason why the court should not take jurisdiction, but is only a matter for consideration in determining the disposition of any money or property recovered in the further progress of the case. The main purport of the bill is to have it declared that the money paid to the First National Bank is in fact part of the estate of John Fitzgerald. If, upon the final hearing upon the merits, it is held that this money really forms part of the estate, and that the bank is holding it in trust for the estate, it will be ordered paid into court, and the disposition to be then made of it will depend upon the then existing circumstances. If by that time the estate in the probate court has been closed up, and the administratrix discharged, it would clearly be the duty of this court to make due distribution of the fund. If the estate has not been closed up, it might be proper to order the fund to be paid into the probate court, in order that it might complete the distribution

of the estate. That a federal court may entertain jurisdiction of a suit in equity between citizens of different states, and involving an amount in excess of \$2,000, wherein it is charged that the defendants, through fraudulent practices, have obtained property which rightfully belongs to the creditors of the estate, even though the transfer of the property to the defendants has been sanctioned by the probate court, is settled by the decisions of the supreme court in *Jackson v. Ludeling*, 21 Wall. 616, *Barrow v. Hunton*, 99 U. S. 80, and *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, and therefore the demurrer cannot be sustained on the ground of want of jurisdiction, nor upon the ground that the bill fails to state a cause of action relievable in equity, according to the allegations of the bill. The First National Bank of Lincoln, being a creditor of John Fitzgerald, through a combination with the administratrix has received the sum of \$72,000 from the assets of the estate, and has applied the same to the payment of its claim against the estate to the exclusion of the other creditors. The bill seeks to set aside this transaction, and to have it declared that the bank holds the money in trust for the creditors on the ground of a fraudulent combination between the administratrix and the bank; and thus, upon the face of the bill, is presented a case of equitable cognizance of which this court can take jurisdiction. Whether the proofs, when adduced, will justify a decree for complainant, is to be determined hereafter; but upon the face of the bill sufficient is shown to put the parties to the proof. So with respect to the claim originally belonging to Mary Fitzgerald as legatee under the will of Edward P. Cagney. It may well be that the money which John Fitzgerald received in his capacity as administrator of Cagney's estate is to be deemed to be a trust fund in his hands, and that the right exists to follow this fund into any property, or its proceeds, in hands of the administratrix of John Fitzgerald's estate, into which it was converted in any form; but according to the allegations of the bill Mary Fitzgerald is the real owner of this claim, the same having been in form transferred to her attorney; and it is charged that these parties have combined to collect this claim out of the property of the Fitzgerald estate situated in Cook county, Ill., to the exclusion of the creditors of the estate. According to the allegations of the bill, the proceedings in Illinois are in fact controlled by the one party, Mary Fitzgerald, who occupies the position of claimant and administratrix, and it is averred that the purpose of these proceedings is to obtain a sale of the Illinois property, and the application of the proceeds to the payment of the claim held by Mary Fitzgerald, and by her assigned to her attorney, James Manahan. If these allegations are true, they make a case for equitable interference, for certainly the creditors have rights in the property belonging to the estate and situated in Illinois; and the question whether the claim of Mary Fitzgerald as legatee of Edward P. Cagney can be enforced against this property to the exclusion of the creditors of the Fitzgerald estate ought not to be determined and be concluded in a proceeding in which the creditors are represented only by Mary Fitzgerald, or her agents and attorneys, she being the party who is interested adversely to the creditors.

The remaining objection relied on in support of the demurrer is that

the bill is multifarious, in that it embraces the controversy between the creditors and the First National Bank with respect to the \$72,000, in which matter Manahan has no interest, and also the controversy between the creditors and Manahan and Mary Fitzgerald over their rights and equities in the realty situated in Cook county, Ill., in which matter the bank has no interest. It is clear that these transactions have no connection with each other, and it must be held that they are improperly joined in the one suit. *Gaines v. Chew*, 2 How. 619. Leave is therefore granted to complainant to strike from the bill one or the other of these causes of action, retaining the bill as to the cause and parties thereto not thus stricken from the bill, the answer thereto to be filed within 30 days after the bill is amended by striking therefrom one of the causes now contained therein.

JESUP et al. v. WABASH, ST. L. & P. RY. CO.

(Circuit Court, N. D. Ohio, W. D. May 15, 1899.)

COSTS—MASTER'S FEE—RECOVERY OF INTEREST.

Where a decree which, among other matters, fixed the fee of a special master without objection as to its amount, and awarded execution therefor against one of the parties, is appealed from and reversed, and the costs, including such fee, are taxed against the other party, the master is entitled to recover interest from such party from the time his fee was allowed.

On Motion to Retax Costs.

Rush Taggart, for Wabash, St. L. & P. Ry. Co.

Brown & Geddes and Wilson & Warren, for Bluford Wilson.

TAFT, Circuit Judge. In the foreclosure of the Wabash Railway Case, a claim of James Compton, on certain equipment bonds, set up in the intervening petition, was referred to Bluford Wilson, as special master, and to this reference the Wabash Railway Company, by order of the court, was allowed to become a party. On the 11th day of June, Bluford Wilson, as special master, filed his report finding that Compton's claim was valid, and was prior in right to certain mortgages under which the Wabash Railroad Company claimed. To this the Wabash Railroad Company filed exceptions. Judge Jackson sustained some of the exceptions, and overruled others. He found that Compton was not entitled to a resale of property, but only to the right of redemption over prior mortgages. The order made was that, if Compton failed to redeem the property, he should pay all the costs of the proceeding, including the fees of the special master, Bluford Wilson, fixed at \$2,500, and, in default of payment, execution should issue; provided, further, that, if Compton should redeem the property, the costs of the proceeding, including the master's fee, should be taxed, one-third to Compton and two-thirds to the redemption fund, if paid into court, or to the Wabash Railroad, if a valid tender of redemption should be refused by said Wabash Company. From this decree Compton appealed to the circuit court of appeals, which court certi-

fied certain questions to the supreme court. The questions were answered by the supreme court so as to require the circuit court of appeals to enter a decree reversing the decree of the court below, which limited the remedy of Compton to the redemption, and finding that he was entitled to a resale, and for an accounting of the rents and profits of the railroad in the hands of the purchaser. The circuit court of appeals further ordered that the Wabash Railroad Company, the appellee, pay all the costs of the proceeding in said consolidated cases in the circuit court, court of appeals, and in the United States supreme court, already incurred, taxed or to be taxed, and, in default of such payment, that execution should issue therefor, and that, as to costs to be made from the circuit court of appeals, the circuit court should make such order as equity might require. Such a decree, in accordance with this mandate of the circuit court of appeals, was entered in the circuit court, and, acting thereunder, the clerk has taxed the costs already incurred, and has included, as part of the costs, interest on the master's fees of \$2,500 from the 1st of July, 1892. The contention of the Wabash Railroad Company is that the interest item is wholly unauthorized.

Section 966 of the United States Revised Statutes provides that "interest shall be allowed on all judgments in civil causes recovered in a circuit or district court and may be levied by the marshal under process of execution issued thereon in all cases where by the law of the state in which such court is held interest may be levied under process of execution; and it shall be calculated from the date of the judgment at such rate as allowed by law on judgments recovered in the courts of such state." In Ohio, interest is allowed at the rate of 6 per cent. The claim by the Wabash Railroad Company in support of this motion is that the appeal of Compton, if it had the effect of setting aside the decree, left the claim of the master an unliquidated and unascertained claim, unsettled, subject to the approval of the court, which was not obtained until 1897. I am clearly of opinion that the interest ought to be allowed in favor of the master. There was no dispute over the amount due to the master. The only question was who owed it. Under the original decree, it was held that Compton owed the amount, and an execution might have issued in favor of the master against Compton at any time before the reversal. If such execution had issued, the master would certainly have been entitled to recover interest against Compton, and, upon reversal, Compton would have been entitled to the costs which he had been obliged to pay in the lower court, under its decree subsequently adjudged to be erroneous. If this be correct, then I can see no escape for the Wabash Company from payment to the master of the interest which the master might have collected from Compton, and which Compton, in that case, might have collected from the Wabash Company, under the decree. The fact that the master forebore to collect his \$2,500 until it was finally settled who should have to pay it is no reason why he should not now collect the full amount due him, with interest. The judgment in his favor has never been set aside. It has only been decided that the Wabash Railroad Company is to pay it, instead of Mr. Compton. The Wabash Railroad Company has suffered nothing from the master's

failing to collect it from Compton. If he had collected it from Compton, the Wabash Railroad Company would have had to pay interest. I do not see why it should not have to pay interest now. The claim is not an unliquidated, unascertained claim. It was never objected to, and never appealed from, in so far as its amount was originally adjudicated. The motion to retax the costs is overruled.

ROBINSON v. SOUTHERN NAT. BANK.

(Circuit Court, S. D. New York. February 6, 1899.)

APPEAL BOND — RECEIVER OF NATIONAL BANK — APPEAL BY DIRECTION OF COMPTROLLER.

Under Rev. St. § 1001, as construed in *Bank v. Mixter*, 5 Sup. Ct. 944, 114 U. S. 463, no security need be given by a receiver of an insolvent national bank on an appeal taken by direction of the comptroller of the currency.

On Application for an Order Dispensing with Security on Appeal.
Edward Winslow Page, for complainant.
Hornblower, Byrne, Taylor & Miller, for defendant.

LACOMBE, Circuit Judge. In a recent decision, filed December 12, 1898 (*Platt v. Adriance*, 90 Fed. 772), this court discussed the question when security should be dispensed with in accordance with the provisions of section 1001, Rev. St. U. S. The conclusion reached was that security should be dispensed with only when the process was issued or the appeal taken "by direction of any department of the government," and it was directed in that case that, unless the plaintiff should file a certificate of the comptroller of the currency to the effect that process was taken out by express direction of the treasury department, he should be required to file security for costs in the usual way. In that case no certificate of the comptroller of the currency was presented, but security for costs was duly filed. In the case at bar the plaintiff has filed a signed direction by the comptroller of the currency, requiring appeal to be taken. This paper does not indicate a direction by the treasury department. It is suggested that the comptroller of the currency is a department by himself, and not a branch of the treasury department. The statutes, however, do not seem to warrant this conclusion, and it is doubtful whether a "direction" of the comptroller of the currency is in fact a "direction" of the treasury department. It appears, however, that the supreme court, in *Bank v. Mixter*, 114 U. S. 463, 5 Sup. Ct. 944, held that, under section 1001 of the Revised Statutes, no bond for the prosecution of a suit, or to answer in damages or costs, is required on writs of error or appeals issuing from or brought to the supreme court, by direction of the comptroller of the currency, in suits by or against insolvent national banks or the receivers thereof. The opinion in no way indicates the theory upon which the language of the section, "by direction of any department of the government," is thus construed, but the practice followed by the supreme court as therein indicated should be followed here. No security need be filed.

MONTGOMERY v. PERKINS et al.

(Circuit Court, S. D. New York. February 17, 1899.)

PRIVILEGED COMMUNICATIONS—CONVERSATIONS BETWEEN COUNSEL.

Conversations between the solicitor and counsel of a party relating to the subject-matter of a suit are privileged.

On Application to Compel the Solicitor of the Complainant to Answer Certain Questions.

William C. Perkins, for the motion.

L. J. Phelps, opposed.

LACOMBE, Circuit Judge. Question 26 is improper in form, calling for a legal conclusion. As to questions 29 and 30, they are clearly improper so far as conversations of the witness with Mr. Macfarland are concerned, if Mr. Macfarland is, as it is asserted on the brief, counsel for complainant. Certainly conversations between solicitor and counsel for a party touching the subject-matter of the litigation are privileged. As to consultations with Mrs. Day and Mr. Larocque, there is some suggestion in the brief that they are the witness' clients in this matter, being the real parties in interest for whom he is acting. If this be so, and it is made to appear in the record, the witness is entirely within his privilege in refusing to answer; but, as I understand the situation, the record does not disclose any such relation, and the witness does not assert that it exists. If it does not exist, I am wholly at a loss to understand upon what theory privilege of counsel is claimed as to these questions, which ask as to conversations or consultations, not with the witness' clients, but with some third persons. No authority is referred to, and I know of no principle of law which would call for such an extension of the doctrine of privilege.

DONAHUE et al. v. CALUMET FIRE-CLAY CO.

(Circuit Court, D. Kentucky. May 6, 1899.)

REMOVAL OF CAUSES—TIME FOR FILING PETITION—EFFECT OF ANSWERING AFTER OVERRULING OF OBJECTIONS TO JURISDICTION.

Where a defendant in a state court, a corporation of another state, appeared specially, and moved to quash the sheriff's return of service, and, on the overruling of its motion, reserved a bill of exceptions, and in its answer and at all times thereafter insisted on its objection to the jurisdiction of the court over it, the fact that it answered to the merits, and took other action, by motion and otherwise, in preparation for trial, did not constitute such a voluntary appearance as would debar it from exercising its right to remove the cause to a federal court, when, on its subsequent motion, the order overruling its objection to the service was set aside, leaving the question whether it could legally be required to answer still pending.

On Motion to Remand.

Wallace & McDonald and J. D. Reed, for plaintiffs.

D. W. Sanders and C. B. Seymour, for defendant.

EVANS, District Judge. The plaintiff Philip Donahue begun this action in the state court by filing his petition therein on April 22, 1897. The plaintiff alleged in his petition that the defendant was an Ohio corporation, and had its chief office in that state. A summons was issued, and attempted to be executed on various persons alleged, in one capacity or another, to be agents or officers of the defendant. On February 12, 1898, the defendant entered its special appearance, for the purpose and moved the court to quash the various returns on the summons. This motion after hearing was overruled by the state court on February 26, 1898. On March 5, 1898, the following order was made in the case by the state court, namely: "Came defendant by counsel, and filed its answer herein. On motion of defendant, by counsel, it is ordered that this action be and is assigned to March 9, 1898, for trial." The opening sentence of the answer of the defendant begins as follows: "The defendant, the Calumet Fire-Clay Company, not waiving its objection to the process herein, but expressly reserving the same, denies that the defendant," etc.; and then proceeds with a full answer to the merits of the case, as the same had been presented in the petition of the plaintiff as amended. On March 12, 1898, defendant tendered its bill of exceptions, which was allowed, signed by the judge, and made part of the record, covering all the proceedings on the motion to quash the returns on the summons, and disposing of that motion. On May 7, 1898, by consent of the parties, the action was assigned for trial on the 1st of June following. On May 23, 1898, on motion of the defendant, by counsel, and on affidavit filed by it, it was ordered by the court that Frank Parsons do personally appear on June 1, 1898, to testify in the action in behalf of the defendant, and not to depart without leave of the court. Parsons was the commonwealth's attorney, who had conducted the case out of which the action grew. On June 1, 1898, by consent of the parties, by counsel, the case was reassigned for trial October 19, 1898. On October 11, 1898, the court, on the defendant's motion, repeated its former order, requiring the personal attendance of Frank Parsons at the trial to testify for defendant. On October 19, 1898, by consent of the parties, it was ordered that the action be assigned to April 4, 1899, for trial. Philip Donahue having become a lunatic in the meantime, Patrick J. Donahue was appointed his committee on October 22, 1898, and on November 2, 1898, on his motion, without objection from the defendant, was admitted as a party plaintiff in this action, and permitted to prosecute the same for the benefit of Philip Donahue. On November 5, 1898, plaintiffs moved the court to set aside the order assigning the case for trial on April 4, 1899, and to assign it for trial at the earliest day possible. The court sustained the motion on November 12, 1898, and set the case for trial on February 6, 1899, the defendant excepting to both orders. On January 25, 1899, on motion of defendant, an order similar to previous ones was entered as to the personal attendance of the witness Frank Parsons, an affidavit on behalf of defendant being filed as the foundation for the order. On January 28, 1899, the defendant, having given notice thereof, moved the court for leave to file, and was per-

mitted to file, an amended answer. On the same day, the plaintiffs demurred to the amended answer, and it was sustained. The amended answer thus filed set forth the reasons and the facts upon which the defendant still insisted that the service of the summons was not sufficient in law and that it should be quashed. The amended answer set up no other facts, except such as embraced an attempt to show the insufficiency of the service of the summons in the case. On February 6, 1899, the defendant, by counsel, moved the court for leave to file an amended answer. No action appears to have been taken upon this motion, and on February 7, 1899, by agreement of counsel, the case was set for trial on the 27th of the month. On February 18, 1899, on defendant's motion, and on an affidavit filed, the order respecting the personal attendance of Frank Parsons as a witness was entered in the same terms as had been frequently done before. On February 25, 1899, the defendant moved the court to set aside the order sustaining the demurrer to defendant's amended answer, and also to set aside the order overruling the motion to quash the returns of the sheriff on the summons. On March 4, 1899, the defendant, by counsel, on notice previously given in writing, moved the court to reassign the case to a day for trial. The motion was sustained, and the case was set for trial on March 13, 1899. On March 13, 1899, an order sustaining the motion to set aside the order overruling the motion to quash the sheriff's returns on the summons, which had been made on March 1, 1898, was entered, and the returns on the summons were quashed; whereupon, on motion of the plaintiffs, leave was given the sheriff to amend his returns according to the facts. On March 25, 1899, the case was passed until March 27, 1899, upon which day the plaintiffs moved the court to assign the case for trial, and, over the defendant's objection, it was assigned for trial on April 7, 1899, and the defendant entered a special appearance, and moved the court to quash the amended return of the sheriff on the summons. This motion was set for hearing on April 1, 1899, but before action was taken thereon, on that day, the defendant filed its petition and bond, and removed the case into this court. Upon these facts, the plaintiffs move to remand the case to the state court, and insist that, if the filing by defendant of its answer on March 5, 1898, and then having the case assigned to a future day for trial, did not per se exclude the right of removal, then that those acts, coupled with the numerous other steps taken by defendant during a period of more than a year succeeding that date, certainly deprived it of the right to do so.

A large number of authorities are cited by the learned counsel for plaintiffs in support of this contention, but it is believed that in every one of them, with one or two possible exceptions, there was an actual service of process upon the defendant, in due form of law, and the only point to be decided in each of the cases was whether, under the state law and practice, the time fixed for answering had passed before the petition for removal was presented to the state court. In the one authority alluded to as being an exception, which was the case of *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, there was not a proper service, and, the court so holding, the

case passed off upon that point, and not upon the one to be disposed of now.

The authorities cited by the plaintiffs have not, for that reason, assisted the court in reaching a proper conclusion in this case, where the objection always insisted upon is that process has never been so served upon the defendant as to give the court jurisdiction of its person. It is contended by the plaintiffs that the long series of steps taken by the defendant after filing its answer, construed and considered in connection with the filing of that pleading, were equivalent to an entry of its appearance in the state court in such form as to bar the right before the defendant applied for the removal of the case to this court; and that having, in fact, answered to the merits, and having so actively pressed for a trial of the issues made, and having taken all the steps above recited to obtain that trial, the defendant must be considered as actually before the state court, and in such form and for such a length of time as to preclude, at this late date, the right to remove the case. But, as indicated, the plaintiffs have cited no direct authority to maintain this position, nor has the court been able to find any, although originally much inclined to think that the motion should prevail, because of an impression that as defendant could, at any time within 14 months previous to doing so, have removed the case so that a motion to quash the returns on the summons could have been passed upon here (*Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126), it should not have appeared to speculate upon its chances, and have acquiesced so long in the jurisdiction of the state court. But, on looking into the authorities, the court is entirely satisfied that this first impression was erroneous, and that it was competent for the defendant to pursue the course it did in the state court, without losing its right to remove the case. There has never been a time when the defendant did not contest the validity of the service of the summons upon it. It did so at the outset, by entering its special appearance for that purpose only, and moving to quash the returns. This motion being denied by the state court, and a proper bill of exceptions having been allowed and signed by the judge, and made part of the record, the defendant, on March 5, 1898, filed its answer, but expressly reserved therein its right to insist upon the validity of the service, and expressly declined to waive that right. Steps looking to a trial of the case, and preparing for it, were, it is true, taken by both parties before the defendant filed an amended answer, in which it again vigorously insisted upon the proposition that it was not legally before the court, because of the want of proper service upon it of the summons. A demurrer to this pleading being sustained, due exception was taken. Some time after this last step, the court of appeals of the state having ruled upon a similar point, the defendant again moved to quash the returns upon the summons, and this time succeeded.

Pending an attempt to secure an amendment of the returns, and a motion to quash that also, when made, the defendant removed the case.

In the opinion of the court, the effect of the special appearance originally made ran along with, and inhered in, all the subsequent

proceedings in the cause, and all steps taken after the 12th of February, 1898, were taken under the cover and protection of the special appearance then entered, and the objection to the jurisdiction then made, and which was, on March 5, 1898, renewed in the answer filed on that date. It is not believed that the defendant could lose its right to remove the cause until after the time arrived under the state law for it to answer, which would be 20 days after a due and legal service of a summons upon it. This court cannot hold that that time had ever come until it has had the right itself to pass upon the question whether the summons was legally executed, nor until it has actually passed upon that question adversely to the defendant.

In short, a defendant does not lose his right of removal, unless, after due and proper service of process, he delays to file his petition therefor until after the time for answering, as fixed by the state law, has passed; nor probably unless, after a full and unrestricted appearance, in the first instance, in the state court, without due service of process, he delays petitioning for a removal beyond a time equivalent to that allowed by law for answering. Certainly this must be true in the case at bar, unless the conduct of the defendant in the state court was a waiver of its objections to the service of the process, and operated as a consent to the jurisdiction claimed over its person. The court cannot so read the record as to perceive any such waiver or consent. All that defendant did was under the duress of a proceeding it always insisted was void. What it did was not, in any fair or legal sense, voluntary.

In the case of *Harkness v. Hyde*, 98 U. S. 476, the supreme court said:

"The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside, nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when, being urged, it is overruled, and the defendant is hereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

This proposition was reaffirmed in the case of *Railway Co. v. Pinkney*, 149 U. S. 207, 13 Sup. Ct. 859, and practically to the same effect are the cases of *Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, and *In re Atlantic City R. Co.*, 164 U. S. 635, 17 Sup. Ct. 208, where it was held that, where a demurrer was filed for the express purpose of raising an objection to the jurisdiction, a subsequent answer to the merits did not waive that objection. The basis of the doctrine is that the defendant does not appear voluntarily, but under a degree of compulsion, when having made, as strenuously as possible in the first instance, objection to the service of the process, he yields to answer to the merits. Particularly must this be so when, as in this case, he repeatedly reiterates, emphasizes, and insists upon his protests against the jurisdiction and the manner of bringing him into

court. The authorities seem clearly to support the view of the court that the motion to remand should be denied for the present, with leave to renew it should the court hereafter determine that the original service of the summons was valid and sufficient.

BRADY et al. v. BERWIND-WHITE COAL-MIN. CO.

(Circuit Court, E. D. Pennsylvania. May 17, 1899.)

No. 33.

ALTERATION OF CONTRACT—MATERIALITY.

An alteration of a written contract by adding a provision thereto is material where, although the rights of the parties would be the same if no contract had been made on the subject covered by the provision, its incorporation in the writing would have rendered inadmissible parol proof of a different agreement, which, as the contract was written, would be competent.

On Motion for New Trial.

C. B. Taylor, W. H. Addicks, and Wm. B. Linn, for plaintiff.
H. C. Terry and O. E. Shannon, for defendant.

DALLAS, Circuit Judge. The most serious question arising upon the plaintiff's motion for a new trial relates to facts and circumstances which may be summarized as follows: A part of his claim was founded upon a writing which he alleged constituted a contract for the purchase and sale of 350 cars of coal. This paper was directly declared upon, and was set out in the statement of claim as follows:

"C. H. Lawrence, Broker.

"Fairmount, W. Va., May 15, 1894.

"C. H. Lawrence: You will please ship to Harsimus, Jersey City, N. J., for account Berwind-White Coal-Mining Company, of Philadelphia, three hundred and fifty cars of run of mine coal; same to be paid for at \$1.45 f. o. b. cars at mine per ton of 2,000 lbs.; shipments to average twenty cars per day, and to commence not later than May 16th, 1894.

"[Signed]

A. O. Tinstman."

When the original of this paper was offered in evidence, it appeared that the letters and words "f. o. b. cars at mine" had been interlined. The defendants therefore objected to its admission. The plaintiffs then claimed that the evidence theretofore presented and thereafter to be introduced would meet and overcome this objection. There being, however, no direct evidence adduced at any time in support of this position, the contention finally was that enough had been shown to at least warrant an inference that the interlineation had been made before execution, or, if made thereafter, that it had become known to and was acquiesced in by the defendant. I was not at all satisfied of this; but, deeming it inexpedient to immediately exclude the writing, I admitted it with the expectation that the question as to whether the jury should be finally permitted to consider it might be more advisedly determined at a later stage of the trial. Upon further reflection, I became convinced that the paper should not have been ad-

mitted, and also that, upon all the evidence, a finding by the jury, if permitted and made, that the alteration in question had been either rightfully made, or had been subsequently accepted by the defendant, could not possibly be sustained. Accordingly the defendant's motion to strike out the paper was granted, and the jury was instructed to regard it as being wholly out of the case. I am still of opinion that this course was, as the matter was then presented, entirely proper. But it is now for the first time denied that the alteration in question is material. I do not think that, in view of the persistent effort which was made to persuade the court that the added words, though material, had been rightfully inserted, this tardy suggestion that no such effort was necessary is entitled to very favorable consideration. In my opinion, however, the alteration cannot be regarded as an immaterial one. The argument which has been urged by the learned counsel for the plaintiff is fully answered by the judgment of the supreme court of Pennsylvania in the case of *Craighead v. McLoney*, 99 Pa. St. 211, where it was said:

"It is evident that any tampering with the instrument which imposes upon the party a burden or a peril which he would not else have incurred is an injury to him, and therefore material. It is a mistake to infer that whether the pecuniary liability is increased or the time of payment changed is the test. In these respects the party may be no worse, yet his rights and remedies on the instrument may be seriously affected. Whenever this is so, it does not matter that the alteration was entirely honest. * * * Any alteration which changes the evidence or mode of proof is material."

See, also, *Hartley v. Corboy*, 150 Pa. St. 23, 24 Atl. 295.

Now, in the present case, a main subject of controversy was as to the place of delivery. The jury were instructed that, in the absence of contract to the contrary, the coal became the property of the defendant when shipped for transportation, and neither party questioned the correctness of this statement of the law. But the defendant had adduced evidence to show that the actual agreement was that it was not to be chargeable for the coal until it had actually received it, and this, of course, the defendant would have been precluded from doing if the phrase "f. o. b. cars at mine" had been regularly comprised in the paper, inasmuch as the express terms of an instrument of writing may not be varied by oral proof. Therefore, under the cases cited, the materiality of the interlined words seems to be entirely plain.

The allegation that the court erred in excluding from the consideration of the jury "the evidence of custom in the sale of coal in West Virginia during 1894" was not pressed upon the argument. There was not sufficient evidence of the existence of the custom referred to, and, if there had been, the circumstances of this case were not such as to justify its annexation to the contract sued on. The several reasons which relate to the action of the jurors need not be considered in detail. The questions of fact were submitted wholly to them, and were ably argued by counsel during several hours. It is true that in telling the jury that the rule of law must be followed with respect to place of delivery unless the parties had varied that rule by agreement, I did say that I recalled no evidence of such an agreement, "but my recollection is not conclusive upon you." But of this statement the

defendant alone could have had any cause to complain. When I made it I must have had in mind that no specific contract upon the subject had been proved, for that there was evidence from which the jury might rightfully deduce the inference that the parties had agreed upon a place or places of delivery other than the point or points of shipment is unquestionable. Upon careful re-examination of the whole case, I find nothing which, in my opinion, would justify the court in setting aside this verdict, and therefore the motion for a new trial is denied.

LAMSON et al. v. BEARD. C. B. CONGDON & CO. v. SAME. PHELPS et al. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. May 19, 1899.)

Nos. 526, 555, and 561.

1. REVIEW—JUDGMENT—SUFFICIENCY OF FINDINGS.

In determining whether a judgment is supported by a special finding, the sufficiency of the facts found is the sole question to be determined, and hence the admission of evidence of immaterial facts is not error.

2. BANKS AND BANKING—AUTHORITY OF PRESIDENT—MISAPPROPRIATION OF FUNDS.

If the directors of a bank, trusting the president's integrity or individual responsibility, authorized him to use drafts drawn on its funds for private purposes, whether paid for at the time or not, any loss resulting from the misuse of such authority would fall on the bank, and not on a third person, who had taken the drafts for value and in good faith, which in such case would be determined by the established rules governing the transfer of negotiable paper.

3. BILLS AND NOTES—PAYMENT BY BANK DRAFT—INQUIRY BY DRAWEE—NECESSITY.

A creditor, receiving a bank draft drawn to his order from his debtor in payment of the debt, is entitled to accept the draft without inquiry, not because of a presumption that the debtor had paid for the draft, but because it was drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known interest in the transaction.

4. SAME—BONA FIDE PURCHASER—EQUITIES.

The receiver of such draft, though apparently an original party, as against the drawer is in effect an indorsee, and hence is only affected by equities of which he had notice before accepting it.

5. BANKS AND BANKING—DRAFTS BY PRESIDENT FOR PERSONAL USE—AUTHORITY TO DRAW—INQUIRY BY DRAWEE.

Where the president of a bank, as such, drew drafts on the bank's funds on deposit with its correspondents, payable to the order of certain brokers, for margins on transactions in futures carried for him personally, such payees are not bona fide holders of such drafts, but are put on inquiry as to the president's authority to draw the same on the bank's funds for his personal use, which inquiry they should have made from the directors of the bank; but they were under no obligation to undertake an examination of the bank's books to ascertain whether the president had reimbursed the bank.

6. SAME.

In the absence of special authority, conferred by the directors of a bank by resolution, acquiescence, or implied assent, the president of a bank has no authority to draw drafts on its funds in payment of personal debts.

7. SAME—RECOVERY OF MONEY—FINDINGS—CONSTRUCTION.

In an action by a bank to recover money fraudulently paid out by its president by means of drafts, a finding that the president was not a de-

positor, and that such wrongful appropriation constituted embezzlement, was not nullified by the fact that it was also found that the entries on the bank's books tended to show that the bank was paid for the drafts so drawn.

8. SAME.

Where a transaction between the president of a bank and defendants, in which the president paid defendants money belonging to the bank, which he wrongfully appropriated, was concealed from the bank, and the mere statement of the facts to the directors would have disclosed the fraud, defendants are liable to the bank for the money so received.

9. SAME—FRAUDULENT WITHDRAWALS BY PRESIDENT—NOTICE.

Possession of books by a bank, containing entries of drafts fraudulently drawn by the president in personal brokerage transactions, is not notice thereof to the bank, where the books were under the sole control of the president, and kept in such a manner as to conceal his defalcations.

10. SAME.

Knowledge by the president of a bank of his misappropriation of its funds in personal transactions is not notice to the bank.

11. SAME—COURSE OF DEALING—ESTOPPEL.

Where the president of a bank wrongfully appropriated the bank's funds to his personal use by means of drafts, which he so entered on the bank's books as to conceal their fraudulent character, the bank is not estopped by the president's course of dealing from denying his authority to draw drafts for such purpose.

12. SAME—TRIAL—FINDINGS—EFFECT.

A finding that money of a bank, appropriated by the president to his personal use by means of drafts, was wrongfully taken by him, is equivalent to a finding that he had no authority to draw and use the drafts.

13. SAME—DEFENSE—NEGLIGENCE.

In an action by a bank to recover the proceeds of drafts wrongfully drawn by its president and used for his personal benefit, the defense that he was permitted to draw them through the culpable negligence of the directors is unavailing, where there was no finding of such negligence, or that defendants were influenced thereby to accept the drafts, of which they had notice the president was making improper use.

14. BILLS AND NOTES—BANK DRAFTS—WRONGFUL ISSUANCE—ACCEPTANCE BY PAYEES—EFFECT.

Where the president of a bank, as such, drew drafts on its funds, in favor of certain brokers as payees, for margins on brokerage transactions, such drafts are neither commercial paper, nor contracts, until accepted by the payees; and by acceptance the payees become parties to their original execution, and hence are put on inquiry whether the president exceeded his authority in drawing them, and, if so, such payees are liable to the bank for their proceeds.

15. TRIAL—SPECIAL INSTRUCTIONS.

It was not error for the court to refuse a special instruction on an issue not pleaded, and impliedly excluded from the consideration of the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

These are actions of assumpsit, brought by Robert R. Beard, as receiver of the First National Bank of Pella, Iowa, to recover of the respective plaintiffs in error, who are commission merchants at Chicago, the proceeds of drafts of the bank, drawn in their favor and delivered to them by E. R. Cassatt, then president of the bank, in discharge of individual liabilities incurred in transactions conducted by them for him on the board of trade at Chicago.

The plaintiffs in error in the first case are co-partners under the name of Lamson Bros. & Co.; in the third case, under the name of Milmine, Bodman &

Co.; and in the second case C. B. Congdon & Co. is the name of a corporation. The declaration in each case contains the customary common counts, and also special counts, to which the drafts therein sued upon are made exhibits. Plea in each case, non assumpsit; and in the first case a trial by jury. The errors assigned in that case have reference to the giving and refusing of instructions. The evidence is in the record, and is without substantial conflict. The drafts, of which there were ten, were all drawn upon a lithographed or printed form, and, excepting dates and amounts, are like the first, which reads as follows:

"First National Bank.

"Pella, June 27, 1892.

"Pay to the order of Lamson Bros. & Co. \$400, four hundred dollars.

"E. R. Cassatt, Pt.

"To National Bank of Illinois.

Cashier."

The word "Cashier" is in print, and the letters "Pt.," opposite the name of Cassatt, were written by him to indicate his office as president of the bank. He sent the drafts by mail to Lamson Bros. & Co., in response to their demands, in order to maintain his margins, and in each instance they acknowledged receipt by a letter addressed to Cassatt individually. In their letter of December 20, 1893, they say, "Your a/c has credit for \$200, received from First National Bank of your city," and in that of January 22, 1894, they say: "We received today from the First National Bank of your city their favor of the 20th instant, containing draft for \$400, which we have credited to your account."

Under the court's charge, which upon the main question in the case followed the opinion of Judge Wallace in *Anderson v. Kissam*, 35 Fed. 699, the jury returned a verdict, upon which judgment was entered in favor of the plaintiff for the sum of \$3,588, of which it is conceded the sum of \$688 was for interest. In support of the court's charge there have been cited (in addition to *Anderson v. Kissam*, supra) *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Moore v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345; *Clafin v. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 29 N. E. 115, 130 N. Y. 261; *Wilson v. Railway Co.* (N. Y. App.) 24 N. E. 384; *Shaw v. Spencer*, 100 Mass. 384; *Bank v. Wagner* (Ky.) 20 S. W. 535. Per contra, the plaintiffs in error have cited *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, 143 N. Y. 564, 38 N. E. 713; *Hanover Nat. Bank v. Same*, 148 N. Y. 612, 43 N. E. 72; *Kissam v. Anderson*, 145 U. S. 435, 12 Sup. Ct. 960. This case was argued at the October session, 1898, Judge Showalter with the other circuit judges composing the court. In each of the other cases a trial by jury was waived by written stipulation, and the court made a special finding of facts, based in the main upon an agreed statement of the parties, and gave judgment for the plaintiff.

The findings in No. 555 are as follows:

"First. The plaintiff was before and at the time of the commencement of this suit, and is now, the receiver, duly appointed by the comptroller of the currency, of the First National Bank of Pella. The plaintiff was at the time of the commencement of this suit, and is, a citizen of the state of Iowa.

"Second. The defendant C. B. Congdon & Co. is a corporation organized under the laws of the state of Illinois, having its principal place of business in Chicago, in the Northern division of the Northern district of said state. Said corporation is a resident and citizen of the state of Illinois, and of the Northern division of the Northern district thereof, and was so organized and incorporated, and was such resident and citizen, at the time of the commencement of this suit.

"Third. The said First National Bank of Pella is situated at Pella, a town of about 3,000 inhabitants, in the midst of a farming community, and was organized in 1871, under the banking laws of the United States, with a capital stock of \$50,000. E. R. Cassatt was the principal person engaged in its organization, and after the year 1883, together with his relatives, owned a majority of the stock, all of which was controlled by Cassatt. From the time of the organization of the bank to its failure Cassatt was president, and the principal executive officer of the bank, and enjoyed in a high degree the confidence of its stockholders and of the people of Pella and of the surrounding country.

Subsequent to 1881 the management of the bank was entirely under the control of E. R. Cassatt. The board of directors performed their duties largely in a perfunctory manner, and their knowledge as to the affairs of the bank was derived almost exclusively from the statements made to them by Cassatt. Cassatt dictated the persons to whom loans should be made, and had the entire discretion as to the acceptance of all bills receivable which became part of the assets of the bank. The method by which the affairs of the bank were conducted, the duties which the clerks performed, the manner of selling exchange, and the other executive methods of the bank were devised by said Cassatt, and carried on under his directions, without interference from the directors. The board of directors reposed implicit confidence in Cassatt, and accepted his statements as true in regard to all the affairs of the bank, and made no examination of the bills receivable to ascertain whether they were spurious or not. Cassatt had charge of the bills receivable of the bank and of the cash chest. Cassatt was accustomed, from the organization of the bank down to the time of its failure, to draw drafts on the funds of said bank on deposit in other banks, signing such drafts in the name of himself as president. The affairs of the bank were examined twice a year by the examiner appointed by the comptroller of the currency of the United States. At the time of such examinations Cassatt was accustomed to exhibit to the examiner the bills receivable and the cash on hand, and then return them to the safe. At such times the proper amount of cash was on hand and such bills receivable as the books of the bank showed to be on hand. The balance of the stock of the bank, outside of Cassatt's holdings, were held in small amounts, the average being about \$2,000 of stock (at its par value).

"Fourth. The said First National Bank of Pella went into the hands of a receiver June 25, 1895. At the time of its failure it was for the first time ascertained by its stockholders, and by the other officers, that said Cassatt was a defaulter to the bank in the sum of about \$65,000. Such sum had been taken by Cassatt, from time to time, from the moneys of the bank, and had been concealed by means of forged, spurious, and other fictitious notes; other evidences of loans having been put into the bank by Cassatt. The forged and fictitious notes were so adroitly executed that there was nothing that would suggest to the ordinary observer that the notes were not genuine, as they purported to be. The said Cassatt has since that time been duly indicted, tried, and convicted for the embezzlement of said \$65,000, and is now serving his sentence on account of such conviction.

"Fifth. The said Cassatt began to have business dealings with C. B. Congdon & Co., a firm consisting of C. B. Congdon and A. C. Davis, commission merchants on the Board of Trade in the city of Chicago, in 1894, continuing to have such transactions down to and including a portion of September, 1894. On or about September 24, 1894, the defendant corporation of C. B. Congdon & Co. was duly organized under the laws of the state of Illinois and authorized to begin business. On said September 29, 1894, said corporation duly purchased the good will and property of the said firm of C. B. Congdon & Co. and of the firm of A. C. Davis & Co., said A. C. Davis being a member of both firms. The stockholders of said corporation were, and at the time of said transaction continued to be, and still are, the same men who constituted the firm of C. B. Congdon & Co. and the firm of A. C. Davis & Co. The officers of said corporation, at the time of its organization and at the time the drafts were made in the suit here, were C. B. Congdon, president; A. C. Davis, vice president; William S. Warren, secretary; Charles H. Hulburd, treasurer,—the said C. B. Congdon being the same C. B. Congdon who belonged to the previous firm of C. B. Congdon & Co., and the said A. C. Davis being the same A. C. Davis who belonged to the firm of C. B. Congdon & Co. The directors of said corporation were at the beginning, and have ever since continued to be, C. B. Congdon, A. C. Davis, C. H. Hulburd, William S. Warren, and E. A. Lancaster. From the time said corporation of C. B. Congdon & Co. was organized the said Cassatt continued his dealings, formerly had with C. B. Congdon & Co., with the said corporation. The said dealings with the said corporation and its predecessor, C. B. Congdon & Co., were substantially as follows: The said Cassatt would, either personally or by wire, direct the said corporation or firm to purchase or sell certain futures in either wheat,

oats, or provisions, which said direction would be executed by the corporation on the Chicago Board of Trade by buying of or selling to some other broker on such board the futures stipulated. Such purchases or sales would thereupon be carried by said corporation or firm in the name of and for the benefit of said Cassatt until another order was received by Cassatt closing out the same, either by purchase or sale, as the case might be. Under the rules of the Board of Trade the corporation or firm would have been obliged to have delivered, in case of sales, or accepted, in case of purchases, from the brokers with whom they had transactions, the cereals or provisions in question when the deals matured, and the said Cassatt would have been obliged to have taken or delivered to the corporation or firm the cereals or provisions called for in such deals at the time they would have matured. As a matter of fact, however, none of the sales made by the corporation or firm on account of Cassatt ever resulted in the delivery of any grain or provisions, and none of any of the purchases made on his account ever resulted in obtaining, or the acceptance of, any grain or provisions. The deals were, in nearly every instance, closed before the future to which they related had arrived, and without the passing or intention to pass of any actual grain or provisions. All the transactions of Cassatt with the said corporation or firm were intended by him to be purely speculative transactions in futures on the Board of Trade, and were so understood by the said corporation or firm, and none of the said transactions contemplated the purchase or sale of grain or provisions with any other purpose than the subsequent disposal of the same without the actual delivery or acceptance of the grain or provisions involved. The purchases and sales were numerous, and represented, in the aggregate, a large amount of dealing. The defendants and the firm were protected from losses by margins put up from time to time with them by said Cassatt for that purpose. The general course of said speculation was unfavorable to Cassatt. He occasionally had some profits, but more frequently suffered losses. The whole course of the transactions would have disclosed to an ordinary observer, fully informed of the facts, that Cassatt was gradually losing, and that some funds owned or controlled by him must have been gradually eaten into by the losses from time to time incurred and the margins put up. The defendants themselves must have known this prior to and at the time they received the drafts sued upon, unless they willingly suffered themselves to be deceived.

"Sixth. The said Cassatt, in order to carry on his deal with the said firm and defendants, kept two accounts in the said First National Bank of Pella, one in his own name, and the other in the name of E. R. Cassatt & Co. During the period of said deals Cassatt remitted to the said firm, on account of the margins aforesaid, from time to time, drafts similar to the drafts sued on in these cases, including the drafts sued upon; that is to say, the drafts signed by the First National Bank of Pella, by E. R. Cassatt, president, drawn upon the National Bank of Illinois, and payable to the firm. These drafts drawn upon the firm of C. B. Congdon & Co. bore the dates, and were for the amounts, as follows: 1894: January 10th, \$400; January 24th, \$200; February 10th, \$500; February 16th, \$600; April 25th, \$500; May 12th, \$500; May 15th, \$500; May 17th, \$1,100; July 18th, \$600; July 20th, \$400. Also, there were sent to the defendant the corporation of C. B. Congdon & Co. drafts as follows: 1894: October 3d, \$2,000. 1895: January 23d, \$2,000. Said drafts, having been received by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., and credited to the said Cassatt on their books, respectively, were indorsed on the back by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., respectively, and deposited to the credit of their account in their bank of deposit in Chicago, the Corn Exchange Bank, by which bank they were passed to the National Bank of Illinois, and charged by said last-named bank to the First National Bank of Pella. Such drafts were, at a date subsequent to their issue, duly credited to said National Bank of Illinois, and charged to some account on the books of said Pella Bank having a credit balance appearing upon said books of sufficient amount to pay or offset such charges, except, however, in so far as the facts stipulated in this paragraph may be modified by the following statement, to wit, that at the time of the failure of the Pella Bank the books of said National Bank of Illinois showed that drafts to the amount of

\$3,000 had been drawn by said Pella Bank upon said National Bank of Illinois and not credited to it upon the books of said Pella Bank.

"Seventh. None of said drafts were used or intended to be used to pay off any debt or obligation of said bank, but all were used to supply the margins in the private transactions of the said Cassatt with the said firm of C. B. Congdon & Co. and said corporation of C. B. Congdon & Co., as aforesaid. Said transactions were all kept secret from the bank by said Cassatt.

"Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. Both the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co. knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means, independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or any one else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

"Ninth. The court finds that the avails of the drafts sued upon in this case, through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement from the funds of said bank, and that the defendants, in receiving the avails of said drafts, were in fact receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interests to subserve, would have been led, by the facts in possession of the firm of C. B. Congdon & Co. and of the defendant, to suspect that said Cassatt might be unlawfully using the funds of said bank to supply the margins transmitted to the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co., respectively.

"Wherefore, the court finds the issues for the plaintiff and against the defendants, and assesses the plaintiff's damage at the sum of \$2,323.61, of which \$2,000 is principal and \$323.61 interest. P. S. Grosscup, Judge."

In No. 561 the findings, with a change of the names of the defendants, are the same, with the following exceptions:

The fifth commences with this statement: "Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the Board of Trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894,"—and also contains the following: "The money which was sent to Milmine, Bodman & Co. to pay the losses aforesaid was in turn paid out by Milmine, Bodman & Co., for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him."

The sixth, after the first sentence, proceeds as follows: "During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in this case, 27 drafts, each of which was exactly similar to the drafts sued on in this case; that is to say, each was signed, 'First National Bank of Pella, by E. R. Cassatt, President.' All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts, prior to the drafts in suit, was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were 5 in 1884, 8 in 1885, 6 in 1886, 2 in 1887, 1 in 1888, 1 in 1890, and 2 in 1891, and were for the amounts and bore the dates as follows: 1884: August 21st, \$500; October 11th, \$300; November 19th, \$300; December 1st, \$500; December 9th, \$300. 1885: January 5th, \$200; February 19th, \$250; March 25th, \$500; April 27th, \$500; July 27th, \$425; October 5th, \$300; October 10th, \$1,500; October 15th, \$1,000. 1886: April 12th, \$1,000; April 17th, \$1,000; September 11th, \$300; September 25th, \$300; October 11th, \$300. 1887: February 19th, \$300; July 8th, \$300. 1888: December 3d, \$1,000. 1889: March 18th, \$800; April 13th, \$500. 1890: February 13th, \$500. 1891: January 6th, \$500; April 6th, \$1,000. Each of said drafts was charged by the National Bank of Illinois to the First National Bank of

Pella, and monthly statements were sent by the National Bank of Illinois to the First National Bank of Pella, which were checked up by the clerks in the latter bank, but during the two years immediately preceding the failure the checking was done by Cassatt himself. Most of the drafts sent by E. R. Cassatt, as aforesaid, both those prior to the ones in suit, as well as the drafts sued upon in this case, except as hereinafter noted, were charged upon the books of the First National Bank of Pella, either to the account of E. R. Cassatt, or to the account of E. R. Cassatt & Co., which account, at the time of such charging, had an apparent credit balance sufficient to pay or offset the charge so made against it. Such of said drafts as were not charged to E. R. Cassatt, or to E. R. Cassatt & Co., were charged to some other account upon the books of said bank, which account, at the time of said charges, had an apparent credit balance sufficient to pay or offset the charges so made against it. Said drafts were all signed by E. R. Cassatt as president. The drafts sued on in this case were all drawn upon the National Bank of Illinois, payable to Milmine, Bodman & Co., and signed 'First National Bank of Pella, by E. R. Cassatt, President,' and were of dates and amounts as follows: 1891: August 20th, \$1,400; August 31st, \$800; September 19th, \$500. 1892: June 13th, \$2,000; August 27th, \$1,000; September 5th, \$1,000; October 22d, \$1,000; October 28th, \$1,000. 1893: January 30th, \$1,000; February 14th, \$600; February 18th, \$1,500; March 13th, \$600; June 21st, \$2,500; November 23d, \$300; December 21st, \$500. 1894: January 24th, \$300; February 10th, \$500; February 12th, \$600."

And the seventh contains the following additional statement: "The telegraphic correspondence between said Cassatt and the defendants was carried on in cipher. On one occasion the defendants failed to observe this cipher, and on a protest from said Cassatt promised that such oversight should not occur again. It is not unusual, however, for Board of Trade commission men to communicate with their customers in cipher. The cipher used in this case was the so-called 'Robinson Cipher.' Nearly every dealer in the country has a copy of this. The telegrams were neither signed nor addressed in cipher, but were addressed and signed by the correct names of the respective parties."

In No. 555 the following propositions and the authorities cited are relied upon:

(1) "There was nothing in the form of the draft sued on to create a suspicion that Cassatt was using the funds of the bank in the payment of his individual indebtedness. *Goshen Nat. Bank v. State*, 141 N. Y. 179, 36 N. E. 316; *Claffin v. Bank*, 25 N. Y. 297; *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, 143 N. Y. 564, 38 N. E. 713; *Huie v. Allen* (Sup.) 34 N. Y. Supp. 577; *Dike v. Drexel* (Sup.) 42 N. Y. Supp. 985; *Goodman v. Simonds*, 20 How. 364; *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.*, 2 C. C. A. 637, 52 Fed. 98-103; *Bank v. Holm*, 19 C. C. A. 94, 71 Fed. 489; *Kaiser v. Bank*, 24 C. C. A. 88, 78 Fed. 281; *Anderson v. Kissam*, 35 Fed. 699; *Kissam v. Anderson*, 145 U. S. 435, 12 Sup. Ct. 960."

(2) "The directors of the Pella Bank were guilty of culpable negligence, which far outweighed any slight negligence of defendant."

(3) "The course of dealing between the bank and the defendant, and its predecessor firm of the same name, created a presumption, upon which defendant could rely, that the draft sued on was properly obtained by Cassatt, and that the defendant was entitled to receive its avails in payment of a debt due from Cassatt. There was implied authority for his act. *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72."

(4) "Cassatt paid for the draft by the use of the credits the bank had given him. He defrauded the bank in his obtention of the credits, but that was another transaction. So long as the credits subsisted, they could, as between the bank and the defendant, be used as they were used. *Wilson v. Railway Co.* (N. Y. App.) 24 N. E. 384."

(5) "Assuming, arguendo, that the form of the draft was such as ought to have created suspicion that Cassatt might be improperly using the funds of the bank in payment of his individual debt, and that the defendant was charged with the duty of inquiry, and made none, it is only chargeable with a knowl-

edge of such facts as it would have learned by the exercise of ordinary diligence. *Birdsall v. Russell*, 29 N. Y. 220; *Woolen Mills v. Sibert*, 81 Ala. 140, 1 South. 773; *Knapp v. Bailey (Me.)* 9 Atl. 122."

In No. 561 the following:

(1) "The defendants were under no duty to inquire into the facts of transactions anterior to, and entirely separate and distinct from, the transactions to which they were parties."

(2) "The court erred in entering judgment against the defendants, when the findings showed that Cassatt had paid the bank for every one of the drafts. *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Wilson v. Railroad Co.*, 120 N. Y. 145, 24 N. E. 384; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72; *Cowing v. Altman*, 71 N. Y. 435; *Railway Co. v. Sprague*, 103 U. S. 756."

(3) "The fact that the bank had allowed Cassatt, for a period of seven years prior to the dates of the drafts in suit, to draw drafts in a manner exactly like the manner in which he drew the drafts sued on, established a course of dealing which estops the bank to deny that Cassatt had a right to act according to this established course. *Bronson's Ex'r v. Chappell*, 12 Wall. 681; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Hooe v. Oxley*, 1 Wash. (Va.) 19; *McDonnell v. Bank*, 20 Ala. 313; *Martin v. Manufacturing Co.*, 9 N. H. 51; *Weaver v. Ogletree*, 39 Ga. 586; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72."

(4) "One who receives a bank draft, fair on its face, signed by the officer duly authorized to sign drafts, may take it as currency, even though he receives it from the officer who signs it, and in payment of the latter's debt. *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Goodman v. Simonds*, 20 How. 343; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Bank of Edgefield v. Farmers' Co-operative Mfg. Co.*, 2 C. C. A. 637, 52 Fed. 98; *Swift v. Smith*, 102 U. S. 442."

(5) "Even if Milmine & Co. had inquired, they could not possibly have found out the secret reasons existing between Cassatt and the bank why it was improper for Cassatt to draw these drafts."

Per contra, for the defendant in error, the following:

(1-3) Questions of practice.

(4) "The receipt by the plaintiff in error of the drafts of the Pella National Bank, signed by Cassatt in his official capacity, to be used as margins for his personal trades, put the plaintiffs in error upon notice that Cassatt was using the bank's funds without authority, and plaintiffs in error took such drafts at their peril, and are accountable to the receiver for the avails thereof. (a) The distinction asserted in counsel's brief as to this point does not exist. *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72; *Moores v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345; *Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797; *Gerard v. McCormick*, 29 N. E. 115, 130 N. Y. 261; *Anderson v. Kissam*, 35 Fed. 699, 703. (b) The form of these drafts put plaintiffs in error upon notice. *Anderson v. Kissam*, 35 Fed. 699, 703; *Christie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Moores v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345; *Claffin v. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 29 N. E. 115, 130 N. Y. 261; *Wilson v. Railway Co.*, 24 N. E. 384, 120 N. Y. 145; *Shaw v. Spencer*, 100 Mass. 382, 384; *Bank v. Wagner (Ky.)*, 20 S. W. 535; *Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797. (c) The defect appearing upon the face of the drafts, the doctrine of *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* and *Goodman v. Simonds*, cited by plaintiffs in error, does not apply. (d) The circumstances of the case of *Goshen Nat. Bank v. State* were radically different from that at bar. (e) The fact that by common usage bank drafts are treated as cash, if that be a fact, cannot be availed of by one who receives the bank's draft, signed by the president, in payment of the president's debt, to relieve the recipient from the operation of the rule that he who knowingly receives from an agent, and on the agent's account, that which belongs to the principal, does so at his peril. *Anderson*

v. Kissam, 35 Fed. 699, 703; Shaw v. Spencer, 100 Mass. 384; Moores v. Bank, 15 Fed. 141; Id., 111 U. S. 156, 4 Sup. Ct. 345."

(5) "Having failed to make inquiry, the plaintiffs in error are bound by the actual facts as they existed, and will not be heard to contend that inquiry would have been unavailing. Shaw v. Spencer, 100 Mass. 384; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797; Manufacturing Co. v. Whitehurst, 19 C. C. A. 130, 72 Fed. 502."

(6) "The course of dealing between the bank and plaintiffs in error did not create a presumption, upon which plaintiffs in error could rely, that the draft sued upon was properly obtained by Cassatt, and that the plaintiffs in error were entitled to receive its avails in payment of a debt due from Cassatt. There was no implied authority for his act. *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Anderson v. Kissam*, supra; *Wright's Appeal*, 99 Pa. St. 425; *Hill v. Publishing Co. (Mass.)* 28 N. E. 142; *Powell v. Rogers*, 105 Ill. 318; *Berwind v. Schultz*, 25 Fed. 912; *Clews v. Bardon*, 36 Fed. 617; *Briggs v. Spaulding*, 141 U. S. 131, 11 Sup. Ct. 924; *Percy v. Millaudon*, 8 Mart. (N. S.) 68, 74, 75."

(7) "The court found, in effect, that the transactions on account of which these drafts were forwarded were gambling deals. Therefore the avails of the drafts could be recovered by the receiver, whether the brokers were or were not put on notice. (a) The finding is that neither party intended actual sales or purchases, but purely speculative transactions in 'futures.' The intent governs. *Irwin v. Willar*, 110 U. S. 499, 4 Sup. Ct. 160; *Boyd v. Hanson*, 41 Fed. 174; *Insurance Co. v. Watson*, 30 Fed. 653; *Kirkpatrick v. Adams*, 20 Fed. 287; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776; 2 Benj. Sales (6th Am. Ed.) 828. (b) The broker is particeps criminis. *Irwin v. Willar*, 110 U. S. 499, 510, 4 Sup. Ct. 160. (c) The intent is a question for the jury (in this case for the court to find, as a question of fact). *Kirkpatrick v. Adams*, 20 Fed. 287. (d) A principal may recover moneys gambled away by his agent. *McAllister v. Oberne*, 42 Ill. App. 287; *Smith v. Ray*, 89 Ga. 838, 16 S. E. 90; *Mason v. Waite*, 17 Mass. 560; *Corner v. Pendleton*, 8 Md. 337; *Causidiere v. Beers*, *41 N. Y. 198, 1 Abb. Dec. 333; *Burnham v. Fisher*, 25 Vt. 514; *Pierson v. Fuhrmann* (Colo. App.) 27 Pac. 1015."

D. M. Kirton, for plaintiffs in error Lamson Bros. & Co.

Charles H. Dupee, for plaintiff in error C. B. Congdon & Co.

Lockwood Honoré and John P. Wilson, for plaintiffs in error E. H. Phelps and L. W. Bodman.

Frank H. Scott, John H. Hamliné, and Frank E. Lord, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is not important to inquire whether the court erred in admitting evidence of immaterial facts stated in the special findings. The one question upon a special finding or verdict is "of the sufficiency of the facts found to support the judgment." In determining that question, of course, every relevant and material fact found must be considered, and every irrelevant or immaterial fact rejected; and when the fact has been excluded from consideration there can remain no harm from the error of admitting the evidence by which it was established. The special findings recite many facts and circumstances which, though not irrelevant, are of an evidentiary character only. The ultimate facts on which the rights of the respective parties must be determined are few. They are comprehended in the statement that Cassatt, being president and practically in sole control of the bank, without authority, and without the knowledge of any other officer or stockholder, discharged his individual liabilities to

the plaintiffs in error, respectively, by sending them drafts of the bank, payable to their order, and drawn upon the bank's correspondent in Chicago, with which it had sufficient moneys out of which the drafts, after indorsement by the payees, were duly paid. Much discussion has been expended upon the effect of the form of the drafts, in connection with the use to which they were put, as notice to the payees that they were drawn without authority; but, before entering upon that inquiry, it will be well to dispose of minor contentions.

Assuming that the plaintiffs in error, when the drafts were tendered them, were put upon inquiry, it is asked, what would have been the subject of inquiry? and what facts would have been developed? It is not accurate to say that the inquiry would have been, "Did Cassatt pay the bank for the drafts?" Payment for the drafts, doubtless, would have been important evidence, but not necessarily conclusive upon the true point of inquiry, which was, "Did Cassatt have authority to draw the drafts?" He might have had money in the bank, or have put it there at the time of drawing the drafts, and yet have been without authority to draw them; and without money on deposit, and without present payment, his authority to draw in the form and for the purpose proven might have been beyond dispute. If, trusting to his integrity and individual responsibility, the directors authorized him to use the drafts of the bank for his individual purposes, whether paid for at the time or not, any loss resulting from a misuse of that authority ought, of course, to fall upon the bank, rather than upon a third person, who in good faith had paid value for the paper; and the question of good faith would be determined by the ordinary rules applicable to the transfer of mercantile paper. The fallacy or inapplicability of the supposed case of John Doe, living at Pella, and procuring of the bank a draft payable to the order of a distant creditor, and forwarding the draft to the creditor in discharge of the debt, is evident. It is, doubtless, a not unusual practice for debtors to obtain and send to their creditors bank drafts, drawn payable to the creditors, and, of course, in every such case the creditor knows that the money of the bank is being used to pay to him the debt of another,—in the case supposed, the debt of John Doe. But in such cases the creditor may accept the draft without inquiry, not, as counsel have said, because of a presumption that the debtor had paid for the draft, but because the draft had been drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known personal interest in the transaction. The receiver of such a draft, though named as payee, and on the face of the paper apparently a party to the original execution thereof, is not so in fact, but, as against the drawer, is in effect an indorsee, affected only by vices or infirmities of which he had notice before he accepted it. He might know that the draft had not been paid for, and yet take it on the assumption of regular and proper execution upon some other consideration than payment. The inquiry, therefore, which these plaintiffs in error should have made, was whether Cassatt had authority to draw drafts of the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. Such an inquiry involved no difficulty beyond communicating to the directors of the bank, other than Cassatt, the fact that such a draft or drafts had been tendered in discharge of

liabilities incurred in dealings upon the Board of Trade in Chicago, and asking whether the execution of the paper had been authorized. There can be little doubt what would have been the result of such an inquiry, accompanied with a frank and full statement of the facts as they were known to the payees of any of the drafts in suit at the time of execution. It would not have needed a discovery of Cassatt's fraudulent bookkeeping to enable the directors to say whether the execution of such paper had been theretofore authorized, or then had their approval. As contended, it was clearly no duty of the plaintiffs in error to undertake an examination of the books, which, once they commenced inquiry into the management of the bank, they would have learned had been, wholly in the keeping of Cassatt, and of clerks who could not be expected to testify against him. Inquiry of Cassatt, too, it is to be presumed, would have been useless, and therefore, if made, would not have met the requirement of the law. The one thing necessary to be known was whether Cassatt had authority to make the proposed use of the bank's paper. The authority could have come only from the directors, by direct resolution or by acquiescence or implied assent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority.

It is a perversion of speech to say that "the findings showed that Cassatt had paid the bank for every one of the drafts," or that if the defendants had gone to Pella, and had ascertained the facts, they would have found that Cassatt was a depositor in the bank, that he had charged each draft to his account, that he had on deposit ample funds to meet the charge, that he gave due credit on the books of the bank to its Chicago correspondent for the amount of each draft, and that no step in the transaction was hidden from the bank, but was known to it and recorded in its books, and that a statement of the transactions to the bank could have caused no surprise, because the bank knew of each as it occurred during the whole period of twelve years. The entries on the books, it may be said, tended to show the facts as stated; but the entire finding shows that Cassatt was not a depositor, and in no way made good to the bank the moneys taken from it by means of the drafts, which takings, it is expressly found, were acts of theft or embezzlement. That finding of the ultimate fact of wrongful and unauthorized appropriation cannot be overcome by proof of book entries, which, even if honestly made, would amount only to evidence tending to show the contrary. False entries took no money out of, and put none into, the bank; and it was not for the fraudulent bookkeeping, or forgeries, or any other wrong or series of wrongs which preceded the execution of the drafts, that the plaintiffs in error were held responsible. On the contrary, we agree that, if they are to be compelled to make restitution, it is because the particular sums which they received were wrongfully taken by Cassatt from the bank, and they were parties to the wrong. This proposition does not depend upon, and cannot be refuted by, the bookkeeping disclosed in the special finding. It embraces the three propositions contended for by counsel, namely:

"(1) The person from whom restitution is sought must have been a party to the particular transaction in which the wrong was accomplished. (2) The par-

ticular transaction to which such person was a party must have been hidden from the wronged party. (3) A mere statement to the wronged party of the facts of such particular transaction would have at once disclosed the fraud."

While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank.

The foregoing considerations dispose of the proposition that the bank, by allowing Cassatt to make a like prior use of drafts drawn by himself, had established a course of dealing which estops the bank to deny his authority. Of course, an estoppel may arise out of such a course of dealing, but whether, in a particular case, it has arisen is a question of fact depending upon the circumstances. It is hardly credible that in the facts here disclosed a jury, or a right-minded court, could find an estoppel; but it is enough to say that it has not been found, and that the facts supposed to point that way which are stated in the finding do not overcome the ultimate fact stated that the sums for which these drafts were drawn were wrongfully taken by Cassatt. That is equivalent to a direct finding that he had no authority to draw and use the drafts in that way. For the same reasons the proposition that the directors of the bank were guilty of culpable negligence is unavailing. There is no finding that there was such negligence, nor, if there were, that the plaintiffs in error were influenced by it to accept the drafts, of which, on the facts known to them, Cassatt was making an improper use.

These considerations of bookkeeping, course of dealing, negligence of directors, and estoppel aside, the main question is simplified: When Cassatt tendered these drafts,—each one of them to the payee named in it in payment of an individual obligation, in which the bank was not interested,—was the taker, accepting the paper in discharge of the debt, a purchaser in good faith, or was he put upon notice of Cassatt's lack of authority to draw upon the funds of his bank for his individual purposes? Upon that question our conclusion is that the opinion in *Anderson v. Kissam*, 35 Fed. 699, is sound in principle and in accord with the weight of authority. The judgment rendered in that case, it is true, was reversed, but upon a minor point, unconnected with the main question, which there, as here, was fundamental; and the fair inference would seem to be that if the supreme court, with the question before it, had doubted the ruling and opinion below in that respect, it would not have left the question undetermined.

The case of *Goshen Nat. Bank v. State*, upon which the plaintiffs in error chiefly rely, is distinguishable. The drafts in that case were drawn by the cashier, and were used to pay his individual debt; but, as the opinion is careful to state, it was "proved on the trial that the cashier had the custody and possession of the blank drafts for the claimant [the bank], and that he had the right to sign drafts drawn by the claimant on its corresponding banks, and that he had the right

to draw a draft on the corresponding bank of the claimant for himself, upon the same terms that he had to draw a draft for a stranger, * * * which means," as the court assumed, "upon payment to the bank of the amount of the draft." That this proof of special authority to draw a draft for his own use was the distinguishing point of the decision is declared in the later case of *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, supra, where it was held that a by-law of a warehouse company, authorizing an officer of the company to sign warehouse receipts, did not authorize him to sign a receipt for his own goods. "It is an acknowledged principle of the law of agency," it was there said, "that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." See, also, *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72.

It is urged, however, "that there is a clearly-defined distinction between the acts of a cashier or president of a bank, in issuing its paper, and that of any ordinary agent." There are dicta in some of the opinions cited which, without attempting to define it, assert in general terms that there is a distinction. For instance, in *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, supra, in addition to what we have already quoted in reference to the case of *Goshen Nat. Bank v. State*, the court said: "And we also held, for the reason therein stated, that there was a difference in the case of bank or cashier's drafts from most cases of agency." There is a plain difference in the fact that such drafts, once they have been issued, are commercial paper, and may be accepted in trade and commerce without inquiry into the consideration for their issue. No other basis for a distinction is suggested in *Goshen Nat. Bank v. State*, and that difference, it is to be observed, is not in the character or extent of the agent's authority, but in the nature of the subject on which it is exercised. It is true, as there said, that "bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts, or in other commercial transactions, that they have almost acquired the characteristics of money." An officer of a bank, however, has no right to appropriate the money of the bank to his individual uses, and, though a creditor, when offered money by his debtor, ordinarily may accept it without inquiry, yet, if, at the time he receives it, he is told or knows that it belongs to another, for whom his debtor is an agent or trustee, on the plainest principles he acquires no title as against the true owner. If, for instance, Cassatt had sent to the plaintiffs in error money of the bank, instead of drafts, advising them that it belonged to the bank, there could be no question of their liability to make restitution; and in what respect is their position better as presented than it would be on the facts supposed, even conceding that the drafts sent them were the same, or "almost the

same," as money? The drafts bore proof on their face that they were drawn upon the funds of the bank; and that they were not drawn in the course of the bank's business, but in discharge of individual liabilities of the president of the bank to themselves, they, of course, understood. They therefore knew that, unless there had been conferred upon Cassatt an unusual and special authority, like that given the cashier in *Goshen Nat. Bank v. State*, supra, to sign and issue drafts of the bank in his private transactions, the paper sent them was unauthorized, and that for the proceeds thereof they would be liable to the bank or its representatives.

It is evident, however, that the drafts in question, when offered the plaintiffs in error, were not commercial paper, capable of treatment as money, and that the considerations of public policy on which the bona fide holder of such paper is protected, even though the rights of an antecedent holder be questionable, have no application or relevancy to the case. The drafts were drawn in favor of plaintiffs in error, and until accepted by them they were not contracts, and by accepting them they did not become assignees or purchasers of existing obligations, but simply parties to the original execution thereof, into whose rights the way to full inquiry is open, unless closed by some estoppel outside of the paper itself, whatever its form. A primary party to the execution of instruments originated as these were cannot be a "bona fide purchaser," in the sense of the law merchant, and to hold the payee of such paper responsible for the proceeds received upon his own negotiation of it to a third party, who will be presumed to be an innocent purchaser, no more tends to discredit the paper, as an agency of business, than it tends to impair the value of money as a medium of exchange to hold one who receives it wrongfully accountable to the rightful owner. If a bank president or cashier, because possessed of a general power to sign drafts, may draw drafts of the bank in favor of his individual creditor, and it is to be said that "there is nothing unusual or suspicious in this way of making the draft payable to the creditor of the cashier or president who draws it," then in *Claffin v. Bank*, 25 N. Y. 293, for all we can see, it might just as well have been said that there was nothing unusual or suspicious in the acceptance or certification by the president of the bank of a check or draft drawn by himself. The power of such an officer to draw drafts of his bank upon others is no greater than his authority to accept the checks or drafts of others upon his bank; yet in that case it was held that the general authority of the president of the bank to certify checks drawn upon it did not extend to checks drawn by himself, and it was declared not to be necessary for the principal in such case to show that the agent had acted unfairly or that he himself had sustained an injury, but that the act of the agent is deemed to be unauthorized, and the contracts void. We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended,

where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well-understood rule. There is, we believe, no good reason to the contrary.

In the first case, where there was a trial by jury and a general verdict, reference is made to Cassatt's own testimony for proof that he "had authority to draw drafts to his own or his creditor's order, upon payments by him to the bank for the same," and on this assumption, it is contended, on the authority of *Hanover Nat. Bank v. American Dock & Trust Co.*, and like cases, that the fact of drawing the drafts was a representation, on which the plaintiffs in error had a right to rely, that such payments had been made. Whether he had such authority was a question of fact, of which the verdict is conclusive, unless material error of law occurred at the trial. The testimony referred to is quite indefinite and uncertain, but, if it affords ground for an inference that Cassatt did in fact draw drafts to his own order, or in favor of his creditors, it shows no basis whatever for a belief that he did so with the knowledge of other officers of the bank. In the case last referred to there was proof that the president of the warehouse company had issued receipts to himself before the one in question; and there was evidence of facts and circumstances, sufficient to go to the jury, tending to show that he had authority to do so. It being apparent on the face of the drafts here in question that they were drawn upon the funds of the bank, it was impossible for the plaintiffs in error to receive them in discharge of Cassatt's individual obligations to themselves without being put upon inquiry whether the president had in fact the authority which he assumed to exercise; and it was not enough to make inquiry of him, nor permissible to rely upon the implied representation deducible from the execution of the drafts. That the execution of the drafts by the president of the bank in his own interest was without authority, and that the plaintiffs in error were not, and could not have been, innocent holders, the evidence was without conflict, and so clear that the court might have directed a verdict in favor of the plaintiff; and on this view of the case the other questions discussed, which in themselves are of minor importance, lose all significance. It is said that "the question of gambling was an issue in the case," and the refusal of a special request for instruction on the subject, it is urged, was material error. No such issue appears in the pleadings, and no mention of the subject is found in the court's charge to the jury. In fact, however, by necessary implication, the question was excluded from consideration when the jury was told that the plaintiff could recover only upon proof that Cassatt, without the authority, knowledge, consent, or acquiescence of the board of directors of the bank, misapplied the moneys of the bank in question to his own use, and that the defendants had knowledge, or were aware of such facts as would amount to knowledge on their part, that he was so misapplying the money of the bank; and the statement that the defendants must have had such knowledge was repeated in substantially the same words and with equal clearness in a separate charge. In short, the controlling question was fairly sub-

mitted to the jury, and, it is clear, was rightly decided. The allowance of interest was proper.

The judgment in each of the cases is affirmed.

RUSSELL v. YOUNG et al.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1899.)

No. 630.

1. CONTRACT FOR LEGAL SERVICES — CONSTRUCTION — AMOUNT OF COMPENSATION.

A contract between attorney and client for the rendition of legal services in connection with an estate to which the client was an heir, providing that the attorney's compensation should "in no event be more" than that received from other heirs similarly interested, nor more than a certain per cent. of the amount recovered for the client, does not fix the amount of compensation, but merely imposes maximum limits thereto, leaving the amount to be determined on a quantum meruit, within such limits.

2. SAME—EVIDENCE OF PRACTICAL CONSTRUCTION BY PARTIES.

Evidence of a practical construction placed on a written contract by the parties is not admissible to affect its construction by a court in an action thereon, where its terms are plain and unambiguous.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This is an action at law to recover compensation for legal services rendered by the plaintiff in error under a contract in these words:

"Whereas, George L. Carlisle is the attorney at law and in fact of Cornelia T. Young in all matters relating to her interests in the estate of Silas S. Stone and Margaretta Stone, both deceased; and whereas, it may become necessary or proper for him, in the discharge of his duties aforesaid, to have the assistance of an Ohio lawyer: Now, therefore, this shows that L. A. Russell, of Cleveland, Ohio, has been, and is hereby, retained and employed by George L. Carlisle, of New York City, to appear for Cornelia T. Young in any partition or other suit or proceeding which may be commenced or taken with respect to the settlement of her interest in the estates of Silas S. Stone and Margaretta Stone, both deceased, either or both, and to do and perform all things necessary for the speedy and complete settlement of said interest. Said Russell accepts said employment, and it is mutually agreed as follows: 1st. Said Carlisle shall be consulted as the principal or employing attorney herein in any such suit or proceeding hereunder (and as often as may be prior thereto) which said Russell shall commence or take, and (as near as may be) all papers necessary and of importance for the prosecution of said interest shall be first submitted to said Carlisle; and all payments on account or otherwise of said interest shall be made to said Carlisle as the attorney for said Young. 2nd. The compensation which said Russell may charge for such services shall in no event be more than he will charge and receive from either Silas S. Stone or his brother, Frank W. Stone, for like services, nor more than seven and one-half (7½) per cent. of the net amount of whatever recovery in cash shall be made through his efforts for said Cornelia T. Young during the continuance hereof, except that if a suit in equity (other than partition) or in law, for ejectment, shall be brought in the name of said Cornelia T. Young hereunder against the personal representatives, heirs, or next of kin of said Margaretta Stone or Silas S. Stone, deceased, or any other person or persons, to recover any moneys or other property now in the possession of said personal representatives, heirs, next of kin, or any other person, under a claim of title thereto or interest therein, but in which said Young is entitled to share, or if

such suit be brought against said Young, then and in any such event said Russell will charge and shall be entitled to receive for such services no more than ten (10) per cent. of the net final recovery therein to said Cornelia T. Young. It is also understood and agreed that in event that any real or other property belonging to said estates, or either of them, be, in the settlement of the same, recovered by said Russell for said Cornelia T. Young during the continuance hereof, and which shall be set apart and accepted by said Young, either in common with her said brothers or either of them, or in severalty, that said Russell, for the purpose of computing and collecting his compensation hereunder, shall be entitled to substitute the value of said Young's interest in such lands at the time as so much cash; and, if dispute shall arise as to the true value thereof, the same shall be finally determined by arbitration in the usual way. In witness whereof, we have hereunto set our hands and seals this 12th day of February, 1892.

"Signed, sealed, and delivered in the presence of James L. Barger.

"George L. Carlisle.

"L. A. Russell."

The defendants were Cornelia T. Young and husband, William S. Young, and George L. Carlisle. There was a jury, and verdict for plaintiff in error for a balance due under the contract of \$3,348.89 against William Shipman Young and wife, Cornelia T. Young, and a verdict for George L. Carlisle. From the judgment thereon the plaintiff in error, L. A. Russell, has sued out this writ of error.

L. A. Russell, in pro. per.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Mr. Russell's suit is based upon the claim that under the contract he is entitled to $7\frac{1}{2}$ per cent. upon the value of Mrs. Young's share of \$206,000, and he sues for the balance due him upon this basis, after crediting Mrs. Young with \$4,506.49 collected and applied upon his fee. The defense was that the contract only provided that Mr. Russell's compensation should not exceed certain limitations therein mentioned, and did not otherwise settle or determine what his compensation should be. The circuit judge interpreted the contract according to the contention of the defendants in error, and held that Mr. Russell could only recover such compensation as his services were reasonably worth, but not to be more than he had charged and received from Silas M. Stone or Frank W. Stone for like services, nor more than $7\frac{1}{2}$ per cent. of the aggregate value of money and land recovered as the share of his client, Mrs. Cornelia T. Young. This is the plain meaning of the contract under which Mr. Russell's services were rendered. It is true that the agreement does not say, in words, that Mr. Russell is to be paid according to the value of his services, or such compensation as is usual and reasonable between client and attorney under all the circumstances of the case. But in the absence of an express agreement the law supplies this term. Here the parties have chosen, however, to provide that such compensation shall "in no event be more than he will charge and receive from either Silas M. Stone or his brother, Frank W. Stone, for like services, nor more than seven and one-half per cent. of the net amount of whatever recovery in

cash shall be made through his efforts for said Cornelia T. Young during the continuance thereof." But it is asked why the parties did not plainly say that Russell's compensation should be a quantum meruit, if that was the intention? To say this was unnecessary. The law implied an agreement that one should pay and the other receive reasonable compensation, according to the value of the services rendered. But the law did not imply that a quantum meruit should not be more than the compensation charged another client having the same interest, nor that it should not be more than $7\frac{1}{2}$ per cent. upon the value of the share recovered. This limitation upon the compensation to be received was therefore placed upon the contract implied by law. But if the parties intended that $7\frac{1}{2}$ per cent. should be received, unless in the event a less sum was received from Mrs. Young's brothers, why were the words "not more than" and "no more than" inserted in the agreement? To say that they were inserted through "awkwardness of expression," as suggested by counsel, or ignorance of their legal effect, is no answer. Mr. Carlisle was the New York counsel for Mrs. Young, as well as her attorney in fact. Mr. Russell was retained to assist him. To assume that these able and experienced lawyers either awkwardly, carelessly, or ignorantly provided that Mr. Russell's compensation should "in no event be more than he will charge or receive from" the two brothers of Mrs. Young, also represented by him, and having identical interests, "nor more than seven and one-half per cent." upon the value of the share recovered for Mrs. Young, and yet mean, as is now contended, that Mr. Russell was to receive $7\frac{1}{2}$ per cent. upon the aggregate recovery, unless he received a less sum from his other clients, in which event he was to receive the same from Mrs. Young, is to abuse language, and do violence to the presumption that these gentlemen knew the meaning of the plain terms they employed in this agreement. Nor is this obvious construction affected by the subsequent clauses of the agreement. The clause providing for the contingency of an action of ejectment or a suit in equity (other than in partition), that Mr. Russell should charge or receive "no more than ten per cent. of the net final recovery therein," did not become effective. No such suit as there contemplated was ever brought or defended. But even in that clause we find the same idea of limiting a quantum meruit recovery so that the fee for services in such suit should not be ten per cent., but "no more than ten per cent." The last clause simply provides that, "in computing and collecting his compensation," land set apart to Mrs. Young shall be estimated as cash; being valued for that purpose by appraisers, if necessary.

Plaintiff offered to prove that he had deducted $7\frac{1}{2}$ per cent. of every cash collection made by him, and remitted the remainder to Mr. Carlisle, with a statement showing that he had retained $7\frac{1}{2}$ per cent. as compensation for the collection of the particular remittance, and that no exception had ever been taken by Mr. Carlisle to this construction of the contract. This evidence was offered for the purpose of showing that the parties had construed the contract according to the present contention of plaintiff in error. The evidence was rejected upon the ground that the contract was not doubtful, and needed no such side light in its interpretation. Evidence as to the practical

construction by the parties of a doubtful or ambiguous instrument is often of great importance. But such evidence can never control the effect, unless the legal meaning of the instrument is doubtful. *Railroad Co. v. Trimble*, 10 Wall. 367-377; *Land Co. v. Doll*, 35 Md. 89; *Fogg v. Insurance Co.*, 10 Cush. 337. To give effect to a written agreement according to an erroneous construction placed upon it by the parties would not be to construe, interpret, and enforce the written agreement upon which the action is brought, but to enforce a new and different contract. No question of a change or variation in the agreement by mutual assent was in issue. There was therefore no error in the exclusion of the evidence offered. The case was properly submitted to the jury under instructions to find upon the evidence the value of the legal services of Mr. Russell, and deduct therefrom the amount he had received, and return a verdict for the balance due him, if any. There was no error in the admission or exclusion of evidence in this aspect of the case, and no exception to the charge, except in so far as it involved the interpretation of the contract already considered. Judgment affirmed.

STATE OF INDIANA ex rel. TYLER v. GOBIN, et al.

(Circuit Court, D. Indiana. May 16, 1899.)

No. 9,668.

1. SHERIFFS—FAILURE TO PROTECT PRISONER—LIABILITY ON OFFICIAL BOND.

The duty of a sheriff to safely keep a prisoner charged with an offense, and committed to his charge, and to produce such prisoner in court at the time of trial, is one that he owes to the state alone, and for a breach of which no action lies in behalf of any citizen; but, in addition, it is his duty to exercise reasonable care for the protection of the life and health of any person lawfully placed in his custody as an official, and this duty he owes to such person, and he and his sureties are liable on his official bond for its breach, where such bond is conditioned generally for the faithful performance of the duties of his office.

2. SAME.

It is no defense to an action against a sheriff and the sureties on his official bond, for his failure to exercise proper care for the protection of a prisoner in his custody, that the acts charged in the complaint also constitute a crime.

3. SAME—ACTION BY LEGAL REPRESENTATIVES.

Under the Indiana statute (1 Burns' Rev. St. 1894, § 285), providing that, when death is caused by the wrongful acts or omission of another, the personal representative of the deceased may maintain an action therefor if the deceased might have maintained an action for an injury resulting from the same act or omission had he lived, the legal representative of a prisoner who was murdered by a mob may maintain an action on the bond of the sheriff, in whose custody the deceased was at the time, for a failure of the sheriff to perform his official duty in protecting his prisoner.

At Law. Heard on demurrers to complaint.

W. V. Rooker, for plaintiff.

Joseph H. Shea and Smith & Korbly, for defendants.

BAKER, District Judge. This is an action to recover damages for the death of Marion Tyler by the alleged wrongful acts and omissions of James F. Gobin, sheriff of Scott county, Ind. The deceased was a prisoner confined in the jail of that county awaiting trial, and in the lawful custody of the sheriff, as the keeper of the jail. The action is upon the bond of the sheriff, and is against him, and five other persons, as sureties thereon. Separate demurrers for want of facts have been filed, one by the defendant Gobin, and the other by his co-defendants, the sureties on his official bond.

The condition of the bond copied in the complaint is "that if the said James F. Gobin shall well and faithfully perform the duties of said office, in accordance with the law governing the administration thereof, and at the end of said term account for and turn over to his successor in office, or to whoever may be legally appointed to receive the same, all moneys, books, papers, and other property whatever, which shall come into his hands as said officer, then this obligation to be void; else to remain in full force and effect." The wrongful acts charged are that the sheriff carelessly and negligently suffered and permitted a mob of persons to collect for the purpose of committing acts of violence against the person of the deceased, and that he carelessly and wrongfully permitted the jail in which the deceased was confined to be and remain without a sufficient guard to protect the same against the acts of violence of the mob, and that, in further disregard of his duty, he aided and abetted the mob in accomplishing their unlawful conspiracy by delivering to the mob the keys of the cell house of the jail in which the deceased was confined, by presenting to the mob a lighted lamp, by means of which they were the better enabled to accomplish their unlawful purpose, by informing the mob as to the location of the cell occupied by the deceased, by failing to make an outcry or to give any alarm whereby assistance could have been obtained, and by failing and refusing to make any resistance or to interpose any obstruction to the mob. It is also alleged that the mob thereupon removed the deceased from the jail to a place near by, and hanged him with a rope by the neck until he was thereby strangled to death. It is also alleged that after the mob had removed the deceased from the jail, and after they had suspended him with a rope by the neck from a tree, the sheriff was guilty of further neglect in that he failed and refused to cut down the body of the deceased before life was extinct, and failed and refused to resuscitate the deceased from the strangulation which was then and there destroying his life.

It is contended that the acts and omissions of the sheriff were not done or permitted by him by virtue of, or under color of, his office, because the acts and omissions charged against him amount to a charge of aiding and abetting in the commission of a murder; and that if the acts of the sheriff were not done by virtue of, and under color of, his office as sheriff, then neither he nor his sureties are liable on his official bond.

It is firmly settled that an officer may be held personally responsible for any and all wrongs committed by him; but, when an action is brought upon the bond he gave for the performance of his official duty, he and his sureties can only be held responsible for a breach of duty

covered by the bond. The supreme court in *South v. Maryland*, 18 How. 396, 402, say: "To entitle a citizen to sue on this bond to his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case." Could the deceased, if alive, have maintained an action on the case against the sheriff for the acts of omission and commission charged against him in the complaint? This depends on the question, whether the sheriff owes any duty of care for the safety of prisoners lawfully committed to his custody to await trial. If the law imposes on the sheriff the duty of exercising due care for the safety of prisoners whom he is holding in custody by virtue of a lawful writ, then he certainly would be responsible on his bond for a breach of that duty. He held the deceased in custody under a warrant of commitment by virtue of his office. He was responsible, by virtue of his office, for the safe-keeping of any person so committed, so that he might produce him in court at the time of the trial. But that is a duty which he owes to the state alone, and for the breach of this duty no action would lie on behalf of any citizen. But, in my opinion, as the lawful custodian of the deceased, he owed to him the duty of exercising ordinary and reasonable care for his life and health. This duty was due to the deceased personally, and is additional to the duty of safe-keeping which he owes to the public. This duty of care arose from his having the person of the deceased committed to his custody by virtue of his office. The sheriff is bound to the exercise of due care and diligence in keeping possession of property levied on by virtue of his office, so as to preserve the lien unimpaired. He leaves the property at his peril in the possession of the debtor. He is bound to take ordinary care of property levied on, to prevent deterioration or destruction, and, if he neglects so to do, is liable for the resulting injury. He must exercise ordinary care in moving goods and in selecting a fit place for their deposit. He must use due care to feed and water live stock seized by him by virtue of a lawful writ. 22 Am. & Eng. Enc. Law, 549, and authorities cited. For a failure to use ordinary care in the cases above mentioned, to which many more might be added, he and his sureties are responsible on his official bond. This liability grows out of a breach of duty to exercise care imposed upon him by law in respect of property seized by virtue of his office. If the law imposes a duty of care in respect of animals and goods which he has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of his office? Is a helpless prisoner in the custody of a sheriff less entitled to his care than a bale of goods or a dumb beast? The law is not subject to any such reproach. When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond. *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818, and 2 U. S. App. 159; *Hixon v. Cupp* (Okla.) 49 Pac. 927.

The condition of the bond is that the sheriff shall well and faithfully perform the duties of his office in accordance with the law, and one of those duties is to exercise due care for the life and health of persons lawfully committed to his custody. The case of *South v. Maryland*, 18 How. 396, announces no doctrine in conflict with the foregoing views. That case holds that a sheriff, as a conservator of the peace of his county, is not liable for a failure or neglect to preserve the public peace, whereby a citizen sustains injury, where such sheriff is not charged with misfeasance or nonfeasance, in his ministerial capacity, in the execution of some process in which the plaintiff was concerned. As such conservator, his duty to keep the peace is one due to the public generally, and is not a private or personal duty owing to some particular individual, and for the breach of such a duty he is answerable to the public, and not to any private citizen, to whom he owes no special duty. But in the instant case the sheriff, by virtue of his office, did owe the deceased, under the circumstances, a special and official duty of care, for the breach of which he is responsible. The contention that the complaint is bad, because it shows that the sheriff is guilty of the commission of a felony, is untenable. Owing to the deceased the duty to exercise due care for the preservation of his life, it is immaterial whether he committed a breach of that duty by acts of misfeasance or nonfeasance. The intent with which he committed the breach of duty is not material. The fact, if it be a fact, that he is criminally liable for the murder of the deceased, would not relieve him from civil liability for damages resulting from a breach of official duty.

There is no ground on which the liability of the sureties on his bond can be separated from that of the sheriff, because the bond is given for the faithful performance of his duty according to law; and, since the sheriff is shown to have made breach of a ministerial duty imposed on him by law, it necessarily follows that his sureties are jointly liable with him, by the express condition of the bond.

The statute of this state (1 Burns' Rev. St. 1894, § 285) provides that, when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. Having already decided that, if the deceased had lived, he could have maintained a suit against the sheriff and his sureties on the bond for the acts and omissions set out in the complaint, it follows that his personal representative may maintain the present action. The demurrer to the complaint is overruled. Exception. Rule to answer in 10 days.

STAUNTON et al. v. GOSHORN.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 295.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE.

In an action for malicious prosecution, defendants are not liable, no matter how vindictive they may have acted, nor what their motives may have been, if they acted with probable cause.

2. SAME—QUESTION FOR COURT.

Whether or not there was probable cause for the institution of a criminal proceeding, where the facts are undisputed, is a question of law for the court; otherwise, one of fact for the jury.

3. SAME—EVIDENCE.

The evidence showed that certain public officials in charge of the public records of the court and the sheriff of the county were informed, by a deputy clerk, that a former clerk was about to steal certain public records and destroy them, with an intent to prejudice such officials by showing payments made without proper vouchers, and that on a certain day he would carry his purpose into effect. On such day the former clerk was discovered by the officials removing such records from the clerk's office, and thereupon they procured his arrest. *Held* that, in an action by such clerk for malicious prosecution, the jury should have been instructed that there existed, so far as the public officials were concerned, probable cause for the institution of the criminal proceedings.

4. SAME.

A former clerk was arrested on a charge of stealing public records with intent to destroy them, but defended on the ground that his purpose was simply to examine the same in order to ascertain their validity. Certain public officials had been informed by a deputy clerk of the intent of such former clerk to steal the papers, and, on finding him in possession of the papers, caused his arrest. *Held*, in an action against such officials and the deputy clerk for malicious prosecution, it was error to instruct the jury that if the purpose of such former clerk in taking the papers was to examine them, and not to destroy them, and the person giving the information to the public officials had knowledge of such intent, that the arrest and prosecution of such clerk for taking the papers was without probable cause, in that it made no distinction between the public officials and the deputy clerk, as such public officials had no knowledge of the facts other than as communicated to them by said deputy clerk.

5. SAME—RES JUDICATA.

Where an indictment for stealing certain road orders from the office of the clerk of court was sustained on demurrer, and the accused tried thereunder and acquitted, in a subsequent action for malicious prosecution accused cannot claim that the prosecution was instituted without probable cause, because the road orders were not subjects of larceny, as the judgment of the criminal court was binding and valid on the questions necessarily involved in the maintenance of the indictment, to wit, that a criminal offense was charged.

6. SAME—ADVICE OF ATTORNEYS.

The advice of reputable counsel, bona fide sought and given on full and fair statement of all the facts, and as a consequence of which a prosecution was instituted, is a sufficient defense in a suit for malicious prosecution.

7. SAME.

On a trial for malicious prosecution, the defense that defendants acted under the advice of attorneys may be sustained, though the advice was taken after the arrest, but before the issuance of the warrant.

8. SAME—EVIDENCE.

On a trial of several defendants for malicious prosecution in procuring the trial of plaintiff for stealing public records, plaintiff could not

prove statements made by him to third parties before the taking of the papers, as to what were his objects and purpose in procuring such papers, such evidence being hearsay.

In Error to the Circuit Court of the United States for the District of West Virginia.

This is a writ of error to the judgment of the circuit court of the United States for the district of West Virginia, rendered on the 11th of August, 1898, in an action for malicious prosecution pending in said court, wherein the defendant in error here was plaintiff, and the plaintiffs in error were defendants. The case grew out of a criminal prosecution in the criminal court of Kanawha county, W. Va., against the defendant in error, inaugurated under the following circumstances:

J. W. Goshorn, defendant in error, had been for two terms, of six years each, expiring on the 1st of January, 1897, clerk of the county court of Kanawha county, in the state of West Virginia. On the said 1st day of January, 1897, E. W. Staunton succeeded him as clerk for the term of six years, having been elected at the preceding election. The plaintiff in error Peter Silman was sheriff of the said county from the 1st day of January, 1893, to the 1st of January, 1897. The plaintiff in error John A. Jarret, on the 1st of January, 1897, became the chief deputy clerk of the said E. W. Staunton; and plaintiff in error Robert A. Coleman, who had been, for several years prior and up to the expiration of his last term of office, deputy clerk for defendant in error, Goshorn, continued to act as such deputy clerk for Staunton, Goshorn's successor. The defendant in error, J. W. Goshorn, and the plaintiffs in error Staunton, Silman, and Jarret, were unfriendly to each other, growing out of a political feud theretofore existing in the said county. During the week preceding the 23d of November, 1897, the day on which defendant in error was arrested, plaintiff in error Robert A. Coleman informed his principal, Staunton, and said Jarret and Silman, that the defendant in error, Goshorn, had had several conversations with him in reference to getting from the clerk's office certain road orders, allowed by the county court of said county to Silman in the settlement of his accounts as sheriff, in which he said that, if he could get hold of these papers, he would then have the newspapers make an investigation, and publish the fact that there were no vouchers for the allowance in question, which would create a great stir, and get the county court, Silman, and Staunton into trouble; and that he had proposed to him (Coleman) to take the road orders out of the clerk's office, and that he (Goshorn) would destroy them. Upon receiving this information, Staunton, Silman, and Jarret determined to lay a trap to catch Goshorn, if he took the papers, and told Coleman that he could make a proposition of some kind to him, so that, if he desired to get the road orders, he would have an opportunity to do so.

On Saturday morning before the arrest of the defendant in error, Coleman had another conversation with him, in which Goshorn, as testified to by Coleman, again renewed the proposition to take the papers from the office, and Coleman told him that he would go to the extent of placing the road orders where he (Goshorn) could get them; whereupon Goshorn requested Coleman to place them in the fourth box of a certain row of tin boxes in the record room of the clerk's office, and have them there on the following Tuesday at noon, and that he would take the papers when Chief Deputy Clerk Jarret left the clerk's office for dinner, to which Coleman agreed. On the same evening Coleman informed Staunton and Silman of what had occurred, and of Goshorn's purpose to take the papers out of the clerk's office on the following Tuesday, and Staunton and Silman told Coleman that they would make an arrangement so that Goshorn would not be able to get away with the papers. The orders in question were placed in the tin box by Coleman, in the presence of Jarret, about half past 11 o'clock on Tuesday morning, the 23d of November, 1897. About noon, almost immediately after Jarret had left the clerk's office for dinner, according to the evidence of the plaintiffs in error, Goshorn, who had been talking with the deputy sheriff, Harlis, near the side entrance to the court house, went into the record room, got the papers, and

left the building. Coleman was not in the room when he got the papers, and did not give them to him. Shortly after leaving the building, Goshorn met plaintiff in error Silman, and returned to the clerk's office with him, in reference to the purchase of a lot of land; but before his return Jarret came back to the office, went into the record room, and found that the papers were gone from the box in which they had been placed. Goshorn, after examining the records with Silman for a short while, and before the examination was completed, asked Silman to excuse him, as he desired to go into the water-closet; that he left the record room, went into the middle office, and, as he started to enter the water-closet, Deputy Clerk Jarret accosted him, and said that he had missed some papers from the clerk's office; whereupon Goshorn took the papers from his pocket, and explained that they were some papers which Deputy Clerk Coleman had given him; and thereupon Silman and Jarret instructed the sheriff and his deputies, who were present, to arrest him, and he was taken into custody by them.

The testimony of the plaintiffs in error further shows that the purpose of Staunton and Jarret was to protect these road orders and other papers in the clerk's office by catching the person who had an intent to take them unlawfully and for illegal purposes, and that the purpose of Silman was to protect the vouchers on which the drafts had been issued to him; that they acted in good faith in all that they did, believed Coleman's statements, and that the time and circumstances under which defendant in error, Goshorn, took the papers corresponded with the information given to them by Coleman on the previous Saturday. Plaintiffs in error Staunton, Silman, and Jarret so testified as to their purpose and motives in what they did, and as to the information imparted to them by Coleman of Goshorn's purpose to secure the papers, his intention to destroy them, and his plan of securing them. They further testified that they believed Coleman's statements, and acted in good faith in all that they did. Coleman corroborated the statements of the plaintiffs in error, and further testified as to his interviews with Goshorn, as above mentioned. That the defendant in error never had any conversation or arrangement to get the papers or road orders with any of the plaintiffs in error except Coleman, and did not know of the fact that Coleman had communicated to his co-plaintiffs in error his (Goshorn's) purpose and plan to take the papers, nor did he know of the arrangement that had been made to entrap him, and in the entire dealing nothing occurred between Goshorn and any of the plaintiffs in error except Coleman. That Coleman did not know of the purpose to have defendant in error arrested if he took the papers, and did not know what steps would be taken to prevent Goshorn from getting away with or destroying the papers if taken.

The defendant in error, Goshorn, testified, in substance, that during the said week preceding the 23d of November, 1897, he met plaintiff in error Coleman on the street, and in conversation stated that the county court had only allowed him \$1,500 for making out the land books, when it had allowed Staunton \$1,800 for doing the same work, and inquired of Coleman why he had not told him of it, to which Coleman replied that he had not thought of it. Goshorn then said that he would sue the county court and expose some of its rascality. That Coleman then stated that the county court had allowed certain road orders to Peter Silman illegally, having paid some of them out of the bridge fund, and some of them were issued to persons claiming to be road surveyors when, in fact, they were not, and he (Goshorn) ought to get them and examine them. That subsequently, during the same week, Coleman again spoke to him, telling him of the action of the court, and urged him to get the road orders and examine them; whereupon he (Goshorn) told him that, if he would get them and give them to him, he would examine them. That on Saturday of the same week Coleman again mentioned to him the action of the county court in respect to these road orders, and urged him to examine them, and told him that he would get them for him in order that he might make the examination. That he replied that he was going out of town, but would be back on the following Tuesday, and that if he would then get them he would examine them, and, upon finding that they had been improperly allowed, he would give the facts to the press, and have them published for the information of the public. That in the last conversation, desiring to

have some conveyances made, he requested Coleman to copy some deeds for him in the clerk's office, which he agreed to do. That on Tuesday morning he met Coleman on the street, went with him to the clerk's office, Coleman explaining that he had not made the copies of the deeds, but would do so that morning. On the way to the court house Coleman told him that he could get the road orders and give them to him to be examined, but that he (Goshorn) stated that he could not make the examination in the court house, and would have to take them outside, for the reason that persons in the court house would watch him and prevent him from making an examination there. That after he went to the clerk's office, and had examined the records about another matter, and while his brother, Ernest Goshorn, was present in the record room, Coleman came to him, and told him that he had placed the road orders in a file box in the record room, where he could get them, but he refused to take them from the box, and told Coleman that he must get them himself and give them to him, which he did in the presence of said Ernest Goshorn, his brother. That he then put the papers in his pocket, went out of the office, started across to the newspaper office for the purpose of making the examination of the papers, where he met the plaintiff in error Silman, and returned with him to the clerk's office in reference to the purchase of a piece of property above mentioned, when he was accused of taking the papers, and placed in the custody of the sheriff, as before stated.

After the defendant in error, Goshorn, had been taken into the custody of the sheriff, he was taken by him before H. M. Bond, a justice of the peace, in a different part of the city, and there detained for nearly three hours before any warrant was issued against or served upon him.

The plaintiffs in error, other than said Coleman, immediately after Goshorn had thus been taken in custody, consulted with S. C. Burdette, then assistant United States district attorney, who had been formerly prosecuting attorney of Kanawha county, a lawyer of more than 15 years' experience, of high standing as a criminal lawyer, and the father of F. C. Burdette, then prosecuting attorney of said Kanawha county, and who frequently assisted his son in prosecutions in the state courts. That they explained to him all the facts relative to the matter, and all the circumstances leading up to Goshorn's arrest, including the plan arranged to catch him, and the information received by them from Coleman, before and after the plan was actually arranged, and asked said Burdette for advice in the matter. That thereupon he advised them that Goshorn should be prosecuted, and himself drafted and wrote the complaint, which was sworn to by plaintiff in error John A. Jarret, before said H. M. Bond, justice of the peace, before whom Goshorn had been taken, who thereupon issued the warrant for his arrest, charging him with the theft of the aforesaid orders and warrants on file in the said clerk's office, alleged to be of the value of \$2,300, and the property of said Staunton, clerk as aforesaid, and the said Silman, late sheriff as aforesaid, and certain other persons whose names were unknown. Said Goshorn was thereupon arrested under the warrants so sworn out against him, and, after an examination of his case before the justice, was bailed for his appearance before the grand jury of the criminal court of Kanawha county to answer of and concerning the charges made against him. That on the 7th of January, 1898, Goshorn was indicted by the grand jury of the criminal court of Kanawha county for the offenses alleged against him, the prosecuting attorney, F. C. Burdette, conducting the examination before the grand jury which found the indictment. And he was subsequently, a demurrer to the indictment and each count thereof being overruled, tried in said court under said indictment, which trial resulted in an acquittal, on the 15th of February, 1898; whereupon this suit, on the 21st day of the same month, was instituted in the circuit court of the United States for the district of West Virginia, the defendant in error here, Goshorn, then being a resident of the state of New York.

Geo. E. Price and Malcolm Jackson (Flournoy, Price & Smith and Brown, Jackson & Knight, on the brief), for plaintiffs in error.

J. W. Kennedy (J. W. St. Clair, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

WADDILL, District Judge (after stating the facts as above). The assignments of error are 34 in number, but, in the view this court takes of the case, it will not be necessary to pass upon all of them. The exceptions were taken mainly to the court's action in granting and refusing certain instructions, and amending others asked for by plaintiffs in error. The instructions, 24 in number, covered many difficult questions and various phases of the case. Five were given at the instance of defendant in error, 8 at the instance of the plaintiffs in error, the court amending, however, 2 of theirs, and rejecting altogether 10 others offered by them, and gave 11 instructions of its own.

It will be necessary to keep well in view just what the law is governing cases of this character. In order for the defendant in error to have maintained his suit, it was necessary for him to prove: (1) The existence of the prosecution, and the fact that plaintiffs in error were the prosecutors or instigators of the same; (2) that it finally terminated in his acquittal; (3) that it was instituted without reasonable or probable cause; and (4) that the plaintiffs in error were actuated by legal malice,—that is, improper or sinister motives; and that these four elements concurred.

It was not enough to establish that the prosecution complained of was instigated by the plaintiffs in error, and the proceedings instituted by them with malice and ill will towards defendant in error. It was necessary that the defendant in error should have gone a step further, and shown that there was no probable cause for the inauguration of the prosecution. If plaintiffs in error acted with probable cause, they were not liable in an action for malicious prosecution, it matters not how vindictively they may have acted or what their motives may have been. *Wheeler v. Nesbitt*, 24 How. 544, 550; *Stewart v. Sonneborn*, 98 U. S. 187, 192, 194, 195; *Crescent City Live-Stock Co. v. Butchers' Union S. H. Co.*, 120 U. S. 141, 148, 149, 7 Sup. Ct. 472; *Sanders v. Palmer*, 14 U. S. App. 297, 307, 5 C. C. A. 77, and 55 Fed. 217; *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; *Scott v. Shelor*, 28 Grat. 891, 899; *Mitchell v. Wall*, 111 Mass. 492; *Howard v. Thompson*, 1 Am. Lead. Cas. 200, 213; 1 Hil. Torts, c. 16, § 18.

It must also be borne in mind that from the evidence in this case plaintiffs in error Staunton, Silman, and Jarret did not occupy the same position as the plaintiff in error Coleman. They claim to have acted solely upon what Coleman told them, and defendant in error conceded that he talked with Coleman alone in reference to the papers alleged to have been stolen. There was no evidence that he had any conversation with any of the plaintiffs in error except Coleman, and Coleman fully corroborated his co-plaintiffs in error, and testified that he communicated to them the fact that defendant in error desired to examine and take the papers in question for the purpose of destroying and making away with them, and said plaintiffs in error Staunton, Jarret, and Silman,

one and all, testified that in all did they acted in good faith and upon the information received from Coleman; Staunton and Jarret swearing that their purpose was to preserve and protect the public records in their custody, and Silman that his was to prevent the destruction of his vouchers.

The purpose and intent with which plaintiffs in error acted was most material, as bearing upon the question of probable cause; for, while malice may be inferred from the absence of probable cause, still the lack of probable cause would not be presumed because of the existence of malice. Whether or not there is probable cause for the institution of a criminal proceeding is sometimes a question of law and sometimes a question of fact. Where the facts are undisputed it is a question of law, and should be determined by the court; otherwise, it is one of fact and for the jury. *Crescent City Live-Stock Co. v. Butchers' Union S. H. Co.*, 120 U. S. 141, 149, 7 Sup. Ct. 472; *Stewart v. Sonneborn*, 98 U. S. 187, 194; *Sanders v. Palmer*, 14 U. S. App. 308, 309, 5 C. C. A. 77, and 55 Fed. 217; *Knight v. Railway Co.*, 9 C. C. A. 376, and 61 Fed. 87, 91.

It seems to us, upon the facts and evidence as certified in the record, there was no dispute as to why, and the circumstances under which, the plaintiffs in error Staunton, Silman, and Jarret acted. They and their co-plaintiff in error Coleman fully corroborated each other in every particular. Indeed, the only conflict was as to what occurred between defendant in error, Goshorn, and Coleman, of which Staunton, Silman, and Jarret had no knowledge, other than as communicated to them by Coleman, and what occurred at the time the papers were taken out of the box in the clerk's office. Goshorn's claim was that Coleman took the papers and gave them to him in the presence of his (Goshorn's) brother, whereas the evidence of the plaintiffs in error was that Goshorn took the papers out of the box himself, and that Coleman was not in the record room at all. Upon this state of facts, there being really no conflict in the evidence as to Staunton's, Silman's, and Jarret's connection with the institution of the criminal prosecution, and of the circumstances under which they acted, the jury should have been instructed that there existed, so far as they were concerned, probable cause for the institution of the criminal proceedings, and that the defendant in error, Goshorn, could not recover against them.

Staunton and Jarret were each public officials, in charge of the public records of the court, one as clerk and the other as deputy clerk of the county court of Kanawha county, and Silman was, as late sheriff, interested personally in preserving the public records, which contained his vouchers used in settlement with the county officially. They all testified that they were reliably informed of the purpose of defendant in error to steal the public records; that they believed the information they received, and watched to see if the records would be taken, as they had been advised they would be, and, seeing the supposed theft, they immediately caused defendant in error to be held until they could consult counsel as to the propriety of swearing out the warrant, and that, upon such advice, they caused the warrant to issue. What less,

as honorable officers, could they have done? And as to all this it is to be borne in mind that there was, so far as they were concerned, apparently no conflict in the evidence, except as to the single question whether Goshorn himself took the papers from the box before starting away with them or whether Coleman handed them to him. Whatever may have been his purpose and motive in procuring the papers, or whether he had been deceived or misled by Coleman, were matters of which they, according to the undisputed evidence in the record, were in total ignorance, except as advised by Coleman, whom they believed.

The answer of the defendant in error to all this was that the case was one in which the charge of conspiracy was made; that Coleman, Staunton, Silman, and Jarret were all conspirators, and therefore bound by the acts of each other, and they each stood, so far as defendant in error was concerned, in exactly the same position. This assumes that a charge of conspiracy is all that is necessary, which is not true. It must be followed by proof, and that proof must be sufficient to connect all of the alleged conspirators with the original unlawful design before the separate act of one can be imputed to them all, and proof of this appears to us to be utterly lacking in this case.

Among the instructions given by the lower court were the following, being No. 4, offered by the defendant in error, and the court's No. 9:

"No. 4. The court instructs the jury that if they believe from the evidence that the purpose and object of the plaintiff, in getting possession of the said road orders in controversy in this suit, was to examine them, in order that he might ascertain their validity or integrity, and not to destroy them, and that the defendant Coleman was made acquainted with such intention and purpose on the part of the plaintiff before he came in possession of said orders, then the arrest and prosecution of the plaintiff for the felonious taking of such orders was without probable cause, and the jury should so find."

"No. 9. The court instructs the jury that if they find from the evidence that the defendants Silman, Staunton, and Jarret, through defendant R. A. Coleman, placed the county orders mentioned in this suit where the plaintiff could get them, and that it was arranged by Coleman on behalf of the defendants with the plaintiff in this action that they would be placed in a certain box in the clerk's office, and that they were so placed, and that the plaintiff was informed by Coleman where the papers were, and that he could get them, and that the defendants Staunton, Silman, and Jarret agreed with Coleman that they should be so placed, then, under such circumstances, the taking of such orders was not larceny; and if the jury further believe from the evidence that the plaintiff was arrested and prosecuted for such taking, then no probable cause existed for such prosecution."

These two instructions seem to us erroneous, and clearly calculated to mislead the jury, to the prejudice of the plaintiffs in error Staunton, Silman, and Jarret, in any view that may be taken of the case. In instruction No. 4, the jury were told that if the purpose of Goshorn in taking the road orders in question was to examine them to ascertain their validity, and not to destroy them, and that plaintiff in error Coleman was acquainted with such intention on his part before Goshorn came in possession of said papers, then that the arrest and prosecution of defendant in error was without probable cause, and they should so find. The instruction is fatally defective, in that

it makes no distinction between plaintiffs in error Coleman, Staunton, Silman, and Jarret, and charges Coleman's co-plaintiffs in error with knowledge of facts communicated to him alone.

The court's instruction No. 9 is subject to the same objection in part as No. 4. It leaves out of view entirely the question of whether or not plaintiffs in error Staunton, Silman, and Jarret acted in good faith in what they did, and the purpose and intent with which defendant in error, Goshorn, acted in what he did. It practically takes the case away from the jury on these two questions, and seems clearly erroneous when read in connection with court's instructions Nos. 8 and 10, which immediately precede and follow it, as follows:

"No. 8. The court instructs the jury that the county orders given in the evidence in this case having been paid off and satisfied, and having no actual value, but being simply papers filed in the clerk's office of the court, are not in law subjects of larceny."

"No. 10. The court instructs the jury that if the papers were taken as set out and described in the court's eighth instruction, and that there was no such value in the papers as would induce the plaintiff to steal them, then this fact is a potential fact, tending to show a want of probable cause."

By instruction No. 8, it will be seen that the court told the jury that these road orders were not the subject of larceny, and by the ninth instruction that if they were taken, as therein stated, the taking of them was not larceny, and that no probable cause existed for the prosecution. By court's instruction No. 10 the jury were told that if the papers were such as the court referred to in its instruction No. 8, and there was no such value in them as would induce the defendant in error to steal them, then that was a potential fact tending to show a want of probable cause.

Aside from the last-named instruction being argumentative, we think the whole theory of these three instructions,—Nos. 8, 9, and 10,—in so far as they deal with the question of the value of the road orders, and their not being the subject of larceny, was erroneous, and that they should not have been given. The action of the criminal court of Kanawha county, W. Va., on this question, of whether or not these papers were the subject of larceny, is binding upon this court in a suit for malicious prosecution, based upon the existence of that case. That court passed upon the validity of the indictment found by the grand jury against the defendant in error, overruling the demurrer thereto and to each count thereof, and expressly refused to charge the jury that said road orders were not the subject of larceny. Under that indictment defendant in error was tried. Upon a conviction thereunder by the jury, that decision, until reversed and set aside by an appellate court, would have been conclusive against the defendant therein, as it would have been conclusive in an action for malicious prosecution growing out of its institution. Such conviction, however, was not had, and the defendant in error was acquitted; but the judgment of the court is none the less binding and valid upon the questions necessarily involved in the maintenance of the indictment, to wit, that a criminal offense was charged. Such decision is entitled to full force and effect everywhere, and to be recognized in all proceedings growing out of, arising under, or dependent upon the existence of that case, and to it should be given due effect,

under the constitution and laws of the United States. The rule has respect to the court and its judgment, and not to the parties. The case was one within its jurisdiction, and it is conclusively presumed, in the absence of fraud, to have acted impartially and honestly, and its judgment, rendered under such circumstances, imports verity. Any departure from this principle would go far to destroy the integrity and value of the judicial system. *Dupassey v. Rochereau*, 21 Wall. 135; *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25; *Crescent City Live-Stock Co. v. Butchers' Union S. H. Co.*, 120 U. S. 146, 147, 159, 7 Sup. Ct. 472.

Several of the assignments of error involve the question of how far the fact that the plaintiffs in error Staunton, Jarret, and Silman consulted counsel before swearing out the warrant against the defendant in error, and acted upon such advice, served to relieve them from liability in this action. The court gave two instructions bearing upon this question, and rejected two offered by the plaintiffs in error; and while the exceptions and assignments of error relate to the rejection of the two instructions offered and the giving of the two by the court, the said assignments are more particularly directed at the limitation the court made in the instruction on this question as to the time when counsel was consulted than to the terms in which the instructions were couched. The court emphasized the fact that consulting counsel, after the defendant in error, Goshorn, was placed in the custody of the sheriff, and before the swearing out of the warrants against him, some hours later, would not avail as a defense, and should not be considered in determining whether probable cause existed or not at the commencement of the proceedings; and by another instruction, offered by defendant in error, the court instructed the jury "that the prosecution of the plaintiff, as alleged in the declaration, began with his arrest in the clerk's office." That the advice of reputable counsel, bona fide sought, and given upon full and fair statement of all the facts and circumstances, and as a consequence of which a prosecution was instituted, will serve as a defense in a suit for malicious prosecution, seems to be too well settled to admit of serious contention. *Stewart v. Sonneborn*, 98 U. S. 187; *Sanders v. Palmer*, 14 U. S. App. 297, 5 C. C. A. 77, and 55 Fed. 217; *Forbes v. Hagman*, 75 Va. 168. This is what was done in this case. The evidence is that the lawyer consulted was of very high standing, a former prosecuting attorney for the county, the father of the then prosecuting attorney, who frequently assisted his son in prosecutions, and who was himself the assistant United States attorney for the state; that plaintiffs in error Staunton, Silman, and Jarret "explained to him all the facts relative to the matter, and all the circumstances leading to Goshorn's arrest, including the plan arranged to catch him, and the information received by them from Coleman, both before and after the plan was arranged," and asked for his advice in the premises; that he advised them that Goshorn should be arrested, and drafted the warrant himself. Was this advice given too late, as held by the lower court? There was no count in the declaration for false imprisonment. The suit was one solely of malicious prosecution, and we think that the advice taken before the issuance of the warrant

was sufficient. If false imprisonment had also been charged, the rule would, of course, be different. The test is whether a suit for false imprisonment could be maintained for the arrest made in the clerk's office in this case before the issuance of the warrant. Manifestly it could. Such arrest was extrajudicial, without legal process, and it is false imprisonment, as distinguished from malicious prosecution. *How. Mal. Pros.* 8; *Murphy v. Martin*, 58 Wis. 278, 16 N. W. 603; *Colter v. Lower*, 35 Ind. 285; *Lewin v. Uzuber*, 65 Md. 341, 344, 4 Atl. 285.

Another of the assignments of error relates to the admission of evidence during the trial, as set forth in the bill of exceptions No. 2; the question being whether defendant in error, Goshorn, could prove by a witness the statements made by Goshorn to the witness on Sunday or Monday preceding the Tuesday on which the papers were taken, with regard to what was his (Goshorn's) object and purpose in procuring the papers. This evidence was admitted, and we think improperly, against the objection of the plaintiffs in error. Whether such evidence might possibly have been introduced in a criminal prosecution it is unnecessary to decide, but manifestly in this case, upon a plea of not guilty, it had no place. The issue joined was not whether defendant in error was guilty of the crime alleged against him, but whether plaintiffs in error had probable cause to believe at the time, and under the circumstances that they acted, that he was guilty. So far as they were concerned, if for no other reason, it should have been excluded as hearsay evidence. There is no pretense that the plaintiffs in error, or either of them, heard or knew anything of the statements claimed to have been made by Goshorn to the witness, and, at best, it was a self-subservient statement, made by the defendant in error, and which could not be used in his own behalf. *Whart. Ev.* (2d Ed.) § 1101; *Tayl. Ev.* § 523; *Whitney v. Houghten*, 127 Mass. 527; *Duvall's Ex'r v. Darby*, 38 Pa. St. 56; *Scott v. Shelor*, 28 Grat. 891, 895.

For these reasons, and without further discussing the assignments of error, the decision of the lower court is reversed, and the case remanded, with instructions to award a new trial therein. Reversed.

JUTTE & FOLEY CO. v. CITY OF ALTOONA.

(Circuit Court of Appeals, Third Circuit. May 9, 1899.)

No. 19, March Term.

MUNICIPAL CORPORATIONS — LIMITATION OF LIABILITY ON CONTRACTS — PENNSYLVANIA STATUTES.

The Pennsylvania act of May 23, 1889 (P. L. 277), provides that no municipal department of a city of the third class shall create any debt or make any contract, except in pursuance of previous authority of law or ordinance; that every contract which involves an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of appropriation thereunder shall be charged against such item, and so certified by the controller on the contract, before it shall take effect; and that, if the controller shall certify any contract in excess of the appropriation made therefor, the city shall not

be liable for such excess, but the controller may be held liable therefor on his bond. The act also authorizes the creation of a water and lighting department, the board of commissioners of which shall make all contracts relating to the department, but only as authorized thereto by the previous consent and direction of the councils. The councils of the city of Altoona, which is a city of the third class, passed an ordinance providing for the construction of certain improvements to the city's water plant, and directed the board of water commissioners to contract therefor. It appropriated for the purpose an unexpended balance of a fund previously created amounting to \$35,000, and expressly limited the cost of the improvements to that sum. The board entered into a contract with plaintiffs for the construction of the improvements for a sum slightly under \$35,000, but providing for an increase or diminution in the estimated quantities of work or materials. The controller certified the contract, in general terms, as "subject to the appropriation made" by the ordinance, but stated no amount in his certificate. *Held*, that the plaintiffs could not recover against the city on such contract any sum in excess of the \$35,000 appropriated by the ordinance, being chargeable with notice of the limitations placed upon the powers of the board by the statute and the ordinance.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Henry A. Davis, for plaintiff in error.

W. M. Hall, Jr., and Geo. B. Bowers, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. In Pennsylvania, cities of the third class, of which the city of Altoona is one, are governed by the act of May 23, 1889 (P. L. 277). Article 4, § 7, of this act provides:

"And no municipal department shall create any debt or make any contract, except in pursuance of previous authority of law or ordinance."

Article 9, § 5, of this act, provides as follows:

"Sec. 5. Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item and so certified by the controller on the contract before it shall take effect as a contract, and the payments required by such contract shall be made from the fund appropriated therefor. If the controller shall certify any contract in excess of the appropriation made therefor, the city shall not be liable for such excess, but the controller and his sureties shall be liable for the same; which may be recovered in an action at law by the contracting party aggrieved. It shall be the duty of the controller to certify contracts for the payment of which sufficient appropriations have been made."

By article 12 of the same act the city is authorized to create a water and lighting department. The duties of the board of commissioners of such department are defined by sections 5 and 6 of that article as follows:

"Sec. 5. It shall be the duty of the board to take charge of the water and lighting department so created as aforesaid, and by their sole authority to employ and dismiss at pleasure a superintendent and a clerk, who shall be secretary of the board, whose compensation shall be fixed by councils, and to employ such laborers, mechanics and workmen as they may deem necessary for the economical and efficient administration of said department. They shall purchase such materials and supplies as may be required for keeping the works in good repair, and have charge and control of all constructions,

repairs, enlargements and extensions of the works, and shall conduct and manage the affairs and business of the department in accordance with law and the directions of the city councils.

"Sec. 6. The said board of commissioners so created shall, whenever called upon by councils, make and submit to them full estimates of the cost, charges and expenses of any new work, enlargement, extension of water or lighting supply, or alteration which councils may contemplate making relative to said works; and said board may at any time submit to councils any suggestions and estimates they may see proper to make touching the improvement, extension or enlargement of said works, but no new construction, reconstruction, extension, supply of water or light, or enlargement of said works shall be undertaken by said commissioners so created, or materials or supplies be purchased therefor, without the previous consent and direction of councils."

On July 6, 1894, the councils of the city of Altoona, in conformity with the previous consent of the electors of the city duly expressed, passed an ordinance (No. 545) increasing the indebtedness of the city \$220,000, authorizing the issue of bonds of the city therefor, and appropriating the entire amount to the purpose of "securing and furnishing an additional ample supply of pure water to the citizens and institutions of the city of Altoona," and specifically appropriating and applying \$185,000 thereof to the construction of a large impounding dam or reservoir. Subsequently the contract for this reservoir was let, and the reservoir was constructed at an expenditure of \$185,000, leaving \$35,000 of the entire above-mentioned appropriation unused. On March 29, 1895, an ordinance (No. 593) was passed by the councils of the city of Altoona and approved by the mayor, providing for the construction of a flood channel and settling basin in connection with said reservoir. The first section ordained that the flood channel should be constructed, and the second section directed the board of water commissioners to have plans and specifications therefor prepared by their engineer. The third section ordained that a settling basin should be constructed, and the fourth section directed the board of water commissioners to have plans and specifications therefor made by their engineer. The fifth section of this ordinance is as follows:

"Sec. 5. Whatever funds are necessary to pay for the construction of said flood channel and settling basin, are hereby appropriated from the unappropriated part of the funds to be raised from the loan of two hundred and twenty thousand (\$220,000) dollars, authorized by Ordinance No. 545, approved the sixth day of July, A. D. 1894, providing the construction of such flood channel and settling basin shall not exceed the sum of \$35,000."

And the sixth section directed the board of water commissioners to advertise for bids for the construction of said flood channel and settling basin "in accordance with said plans and specifications and this ordinance," and to award the contract to the lowest responsible bidder; and further directed that the contract, on the part of the city, "shall be executed by the mayor and board of water commissioners, and shall be certified by the city controller according to law."

The water commissioners, professing to act "in compliance with an ordinance of councils under date of March 29, 1895," advertised for proposals for the construction of the flood channel and settling basin. The Jutte & Foley Company, the plaintiff below and in error, proposed to furnish the materials and do the work for the sum of thirty-

four thousand five hundred and eighty dollars (\$34,580), with a provision, however, for increase or diminution in the estimated quantities of work and materials. The board of water commissioners awarded the contract to the plaintiff on its bid, and a contract in writing was executed without any report to councils or further action on the part of councils. The contract bears date May 22, 1895, and purports to be "between the city of Altoona, Pa., by its board of water commissioners, of the first part, and Jutte & Foley Company," of the second part, and it is signed by the mayor of the city and the members of the board of water commissioners, but without any official designation accompanying their signatures. The city controller indorsed upon the contract the following certificate:

"The within contract is hereby certified, subject to the appropriation made therefor in Ordinance No. 593, approved the 29th day of March, 1895.

"Altoona, Pa., June 10, 1895.

George Harpham,

"City Controller."

Before the bringing of this suit, the city had paid the plaintiff on this contract a sum of money considerably in excess of \$35,000, yet the plaintiff claimed to recover in this action upon the contract the further sum of about \$40,000. Under the rulings and pursuant to the peremptory instruction of the circuit court, the jury rendered a verdict for the city of Altoona, the defendant, and judgment thereon was entered in its favor. We are now to determine whether there was error in these rulings and instruction.

From the above-quoted provisions of the act of May 23, 1889, it is plain that in the matter of the contract here in question the board of water commissioners had no lawful authority to bind the city of Altoona other than was conferred by the ordinance of March 29, 1895. We entirely agree with the court below that the authority given to the board of water commissioners by that ordinance was restricted to an expenditure not exceeding \$35,000. A public fund of \$220,000 had been raised and set apart to procure for the city a supply of water, and \$185,000 of that fund had been appropriated and applied to the construction of an impounding dam or reservoir. There was thus left of this water fund an unexpended balance of \$35,000. In this condition of affairs the ordinance of March 29, 1895, was passed, authorizing the construction of a flood channel and a settling basin. For this purpose the fifth section of the ordinance appropriated the "unappropriated part" of the water fund of \$220,000. And then, to make it the clearer that no expenditure in excess of that unappropriated balance was contemplated or sanctioned, there was added the proviso, "providing the construction of said flood channel and settling basin shall not exceed the sum of \$35,000." Manifestly this was a limitation upon the cost of the work. This limitation bound the board of water commissioners and the contractor dealing with the board. The ordinance did not empower the board of water commissioners to enter into a contract involving the city in a liability in excess of \$35,000. If authority is needed to sustain the conclusion that the city is not liable to the contractor beyond the limited cost specified in the ordinance, it is to be found in the decisions of the supreme court of Pennsylvania in the cases of Lehigh

Co. v. Kleckner, 5 Watts & S. 181, and Hague v. City of Philadelphia, 48 Pa. St. 527.

Again, the certificate of the city controller prescribed by section 5 of article 9 of the act of May 23, 1889, was requisite to the validity of the contract in suit. *City of Erie v. A Piece of Land on Eighteenth Street*, 176 Pa. St. 478, 484, 35 Atl. 136. This section provides:

"Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and the estimated amount of the expenditure thereunder shall be charged against such item and so certified by the controller on the contract before it shall take effect as a contract, and the payments required by such contract shall be made from the fund appropriated therefor."

This certificate by the controller is a condition precedent to the taking effect of the contract. This was so adjudged in *City of Erie v. A Piece of Land on Eighteenth Street*, supra. In the present case the certificate by the controller does not conform to the requirements of the act. Certainly, if it can be sustained at all, it is only good to the extent of the appropriation made by the ordinance. The language of the certificate is:

"The within contract is hereby certified, subject to the appropriation made therefor in Ordinance No. 593, approved the 29th day of March, 1895."

Now, the appropriation made was the unappropriated part of the water fund, namely, the sum of \$35,000. It is to be noted that section 5 of article 9 provides:

"If the controller shall certify any contract in excess of the appropriation made therefor the city shall not be liable for such excess, but the controller and his sureties shall be liable for the same."

Possibly the certificate of the controller may be regarded as good to the extent of the unexpended balance of \$35,000 of the water fund. We are clear, however, that beyond that sum there was no proper certification, and therefore no valid contract with the city.

From the views we have expressed above, it follows that the obstacles to the plaintiff's recovery were insuperable, and therefore that there was no error in the rulings of the court upon the plaintiff's offers of evidence. The court was right in instructing the jury to return a verdict for the defendant. The judgment of the circuit court is affirmed.

CITY OF PONTIAC v. TALBOT PAV. CO.

(Circuit Court of Appeals, Seventh Circuit. May 19, 1899.)

No. 563.

1. REVIEW—CASES TRIED TO COURT—EFFECT OF GENERAL FINDING.

The sufficiency of a declaration is reviewable on error by the circuit court of appeals, and, if it fails to state a cause of action, the defect is not cured by a general finding for plaintiff by the circuit court, where a jury is waived, nor is it waived by the defendant by answering and proceeding to trial after his demurrer has been overruled.

2. MUNICIPAL CORPORATIONS—LIABILITY ON CONTRACT FOR PUBLIC IMPROVEMENTS—ILLINOIS STATUTE.

A contractor for the making of public improvements in an Illinois city, governed by the city and village act (1 Starr & C. Ann. St. [2d Ed.] 777 et seq.), which provides (article 9, § 49) that all persons taking such contracts, who agree to be paid from special assessments, "shall have no claim or lien upon the city or village in any event, except from the collection of the special assessment made for the work contracted for," and whose contract provided that he should make no claim against the city in any event, except from collections, and should take all risk of the invalidity of the special tax, cannot maintain an action against the city for a general judgment on the ground that its officers failed or refused to levy a second assessment after the first had been held invalid by the supreme court of the state, but is confined to his remedy to compel the officers to perform their duty.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

Judgment is entered against the city of Pontiac, plaintiff in error and defendant below, in an action on the case, upon a general finding by the court that the defendant is guilty, and that plaintiff's damages are assessed at the sum of \$12,343; a trial by jury being waived. The alleged cause of action, as set out in the several counts of the declaration, is failure and neglect on the part of the municipal authorities to provide "for a new special tax assessment" against contiguous property, to pay amounts earned under a contract for the paving and improvement of certain streets under the following state of facts: On June 27, 1895, an ordinance was adopted by the city of Pontiac for the improvement of certain streets, whereby the expense of street intersections was to be paid by general taxation, and "the remainder of cost of said improvement should be paid for by special taxation, to be assessed, levied, and collected against real estate abutting on the lines of said streets so ordered to be improved," in accordance with the provisions of article 9 of chapter 24 of the statute of the state of Illinois entitled "An act to provide for the incorporation of cities and villages." The general act so referred to declares, by section 49 of article 9 (1 Starr & C. Ann. St. Ill. [2d Ed.] p. 777 et seq.), that "all persons taking any contract with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collection of the special assessment made for the work contracted for." Section 64 of the same article provides that vouchers issued for the work shall be subject to like condition, whether the holders are the original contractors or their assigns. Proceedings were taken under the ordinance, the special tax assessments were made and confirmed, and thereupon a contract was entered into between Talbot Paving Company, the plaintiff below, and the city of Pontiac, whereby that company, as the lowest bidder, undertook to "furnish all labor and material for the construction of said local improvement" for the aggregate sum of \$15,168.90, to be paid when completed and accepted,— "and when the special tax levied under said ordinance, or any special tax which shall thereafter be levied by said city, upon the property contiguous to said improvement, should be collected," and also when the general tax provided for the cost of street intersections was collected; and the contract further provides, in express terms, that "they shall make no claims against said city, in any event, except from the collections" so referred to, and that the contractors "take all risk of the invalidity of any such special tax." The work was performed by the contractor and accepted by the city, but payment was not made, except for the cost of the intersections, raised by general tax, and portions of the special assessments which were paid in by certain property owners. The balance thus left unpaid was \$10,567.33, for which "local-improvement vouchers" were issued, reciting that they were to be paid out of the special assessments when collected, and that the city was exempt from other liability. The declaration states that the failure to collect the special taxes in the first instance arose out of the prosecution by lot owners of an appeal to the supreme court of the state, which resulted in a judgment "holding the said ordinance providing for said special

tax assessment invalid, thereby rendering it impossible, under said ordinance, to collect said special tax from said property to pay the balance due the plaintiff." *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794, is cited in the briefs as the case so referred to. After this decision, the Talbot Paving Company presented its petition to the city council for the adoption of a supplemental ordinance "for the assessment of a special tax upon the property contiguous to said improvement" to pay the balance due, but the city council failed to make provision to that end, and the action rests upon the allegation of negligence and willful refusal on that behalf. The defendant demurred to the declaration, stating several grounds, but the demurrer was overruled, and the defendant, being required to plead instant, filed its plea of not guilty, and trial before the court proceeded upon the merits.

F. W. Winkler and A. C. Norton, for plaintiff in error.

W. T. Whiting, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The general finding by the court clearly determines all issues of fact. *Fourth Nat. Bank of St. Louis v. City of Belleville*, 53 U. S. App. 628, 27 C. C. A. 674, 83 Fed. 675, and cases cited. But it is not conclusive on all the questions involved, as contended on behalf of the defendant in error. Its utmost effect is to limit the inquiry on review "to the sufficiency of the declaration, and the rulings, if any be preserved, on questions of law arising during the trial." *Lehnen v. Dickson*, 148 U. S. 71, 72, 13 Sup. Ct. 481. In the case of general verdict on a trial by jury, the finding establishes all the material facts which are alleged in the declaration. If, however, the declaration on which either verdict or finding must rest "fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover," the error is not cured by verdict, and is not waived by answering and proceeding to trial after the demurrer is overruled. *Teal v. Walker*, 111 U. S. 242, 246, 4 Sup. Ct. 420. In such case, there is no foundation for the judgment, and that inquiry is clearly presented for review on this record. Whether considered as raised by the demurrer, or upon the objections and exceptions covering all the testimony to support the declaration, or upon the facts stated and found, is not material.

The defendant in error entered upon the performance of its contract for the street improvement under the express statutory provision that payment could be made solely out of special assessments against property abutting on the improvement, and that the contractor should "have no lien or claim upon the city * * * in any event, except from the collection of the special assessments made for the work contracted for." The ordinance by which the paving in question was authorized and let expressly referred to this statute; this condition of payment was clearly stipulated both in the contract and in the vouchers, which were finally issued and accepted for the unpaid installments in controversy; and the contract further provided that the contractor "shall take all risk of the invalidity of any such special tax, the said city not to be liable in any event by reason of the invalidity of said special tax assessment, or any of them, or of

the proceedings thereon, but only for failure to collect the same, the same being collectible in law." Proceedings were taken, and the special assessments were made, but on appeal by lot owners it was held by the supreme court that the ordinance was invalid by reason of provisions which committed to the city engineer an unauthorized discretion relative to the improvement, and the assessments were set aside. As the necessary result of this adjudication, which involved the entire amount unpaid on the contract, the assessments were not collected and the vouchers were not paid. The city council has since refused to take action for a new special assessment to charge the deficiency against the abutting property; and it is urged, in defense of such nonaction, that its power is exhausted, and that no such assessment can be made, under the decision referred to. Whether the power subsisted in the city council to provide for a reassessment notwithstanding the defect in the original ordinance appears to have been the main subject of controversy in the trial court; and, for the purposes of the present inquiry, it is assumed that the decision there in favor of the power is not only in accord with justice, but is sustained as well by interpretations placed upon the statute by the supreme court. On that assumption, the duty of the city is manifest to proceed promptly in the exercise of its power to assess and collect the unpaid amounts, and such duty can be enforced by mandamus, if remedies at law are not adequate for the adjustment of all rights.

The statute which confers authority for making the improvement in question imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property, through special assessment, and shall not become a public charge "in any event." The provision is of general application to cities and villages in the state of Illinois, and is in accord with a rule of public policy which is common in municipal charters and is upheld by judicial authority. If, however, the contractor who performs work so authorized, has the right to recover the contract price against the municipality, by way of damages, in the event of neglect or refusal on the part of the public officers to perform their duty in enforcing the special assessments, the way is clearly open to evade and nullify the legislative purpose. By their conduct,—either through negligence, ignorance, or collusion,—the city council or officers may impose upon the public the expense of the improvement, in despite of the statute which declares it a special benefit, to be paid exclusively by abutting lot owners. Indeed, if this judgment is sustainable, it so operates in the present case, as no provision appears for collecting the amount of such recovery by a supplemental special assessment against the lot owners. On the other hand, a complete remedy is clearly open to the contractor, by a proceeding in the proper forum, to ascertain the power, and thereupon enforce the ministerial duty to make the new assessment in obedience to the statute and violating none of its provisions.

The contention, however, on behalf of the defendant in error, is predicated on the duty which is imposed by law upon the municipality to make provision for the special assessment, and on the gen-

eral doctrine, held in a line of authorities and well recognized in Illinois, of municipal liability for failure or neglect on the part of its officers to discharge the public duty. The question whether this doctrine applies to any case "where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited," to the extent of furnishing the contractor a right to recover his compensation in an action against the corporation founded on its failure to make the necessary assessment, has given rise to decisions which are not in accord in the various jurisdictions. In 1 Dill. Mun. Corp. (4th Ed.) § 482, numerous cases are collated in a note, and the learned author well remarks in the text: "The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment; for why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence." But examination of the cases there noted as favoring the general recovery, and as well those cited in the brief of counsel in support of this judgment, reveals no instance of such allowance in the face of a statute expressly prohibiting the payment or collection as a public charge in any event, and the extreme view of liability held in the two leading citations (*Reilly v. City of Albany*, 112 N. Y. 30, 42, 19 N. E. 508, and *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532) would merely disregard the contract stipulations, and not affect a case so limited by statute. In *People v. City of Syracuse*, 144 N. Y. 63, 66, 38 N. E. 1006, the New York court of appeals appears to disapprove the doctrine of *Reilly v. City of Albany*, supra, holding that no action is maintainable against the city, even in such case, for the failure to make an assessment, but the "proper remedy was to compel, by mandamus, the officers of the city having the matter in charge to proceed with their duties as required by law."

However the consensus or weight of authority shall ultimately determine the remedy of the contractor for local improvements, where the statute authorizes payment by special assessment, but is merely directory in its terms to that end, or where the collection is limited by ordinance or contract to such assessments, and the authorities fail to provide for or to carry out the assessment, we are clearly of opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override per se the inhibitions expressed in this statute, and that the contractor must proceed by mandamus to enforce his claim. The decisions in support of this view are well considered, and apparently without conflict, and the following are leading and pertinent examples: *Fletcher v. City of Oshkosh*, 18 Wis. 228; *City of Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. City of Detroit*, 12 Mich. 279; *Reock v. Mayor, etc., of Newark*, 33 N. J. Law, 129; *People v. City of Syracuse*, 144 N. Y. 63, 38 N. E. 1006. See, also, *Elliott, Roads & S.* 436, and note; *Beach, Mod. Cont.* § 1191. In *Fletcher v. City of Oshkosh*, supra, Mr. Justice

Paine, speaking for the court in reference to a case which is practically identical, says:

"Now, in the face of this provision, which says that the city shall in no event be liable, we are asked to hold that if the money is not collected in a reasonable time, in the mode which is provided, the city shall be liable. * * * We know of no rule of construction, and certainly the counsel cited no case, that could justify a court in thus overriding a plain provision of law. Whoever contracts for this kind of work, or deals in these certificates, under such a charter, takes the risk of collecting his money in the manner provided, with a right to resort to the appropriate remedy to compel the officers to whom it is intrusted to discharge their duties, and he cannot come into a court and ask to hold the city liable, in the teeth of a provision which informed him at the outset that the city should, in no event, be liable."

So considered, support cannot be found for the judgment under the general authorities, and no foundation remains unless the cases cited by counsel sustain the further contention that a rule of decision prevails in the state of Illinois which establishes the primary liability of the municipality in such contingency through the failure to make the special assessment. The decisions invoked in that view are *Clayburgh v. City of Chicago*, 25 Ill. 535, and *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76; but in the first-mentioned case no statute was involved which forbade liability in any event on the part of the city, and in neither case was any rule of liability adopted which can be brought into the present statute, by way of construction, to sanction an inhibited recovery. In *Clayburgh v. City of Chicago*, 25 Ill. 535, the question was of a different nature, and not within the statute. An action on the case was sustained in favor of a lot owner to recover of the city damages arising out of the taking of his property for public use in opening a street. The law provided for an assessment of benefits and damages to that end, the property was appropriated and the damages ascertained, but there was a refusal to enforce collection of the assessment. The terms of the statute are not stated, but, clearly, the remedy for compensation in such a case is not applicable, in any view, to a contractor, under the present statute. In *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76, however, the same statute and like conditions as in the case at bar were present, except that suit was commenced by the contractor after he had petitioned for a reassessment, and before an ordinance could be adopted for that purpose; the action being based on the ground that the city "had exhausted its power, and could not make a reassessment, as it had agreed to do, and that it was therefore liable for the balance, to be paid by general taxation or out of the general fund." The decision of the supreme court denies the right of action, and is based solely upon the ground that a reassessment could be made for the collection; and, so far as it furnishes light, the ruling is distinctly adverse to recovery here, and appears to have been misapprehended by counsel. It is cited in the argument submitted on behalf of the defendant in error as stating in the opinion of the court: "This action cannot be maintained except upon refusal or neglect of appellant to levy a reassessment, which is not claimed." This remark appears in the recital of facts only, and as a quotation from the findings of the appellate court of a reason for not remanding the cause.

It is neither approved in the opinion, nor referred to as influencing the decision; nor could the excerpt have the force of a binding decision, if it were approved. No ground appearing to authorize the recovery against the plaintiff in error, the judgment is reversed, with direction to sustain the demurrer to the declaration.

SPREEN v. DELSIGNORE et al.

(Circuit Court, D. Kentucky. April 24, 1899.)

No. 5,549.

1. APPEARANCE—FILING PETITION FOR REMOVAL.

The filing of a petition and bond for the removal of a cause from a state court, though the defendant's appearance is not, in terms, restricted to that purpose, does not constitute a general appearance to the suit.

2. ATTACHMENT—ISSUANCE BEFORE SUMMONS—KENTUCKY STATUTE.

Under Civ. Code Ky. § 39, providing that an action is commenced by filing a petition, and causing a summons to issue or a warning order to be made thereon, and section 194, providing that a plaintiff may obtain an attachment "at or after the commencement of the action," an attachment issued on the filing of the petition, but before a summons has been issued or a warning order made, is void.

3. SAME—SUCCESSIVE WRITS—AFFIDAVIT.

Under Civ. Code Ky. §§ 194, 201, authorizing attachments at or after the commencement of the action and the issuance of successive writs, an attachment may lawfully be issued at any time after an action is commenced, and before final judgment on an affidavit filed at the time the action is commenced.

4. SAME—AMENDMENT OF AFFIDAVIT.

Under Civ. Code Ky. § 268, subsec. 2, permitting the amendment of affidavits for attachment, an amendment stating a new ground for attachment may be allowed.

5. CONSTRUCTIVE SERVICE—WARNING ORDER—AFFIDAVIT.

A warning order against a defendant on the ground that he is a non-resident of Kentucky, and believed to be absent therefrom, cannot be made on an affidavit of such facts filed by plaintiff four months previously.

On Motion by Plaintiff for Judgment and by Defendants to Discharge an Attachment.

Augustus E. Willson, for plaintiff.

W. O. Harris, for defendants.

EVANS, District Judge. This ordinary action on a contract in writing was instituted in the Trimble circuit court. The petition was filed February 13, 1896, and embraced an affidavit stating grounds, which, under the Civil Code, authorized a warning order against the defendants, who were alleged to be nonresidents, and believed to be absent from the state of Kentucky, and also authorized, on the ground of the nonresidence, only, of the defendants, an order of attachment against defendants' property. On the same day, bond was duly executed by the plaintiff in the case, and an attachment was issued, directed to the sheriff of Trimble county, by whom it was levied upon 800 empty barrels belonging to the defendants. No summons, however, was issued in the action until March

18, 1896, and that process was returned "Not found." On March 18, 1896, another attachment was issued, directed to the sheriff of Kenton county, but on June 8, 1896, was returned "No property found" upon which to levy it. On June 8, 1896, a warning order against defendants was made by the clerk, and indorsed on the petition, and an attorney was thereby appointed to correspond with the defendants, and inform them of the nature and pendency of the action. On the 8th of June, 1896, another attachment was issued, directed to the sheriff of Trimble county, and, coming to his hands, was on the same day levied upon the same 800 empty barrels that had been levied upon under the attachment issued February 13, 1896. On February 10, 1897, the defendants, by a proper petition for that purpose, removed the case to this court, and subsequently a motion to remand it was overruled by Judge Barr. A motion is now made by the plaintiff for judgment against the defendants, but, although the appearance in the state court would seem, from the entry of the motion made on February 10, 1897, not to have been a restrictive one, the court must overrule the plaintiff's motion for a judgment for the debt sued on, upon the authority of the opinion of the supreme court in the case of *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. On the 1st day of March, 1897, the defendants, expressing their appearance to be for that purpose only, moved the court to discharge and set aside the attachments heretofore issued herein. Under section 39 of the Civil Code it is provided that an action is commenced by filing in the clerk's office a petition, and causing a summons to be issued, or a warning order to be made thereon. Section 194 of the Code provides that the plaintiff may, at or after the commencement of the action, obtain an attachment against the defendant's property in an action for the recovery of money if the defendant is a nonresident of the state. Inasmuch as the attachment dated February 13, 1896, was issued before the commencement of the action, as defined by section 39, it was clearly void. *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477. On March 18, 1896, a summons was issued to Kenton county, and on that day the action may be said to have been commenced. On the same day an attachment was also issued to the sheriff of Kenton county, and, although no property was found upon which to levy it, its issuance was an important act in the progress of the case, especially as section 201 of the Code authorizes several orders of attachment in succession, and as, by section 194, attachments may be issued as well "after" as "at" the commencement of the action. No case is referred to which holds that an attachment may not issue at any time, however long after the affidavit is filed showing the grounds therefor. On the affidavit embraced in the petition no reason is perceived why, under sections 194 and 201 of the Code, an attachment may not have issued at any time between the commencement of the action and final judgment therein. It is, indeed, the uniform practice to issue attachments as long as anything can be found to levy upon, if necessary.

Considering this action as having been commenced as of March 18, 1896, the court should probably now overrule the motion to discharge and set aside the attachments of March 18, 1896, and June 8,

1896, in the absence of an affidavit controverting the grounds of attachment, notwithstanding the affidavit was made in February, and would do so were it not that the plaintiff tenders an affidavit attempting to amend his grounds of attachment, and it seems just to consider the amendment. But, as objection is made to the affidavit thus tendered upon the ground that it is the affidavit of plaintiff's attorney instead of himself, further action upon this phase of the case will be postponed until and including the 3d day of May, 1899, for plaintiff to tender, if so advised, his own affidavit, instead of that of his attorney. It seems to the court that such an amendment, properly sworn to, is clearly admissible under subsection 2, § 268, of the Civil Code. The court is of opinion that the warning order made on the petition on June 8, 1896, should be set aside upon the ground that an unreasonable time had elapsed between February 13, 1896, when the affidavit showed plaintiff's belief that defendants were then absent from Kentucky, and the time of making the warning order. There would seem, however, to be no reason why another warning order may not be made if the proper affidavit therefor should be presented. Counsel will prepare orders accordingly.

DETROIT CRUDE-OIL CO. v. GRABLE.

(Circuit Court of Appeals, Sixth Circuit. March 31, 1899.)

No. 623.

1. TRIAL—DIRECTION OF VERDICT—WAIVER OF ERROR.

Error in refusing to direct a verdict for defendant, on his motion, at the close of plaintiff's evidence, is waived, where defendant proceeds with the case, and gives evidence on his part.

2. SAME—RIGHT TO HAVE VERDICT DIRECTED.

Refusal to direct a verdict for defendant at close of plaintiff's case cannot be assigned as error.

3. SAME—MOTION—REQUEST FOR INSTRUCTIONS.

A request for a charge that, under the evidence, the verdict must be for defendant, is equivalent to a motion to direct a verdict.

4. SAME—AUTHORITY TO DIRECT VERDICT.

Where the trial judge is satisfied, upon the evidence, that plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, should be set aside, the jury may be directed to find for defendant.

5. MASTER AND SERVANT—ASSUMPTION OF RISK—MACHINERY.

The rim of a fly wheel was fastened on by bolts that projected towards the engine from $1\frac{1}{2}$ to 3 inches. Between the wheel and the engine block there was a water-pipe line connected with the engine pump. This line was only a half inch from the longest projecting bolt, and when the pump was in operation it vibrated. *Held*, that an engineer accepting employment under such conditions, and remaining in service without reliance on any promise of the master to remove the cause of danger, assumed the risk of the bolts catching the pipe and breaking it, and throwing part of it against him, although he did not anticipate that such an event might result from the situation of things.

6. SAME—PROMISE TO REPAIR DEFECTS.

A master is liable for an injury to a servant, resulting from an obvious defect and known danger, where the servant relied on an express or implied promise by the master to make repairs, for such time as would be

reasonably required to repair the defect, but no longer; and, in the event of an injury during such time, the servant could recover therefor.

7. SAME—KNOWLEDGE OF DEFECT.

Where the knowledge and the means of knowledge of the servant in respect to a patent defect are equal or superior to those of the master, the servant cannot recover for injuries resulting from such defect, where there is no question of the intricate character of the machinery or the imperfect intelligence of the servant involved.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This suit was instituted in the court of common pleas of Wood county, Ohio, and removed, on application of plaintiff in error, into the circuit court of the United States for the Western division of the Northern district of Ohio. The plaintiff in error is a corporation engaged in the business of leasing land, and sinking and working oil wells thereon. The action was brought to recover damages for a personal injury sustained by the defendant in error while in the service of the plaintiff in error. He was employed in June, 1895, and continued in the same work until October 23, 1896, when the injury was received,—a period of 14 months. During this entire time the defendant in error was engaged in operating, and had charge of, an engine used in pumping oil from oil wells; the engine in question being at well No. 9. He was 26 years old, and was an experienced engineer; having worked (though not continuously) as engineer for about 12 years. He says he considered himself qualified to properly operate such an engine as he was handling. Such minor repairs as were needed from time to time were made by him. The engine was situated in an engine house, and this, with all the machinery connected with it, was, at the time of the accident, in the same condition as when the defendant in error entered into the service of the master, and had been in such condition during the entire time of his service. What is called the "fly wheel" had a balance or outer rim, attached to it with bolts, which extended through, beyond the outer rim of the wheel, towards the engine block. There were three of such bolts, varying in length from $1\frac{1}{2}$ to 3 inches, all projecting, as stated, beyond the rim of the wheel, and towards the engine block. Between this fly wheel and the engine block there was a water-pipe line, placed along the floor, and extending from a well in the rear of the engine house between the engine block and the fly wheel, connecting with what is called a "union," and extending from that union to the pump; being screwed into the water pump at the engine head. Two or three days previous to the accident, the engineer had himself uncoupled this water-pipe line at the union, for some purpose, and coupled it up again. This line was so placed that it extended along close to the fly wheel, and, as exact measurements made after the accident showed, was within about half an inch of the longest projecting bolt of the outer rim of the fly wheel when revolving. The proof also showed that, when the pump was working, this water pipe would vibrate, though this vibration was very slight, if at all, in a lateral direction. Just how the accident happened was a disputed question, and was left in some uncertainty by the evidence. The theory of the defendant in error was and is that, the machinery being in operation, the projecting bolts on the outer rim of the fly wheel caught this pipe, jerked it loose from its fastenings, breaking it, and that a part of it, thrown by the fly wheel, struck the plaintiff. His jaw was broken in two places, and a severe injury sustained. The pipe was undoubtedly found uncoupled at the union after the accident, and a part of it wound around the shaft; indicating that it had been, by great force, driven out of place and broken. What the defendant in error knows or says in regard to the manner in which the accident happened may be stated in his own language as follows: "Well, I went to my place at noon to start up, and pump there in the afternoon; and I fired up, and got up steam on the boiler, and turned it down to the engine, and went down and started my engine. Well, I left the top pet cock open, always, to see when it started; and the pump started off in good shape; and I shut that up, and started around; and the steam was coming up, and the engine was running a little faster than I

wanted it to, and I took hold of the throttle and checked the engine down; and, just as I took my hand off the throttle, it hit me, and— The Court: What hit you? A. The water line. * * * Q. Do you know how you were injured? A. Well, I know I was injured while I was standing right at the engine, even with the throttle wheel. I was checking the engine down. I did not notice any displacement of any portion of the water-line pipe, or balance of the machinery. I was starting the pump. It was twelve o'clock when I got there, and I fired up the boilers, and the water was low, and I got up steam. The engine was running a little faster than I wanted it to run, and I started around to check it down; and, just as I took my hand off, something happened, and struck me. It was done so quick I couldn't see. Q. Did you know yourself what had happened? A. I could not say, exactly." The foregoing, taken from different parts of his testimony, is practically all that is said by him upon this subject.

Everything connected with the fly wheel and the water-pipe line, and their situation with reference to each other, were, as the defendant in error admits, entirely familiar to him, and had been during the time he had been in the master's service. He says he called the attention of the superintendent of the company to the danger of the projecting bolts on two different occasions,—first, when, or very soon after, he entered upon this particular work, and also at a subsequent time, when he received an injury in the finger from the projecting bolts. He does not fix, or undertake to fix, the date of the second conversation, otherwise than to say that it was at the time of the injury to the finger. The superintendent, Modisette, does, however, fix the date of this conversation definitely, as being in January, 1896, but denies any previous conversation upon the same subject as testified to by defendant in error. The defendant in error says that he requested the superintendent to furnish suitable bolts for fastening the outer rim or balance wheel to the fly wheel, and further says there are bolts, made for that purpose, which would not project, and that the superintendent promised to get other bolts; while the superintendent says he told him that the balance wheel held in place by these bolts should be removed, as it was of no use there any way. There is therefore no conflict as to the time when the last conversation on the subject occurred. In the first conversation the servant claims to have had with the superintendent, he says he mentioned the danger of the bolts on the wheel catching in his clothes and hurting him while the wheel was in motion, and when his finger was subsequently injured that fact was mentioned. Nothing was ever said in regard to the proximity of the water-line pipe to the bolts on the fly wheel when in motion. He undertakes to say he did not think of the danger of the bolts striking the pipe line, and causing such an accident as the one which actually happened, agreeably to his theory of the case.

At the close of the whole evidence, the court overruled a motion to direct a verdict for defendant. The defendant also requested the court to charge the jury that their verdict must be for the defendant; this being in effect a motion to direct a verdict, though not put in that form. Various other special instructions were requested and refused, and certain exceptions taken to the court's charge to the jury. The trial resulted in a verdict and judgment in plaintiff's favor for \$1,200, and the case is now before this court on writ of error sued out to review that judgment.

Geo. W. Radford, for plaintiff in error.

Harvey Scribner, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case, delivered the opinion of the court.

The refusal of the court, on defendant's motion at the close of the plaintiff's evidence, to direct a verdict for the defendant, is assigned for error, although apparently not relied on in the printed brief. After the motion was overruled the defendant proceeded with the case, and gave evidence on its part, and thereby waived any exception

to a denial of this motion. *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837; *Wilson v. Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 768. Moreover, the refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, and when the defendant has not rested his case, cannot be assigned for error in this court. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591. The court also denied the defendant's motion at the close of the whole evidence to direct a verdict for the defendant, to which exception was duly taken; and, although the argument in this court has been directed mainly to the court's action in that respect, yet, curiously enough, the court's refusal to grant the motion is not specifically assigned for error. The court also refused the defendant's first request, which was in this language: "Under the evidence in this case, the verdict of the jury must be for the defendant." This request must be regarded as in all respects equivalent to a motion to direct a verdict, for it could have no other purpose or meaning, and we accordingly so treat it.

The first question with which we deal, then, is raised by the court's refusal to grant defendant's request to direct a verdict; for this is assigned for error. In determining this question, we take it for granted (but without deciding) that the accident was caused and the injury resulted as the defendant in error insists. The rim was bolted to the fly wheel to correct a loss of balance after it had been in operation, and presumably after the water-line pipe had been put down. In this view, the negligence would be in placing in position and leaving the projecting bolts, which were dangerously near the line pipe when the fly wheel was in rapid motion. Accordingly the bolts are chiefly complained of as causing the accident. But it is not material whether the accident must be attributed to the projecting bolts, or the position in which the line pipe was suffered to remain after the bolts were attached, or to both. The existing situation was, as we have stated, just as it had been when the servant entered upon the particular employment, 14 months before. The projecting bolts, the position of the line pipe in relation to the fly wheel, such vibration as there was in the water line with the engine working and the wheel revolving, were conditions well known to the servant, as he admits. He was an experienced engineer. The defects and conditions were patently obvious, and the danger apparent to one of ordinary intelligence, and still more to a person of this servant's skill, experience, and long familiarity with this situation and machinery. The rules applicable to the relation of master and servant, so far as they affect the question now to be determined, may be briefly stated. The well-understood general rule is that the master is bound to use due and reasonable care to furnish the servant with a safe place to work, and with safe and sound machinery, appliances, and instrumentalities for use in the service. The servant, on his part, assumes the ordinary risks of the business upon which he enters, so far as the risks are known to him, or should be known by a person of ordinary capacity in the exercise of reasonable care; and this, whether the business is a dangerous one or not. And, notwithstanding the general rule requiring the master to furnish a safe working place and safe instru-

mentalities, the servant, in addition to the ordinary perils incident to the business, assumes the risks arising from obvious, patent defects in the things which he uses, and which are known, or should be known, to him. *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166; *Dillon v. Railway Co.*, 3 Dill. 319, 7 Fed. Cas. 718 (No. 3,916); *Southern Pac. Co. v. Johnson*, 16 C. C. A. 317, 69 Fed. 559; *Railway Co. v. Rogers*, 6 C. C. A. 403, 57 Fed. 378; *Shear. & R. Neg.* (5th Ed.) § 185; *Whart. Neg.* § 214; *Smith, Neg.* (Whittaker's Ed.) 133, 396; 14 Am. & Eng. Enc. Law, 845, 853, and illustrative cases.

In the very late case of *Railway Co. v. Archibald*, 170 U. S. 673, 18 Sup. Ct. 777, the supreme court of the United States approved the rule as declared in *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, in the following language:

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation; and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation."

In *Mining Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387, the deceased was engaged in firing a ventilation furnace in a coal mine, and was suffocated by smoke, caused by the burning of certain wooden buildings, viz. an engine house, oil house, and shed, situated at and near the entrance of the main entry to the mine. The entry was the intake air passage for the mine. The furnace was situated 150 feet from the terminus of the entry, which was the only way of escape from the furnace. The deceased servant exercised general supervision over the entry and buildings, and had entered upon the employment with full knowledge of the situation. It was adjudged that the company was not liable for the servant's death, upon the assumption that the buildings were negligently located and improperly constructed; it appearing that such buildings were in use by well-regulated companies. The supreme court of Tennessee, speaking through Judge Lurton (now one of the circuit judges of this court), after disposing of other points in the case, said:

"But, aside from all this, Davis was an old miner, thoroughly acquainted with this mine, and aware of the character and location of these buildings. With all his experience and knowledge, he must be taken to have willingly engaged in the service of this company, and to have taken upon himself the risks incident to these buildings. Being in charge of the ventilation of this mine, he was peculiarly aware of the effect of an intake of smoke resulting from the burning of these buildings. He was necessarily aware that this smoke would only reach him after permeating and filling all the passages and chambers of the mine and that his escape would be then cut off. This danger, while a slight one, was, in the nature of things, more apparent to him than any other servant of the company. His honor properly charged the jury upon the effect of his knowledge, and we must assume that the judgment is not predicated upon any negligence in this regard."

See, to the same effect, *Railroad Co. v. Handman*, 13 Lea, 425; *Railroad Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824; *Crown v. Orr*,

140 N. Y. 450, 35 N. E. 648; *Kennedy v. Railway Co.*, 145 N. Y. 288, 39 N. E. 956.

An exception to the rule of exemption or immunity of the master from liability under such circumstances arises when the master expressly or impliedly promises or assures the servant that the defect shall be remedied, or the danger removed. During the running of such a promise, the servant may rely upon the master's promise or assurance, and recover in case of an accident resulting from the defect, although obvious, if the claim to damage is otherwise good. This liability of the master in consequence of a promise or assurance continues only for such period of time as might reasonably be allowed or required to remedy the defect or for removal of the danger. "After the prescribed period has elapsed without change, or if the master has refused to remedy the defect, the servant cannot rely upon his expectation of a remedy as an excuse for remaining, whatever rights he may have upon other grounds; and in many cases it has been held that he 'assumed the risk.'" *Shear. & R. Neg.* § 215. Substantially the same rule was declared in *Hough v. Railway Co.*, 100 U. S. 225. In *Smith, Neg.* (Whittaker's Ed.) p. 136, what may be regarded as the English rule is thus declared:

"If the master has expressly or impliedly promised to repair a defect, then, if an accident happens while such promise is running, the servant can recover; or, if the servant continues in the service in the reasonable expectation that the repairs will be effected, he can recover. If the promise is not performed in a reasonable time, and the servant continues in the employment, an inference arises of new terms having been agreed upon, and the servant cannot recover. The reason of this is said to be (*Clarke v. Holmes*, 7 Hurl. & N. 937) that there is contributory negligence on the part of the servant; but it is suggested in *Shear. & R. Neg.* § 97, that the true ground is, that the servant has waived the objection, and induced the master to suppose that it is waived, or, as we are inclined to say, the servant has renewed the service, accepting the risk."

In *Whart. Neg.* § 220, the doctrine upon the subject is thus laid down:

"It has been further argued that a servant does not, by remaining in his master's employ with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied; such confidence being based on the master's engagements, either express or implied. The only ground on which the exception before us can be justified is that in the ordinary course of events the employé, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employé sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it. In such case, on the principles heretofore announced, the employer's liability in this form of action ceases. He may be liable for breach of promise, but the casual connection between his negligence and the injury is broken by the intermediate voluntary assumption of the risk by the employé."

In *Gowen v. Harley*, 12 U. S. App. 574, 6 C. C. A. 190, and 56 Fed. 973, the circuit court of appeals for the Eighth circuit, through Sanborn, Circuit Judge, declared the general rule and the exception in language as follows:

"A person who is of age, and of ordinary capacity, assumes the usual risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a reasonably prudent person, under like circumstances, by the exercise of ordinary care and foresight. One of the usual risks he thus assumes is the danger from the negligence of a fellow servant who is engaged with him in a common employment in the service of the same master. Railroad Co. v. Baugh, 13 Sup. Ct. 914. To the last rule there is this exception: If a servant, who is aware of a defect in the instruments with which he is furnished, notifies the master of such defect, and is induced, by the promise of the latter to remedy it, to remain in the service, he does not thereafter assume the risk from such defect, until after the master has had a reasonable time to repair it, unless the defect renders the service so imminently dangerous that no prudent person would continue in it. Hough v. Railway Co., 100 U. S. 213, 225; Railroad Co. v. Young, 1 C. C. A. 428, 49 Fed. 723; Greene v. Railway Co., 31 Minn. 248, 17 N. W. 378; Railway Co. v. Watson, 114 Ind. 20, 27, 14 N. E. 721, and 15 N. E. 824."

See, also, District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884; Parody v. Railway Co., 15 Fed. 205; 14 Am. & Eng. Enc. Law, 815, and cases there cited.

Among recent cases in accord with those already cited, as to the effect of a promise to repair, and the exception created during the running of such a promise, we may mention the following: Oil Co. v. Helmick, 148 Ind. 459, 47 N. E. 14; Carriage Co. v. Potter (Ind. Sup.) 52 N. E. 209; Trotter v. Furniture Co., 47 S. W. 425, 101 Tenn. 380; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714; Steel Co. v. Mann, 170 Ill. 200, 48 N. E. 417.

In view of the undisputed facts of this case, and the established rules applicable to such facts, the proper disposition of this question would seem to require no elaborate discussion. There is obviously no special ground in this case on which to base or claim an exception to the general rule under which the risk of a patent defect is assumed. The interval of time between the date when the servant claims assurance was given that the projecting bolts would be removed and date of the accident was such that there could clearly be no claim to an exception on that ground. Indeed, plaintiff's counsel do not insist that there is. On the contrary, it is conceded, or, if not conceded, it is too evident to be denied, that the case is not within the exception created by a promise to repair. The contention by which it is sought to sustain the judgment of the court below is that the servant "did not anticipate being hurt in the way he was." It is said that the danger of this character of accident was not anticipated, and the risk of it not, therefore, assumed. It is not insisted that the servant could recover for injury received by his clothes being caught by the bolts on the revolving wheel; being aware of that danger, and having complained of it to the master. But, the position of the water-line pipe and the revolving wheel being visible and patent, such danger as existed on account of this situation was just as obvious to, and as easily comprehended by, the servant as the master. The duties of the servant brought him in daily contact with the machinery, and furnished him a constant opportunity to inspect the same. His means of knowledge were evidently superior to those of the master. Notwithstanding that the defect was open,

patent, and constant, and the servant's means of knowledge not only equal, but superior, to those of the master, defendant in error is forced into the dilemma of maintaining that the danger of such a defect was one which the master was bound to anticipate, while the servant was not. This contention is evidently unsound, as will be recognized upon its simple statement, without more. The servant was a mature man, and a skilled engineer, whose duty brought the patent conditions and dangers constantly under his notice, and during a long service. Under such circumstances, if the servant is not bound to anticipate and appreciate the danger, no grounds can be suggested on which the master is required to do so. If the knowledge and means of knowledge of the servant in respect to a patent defect are equal or superior to those of the master, there can be no recovery,—certainly so in the ordinary case. *Railroad Co. v. Handman*, 13 Lea, 430; *Ogden v. Rummens*, 3 Fost. & F. 751; *Dynen v. Leach*, 26 Law J. Exch. 221; *Railway Co. v. Gann*, 47 S. W. 493, 101 Tenn. 257. In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, although the case turned on another point, the court apparently recognized this general rule. And see, to same effect, *Southern Pac. Co. v. Seley*, 152 U. S. 152, 14 Sup. Ct. 530, approving *Sweeney v. Engraving Co.*, 101 N. Y. 520, 524, 5 N. E. 358, in which it was said of the servant, "He knew as much about it, and the risk attending its use, as the master." See, also, *Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, and *Railroad Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1044. It will be observed that the rule, as thus stated and applied, proceeds upon the ground that the defect is open, and the danger one reasonably to be apprehended, and the means of knowledge equal; and it is not necessary, for the purpose of this case, to make any broader statement of the rule, for the conditions here met with give rise to no intricate question of mechanics, any imperfect intelligence on the part of the servant, or other ground for exception. With the rule in a case of latent defects, we here have no concern. It must not be forgotten that when the defect is patent, and the danger apparent, and such as the servant, in the exercise of reasonable prudence, ought to comprehend, with a constant opportunity for inspection, he is bound to know of the danger. He has, in such a case, constructive notice. *Southern Pac. Co. v. Seley*, 152 U. S. 152, 14 Sup. Ct. 530; *Railroad Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1044. When the defect is known, and the danger apparent, it is immaterial that the servant does not anticipate the precise extent or character of the injury which may result. None of the authorities upon the subject put the rule of assumption of risks upon the narrow distinction that the servant may know of the danger, but not fully realize the extent or character of the injury which may be sustained. The attempt to introduce such a test or condition would render the rule of the assumption of risks by the servant practically nugatory. That there is no such impracticable element in the rule must be regarded as settled. *Railroad Co. v. Kemper*, 47 N. E. 214, 147 Ind. 561; *Feely v. Cordage Co.*, 161 Mass. 426, 37 N. E. 368. If the water-pipe line was constructed too close to the fly

wheel, with the bolts attached, the danger that the bolts on the fly wheel would come in contact with the water-line pipe in the operation of the machinery, and thereby cause an accident, was fully as apparent to the servant as the master; and if it might have been anticipated that fragments of the broken bolts on the fly wheel, or of the broken water-line pipe, hurled in different directions, might cause injury, the anticipation of such a result was as much within the power of the servant as the master. In *Kohn v. McNulta*, 147 U. S. 241, 13 Sup. Ct. 298, the defect complained of by the servant was a lack of deadwoods or bumpers on the freight cars. The court, disposing of this contention, said:

"The intervener was twenty-six years of age. He had been working as a blacksmith for about six years before entering into the employ of the defendant. He had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed through that yard, had none of those deadwoods or bumpers; but inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service."

The principle thus declared is fully applicable to the case in hand.

This case, in its facts, is quite different from *Norman v. Railroad Co.*, 22 U. S. App. 505, 10 C. C. A. 617, and 62 Fed. 727, and *James B. Clow & Sons v. Boltz* (decided at the present term of this court) 92 Fed. 572. In the former case the testimony in behalf of the injured employé went to show that the injury was without fault on his part, but was due to a defective condition of the floor of the shed where he was working, and that he had worked at the place where he was injured only at rare intervals, and that he was ignorant of the condition of the floor of the shed at that place; the servant expressly denying knowledge of the defects in the floor. The foreman of the master, on the contrary, testifies that the servant had been in that part of the shed several hundred times. It was adjudged that the conflict of testimony between the servant and the foreman as to the servant's knowledge, and his opportunity to know, of the defects, should have been submitted to the jury. In the latter case certain wedges had been introduced in the framework of the truck or car eight days before the accident, in order to meet a demand made by heavy orders, whereby the danger was increased. This change was made with the knowledge and by the direction of the superintendent and managers of the master's works, and against the express protest of the expert core maker in charge of the labor gang, who stated that the use of such wedges was not safe. The injured employé was a common laborer, without mechanical skill, and the car had been operated before the change for a period of six months without injury. At the joint of the two rails on one side of the car track there was a depression in the ground, causing one rail to rest higher than the other, and giving a jolt to the passing car. This defect was known to the servant, but an attempt had been made to remedy it. Under such circum-

stances as these, the court held that it could not be ruled, as a matter of law, that the question of the servant's knowledge of the danger incident to the use of the machinery as changed was not one for the jury.

The conclusion of the whole matter, shortly put, is that the defects and conditions complained of as causing the accident were obvious and known to the servant when he entered into the service, and constantly brought under his notice, in the discharge of his regular duties, during the time of his service. He was a skilled, experienced engineer, with opportunities to observe and understand the danger superior to those of the master. In such a state of the evidence as this, the question was one of law for the court, and not of fact for the jury. The evidence was so conclusive that it would have been the clear duty of the court below, on motion, to set aside the verdict returned in plaintiff's favor; and in such a case it was the court's duty, on motion, to withdraw the case from the consideration of the jury. On substantially such facts as this record discloses, the rule has been thus announced:

"Where, however, an experienced operator, cognizant of the defects of machinery, puts himself within its range, and is injured, he is thereby, in law, supposing the fact to be established, precluded from recovering from the employer." Whart. Neg. § 218.

In *Elliott v. Railway Co.*, 150 U. S. 246, 14 Sup. Ct. 85, Mr. Justice Brewer, speaking for the court, enunciated the rule as follows:

"It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835."

And in the later case of *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, 15 Sup. Ct. 718, the supreme court stated the same rule thus:

"But it is well settled that where the trial judge is satisfied, upon the evidence, that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant."

Well-considered cases in this court speak the same language. *Blount's Adm'x v. Railway Co.*, 22 U. S. App. 129, 9 C. C. A. 526, and 61 Fed. 375; *Railway Co. v. Lowry*, 43 U. S. App. 408, 20 C. C. A. 596, and 74 Fed. 463; *Railroad Co. v. Cook*, 31 U. S. App. 277, 13 C. C. A. 95, and 66 Fed. 115.

Concluding, as we do, that the defendant was entitled to a peremptory instruction in its favor, and this view being decisive of the case as presented in this record, it is not material to decide other questions made and discussed. Reversed and remanded, with a direction to set aside the verdict and grant a new trial.

SANDHAM v. GROUNDS.

(Circuit Court of Appeals, Third Circuit. May 9, 1899.)

No. 31, March Term.

1. DAMAGES—BREACH OF CONTRACT FOR ADOPTION.

The measure of damages for breach of a contract by one person to adopt another and make the latter an heir, under the law of Pennsylvania, is not the value of the share of the promisor's estate at his death which would have been inherited by the promisee, but the value of the services rendered or outlay incurred by the promisee on the faith of the promise, with interest.

2. SAME—WHAT LAW GOVERNS.

Where a contract for adoption was to be performed in a certain state, and the estate to which the person to be adopted would thus have become an heir is there situated, the law of such state governs as to the measure of damages for a breach of the contract.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

W. M. Hall, Jr., for plaintiff in error.

James S. Young, for defendant in error.

Before DALLAS, Circuit Judge, and KIRKPATRICK and BRADFORD, District Judges.

KIRKPATRICK, District Judge. The plaintiff in this action brought her suit against the defendant, as administratrix of Samuel Smith, to recover damages for the breach of a contract entered into between the plaintiff and said Smith in his lifetime, in and by which said Smith agreed that he would take the plaintiff (who was his niece) from her home in Ireland to America, adopt her as his daughter, and that he would so provide that at his death she should receive one-half part of his property. The plaintiff accordingly came to America with her uncle, and for a short time continued to live under his care and protection. During her stay she rendered no service, and after her departure, at the end of some 16 months, she did not return to him. Smith never took any steps looking to the adoption of the plaintiff as his daughter according to the form of the statute of the state of Pennsylvania, but did so adopt an inmate of his house, who was a relative of his wife. The contract between Smith and the plaintiff was to be performed in the state of Pennsylvania, where Smith resided, and where he afterwards died intestate. Upon the trial of the cause the learned judge charged the jury, *inter alia*, as follows:

"Upon the question of the rule of damages the court charges the jury that for the breach of the alleged contract the measure of damages is not the value of decedent's estate at the time of his death, but the value of the services the plaintiff rendered the said Smith while she remained with him, and also any pecuniary outlay or expense she was subjected to or incurred, with interest."

To this part of the charge exception was taken, and the only question argued before us was whether the measure of damages was correctly stated. We cannot doubt that the damages in this case must be determined by the laws of the state of Pennsylvania, where the

contract was to be performed, and where the assets of Smith's estate are properly distributable. We find, upon reviewing the decisions of the highest court of that state, that the question here at issue was set at rest in *Graham v. Graham's Ex'rs*, 34 Pa. St. 475, in which the case of *Jack v. McKee*, 9 Pa. St. 240, holding a contrary doctrine, was carefully considered, and expressly overruled. In *Graham v. Graham's Ex'rs*, supra, the decedent agreed with two distant relations that, if they would come and live with him, they should share his property equally with his nephews after his death. He failed to carry out his agreement, and suit was brought against his executors to recover the value of the promised shares of his estate. The plaintiff offered to prove the value of the decedent's estate, and the share of each nephew, for the purpose of showing the damage sustained by the plaintiff. To this offer the defendants objected on the ground that the measure of damages was the value of the services rendered, and was not to be governed by the value of the decedent's estate. Strong, J., said:

"Without pressing the insufficiency of the proof of the contract, * * * it by no means follows that the measure of damages in an action for its breach is the value of the thing promised at the time of the breach. *Jack v. McKee*, supra, is no longer a rule. This court has returned from the departure which was made in that case."

The rule laid down in *Graham v. Graham's Ex'rs* has been invariably followed since by the courts of Pennsylvania, the latest case brought to our attention being *Kauss v. Rohner*, 172 Pa. St. 481, 33 Atl. 1016, in which the court said, "Proof of contract did not entitle plaintiff to recover value of the estate." We find no error in the instruction given by the learned judge, and the judgment of the circuit court should be affirmed.

In re WILCOX.

Ex parte ROUSS.

(District Court, D. Massachusetts. April 29, 1899.)

No. 43.

1. BANKRUPTCY—PARTNERSHIPS—RULE OF DISTRIBUTION—JOINT AND SEPARATE CREDITORS.

Bankruptcy Act 1898, § 5, cl. f, prescribing the rule for the distribution of assets as between individual and firm creditors of bankrupt partners, applies not only to the case of the adjudication of the partnership as such, but also to the case where one member of the firm is adjudged bankrupt in his individual capacity.

2. SAME—NO JOINT ASSETS.

Where a member of a co-partnership is adjudged bankrupt in his individual capacity, creditors of the firm are not entitled to receive dividends out of his separate estate until his individual creditors have been paid in full; and this rule prevails notwithstanding the fact that there are no partnership assets.

In Bankruptcy. On review of ruling of referee.

The certificate of the referee (Henry J. Field, referee in bankruptcy for Franklin county, Mass.) was as follows:

"The bankrupt, three or four years ago, was a member of a partnership at Lincoln, Nebraska. The other member of the firm left, with all the funds; and she set herself about to pay up the partnership debts, in which she succeeded so far as to pay all of them except the one in question, amounting to \$1,000, besides accrued interest, which was presented for proof against her individual estate in bankruptcy, and allowed. Upon the question whether such creditor of a former partnership should share pro rata with the individual creditors, I ruled that as no evidence appeared showing that there are any assets of said partnership, and there was some evidence that there are none, under the law such creditor is entitled to share with the individual creditors; that is, pro rata."

The case was submitted to the judge without argument.

LOWELL, District Judge. The proper distribution of the joint estate of a bankrupt firm and of the separate estate of its component bankrupt partners has been the subject of much discussion in the courts of England and of this country for nearly 200 years, and the conclusions reached by the several courts, and by the same court at various times, have differed greatly. As was observed by Judge Ware in *Re Marwick*, 2 Ware, 229, 233, Fed. Cas. No. 9,181:

"The whole subject of marshaling the assets and claims between the joint and separate creditors in bankruptcy involves some of the most difficult problems that occur in the whole range of jurisprudence."

The historical development in England and in this country of the law upon this subject has often been stated imperfectly, and sometimes quite inaccurately, both in text-books and in reported opinions, and therefore it has seemed worth while to review with some degree of fullness that development from its beginning.

At common law the creditor of a partnership was the joint creditor of the partners. He might sue them, obtain judgment against them, and take out execution against them jointly, and satisfy the execution from any part of the estate of either or both, whether such estate were joint or separate. On the other hand, the separate creditor of one partner, having sued that partner, having obtained judgment against him, and having taken out execution thereupon, might satisfy the execution either from that partner's separate estate, or from his share of the joint estate. If, however, a partner's share of the joint estate was sold to satisfy a separate execution issued against him, the purchaser of the share found himself somewhat differently situated from the purchaser of an undivided share of property held jointly by persons not partners. The former was limited by a court of equity to take, not an undivided share of the joint partnership estate, but only the net amount due the debtor partner after the affairs of the partnership had been settled, and after all its debts had been paid. Hence the separate creditor of an individual partner found his claim upon his debtor's share of the partnership estate subordinated to the right of the remaining partners to apply the joint partnership estate in satisfaction of the claims of the partnership creditors. See *Lindl. Partn.* (6th Ed.) 308; *Fox v. Hanbury*, Cowp. 445.

Statutes of bankruptcy are of considerable antiquity in England, the first having been passed in the reign of Henry VIII. The bankrupt law of the present day descends from statutes passed in the

reigns of Elizabeth and of James I., which have been frequently amended from that time to this. Previous to the year 1822 these statutes contained but a single mention of bankrupt partners or partnerships, viz. that contained in St. 10 Anne, c. 15, § 3, which provided that the discharge of a bankrupt should not discharge a bankrupt partner or co-obligor. Before 1822, therefore, the rules regulating the distribution in bankruptcy of the joint and separate estates of partners were established altogether by judicial decision. An examination of the earliest records of the English courts of bankruptcy would be necessary to determine precisely how commissions of bankruptcy against members of a trading partnership were issued in the seventeenth century and in the first years of the eighteenth. It is pretty clear that a joint commission against all the partners was not unusual. In 2 Christ. Bankr. (2d Ed.) 33, it is stated that the first reported instance of a joint commission against two partners occurred in 1682. Nothing in the report suggests that the practice was then deemed extraordinary. In the case mentioned, the separate creditors of one partner alleged that the commissioners intended to divide the joint property among the joint creditors without permitting the separate creditors to share in the same, and they filed a bill to secure their own admission to come upon the joint fund. The assignees alleged that the partnership articles provided that joint debts should be paid out of joint assets, and that those assets should not be charged with the separate debts of the individual partners. Lord North decreed, in substance, that the joint assets should be applied to the payment of the joint debts, and that, if there was any surplus, it should be applied to the payment of the separate debts of the individual partners. If, however, the joint estate was insufficient, and the separate estates of the partners were drawn upon for payment of the joint debts, then, in that case, if either partner paid more than the other, he might be admitted to prove for such surplus against the separate estate of the other partner. It is not stated if the separate creditors of the several partners had, as against the separate estate of the several partners, a claim prior to that of the joint creditors; and it does not clearly appear whether Lord North's decision was rested by him upon the articles of partnership or upon the general law, though the latter is probable. *Craven v. Knight, Goodinge, Bankr. 149*; s. c. sub nom. *Craven v. Widdows*, 2 Cas. Ch. 139. It was thus established that, in case of a joint commission against all the partners, the joint creditors could avail themselves of the equitable right of the partners of a bankrupt to subordinate to the settlement of the partnership accounts the claims of his separate creditors upon his share of the joint estate. In 1693 a partner indebted to the partnership was made bankrupt under a separate commission, and the commissioners (for what reason does not plainly appear) assigned the partnership goods to the assignees in bankruptcy under that commission. The other partners brought a bill for an account, and urged that the assignees in bankruptcy took no more than the net share of the bankrupt after his debts had been paid. Of this opinion the court seemed to be, and the joint creditors were given priority in payment out of the joint estate. This, however,

was done, not in execution of the bankrupt law, but only after the interposition of a court of equity. The joint debts, though paid by the assignees, were proved before a master in chancery. *Richardson v. Gooding*, 2 Vern. 293. From this case it appears that, under a separate commission against one partner, joint creditors could enforce their prior claims upon the joint estate only by bill in equity, and not by petition in bankruptcy. See *Gross v. Dufresnay* (1734) 2 Eq. Cas. Abr. 110. As has been said, it is impossible to determine what was the practice, at or about the year 1700, concerning the issuance of joint and separate commissions in cases where both partnership and partners were bankrupt, and where there were joint and separate assets and debts. In such cases, probably, both joint and separate commissions were issued and subsisted at the same time, the joint assignees acquiring the joint estate and paying the joint debts, and the separate assignees acquiring the separate estate and paying the separate debts; but the data are too imperfect to establish plainly that this course, or any other, was invariably pursued. See *Ex parte Crowder* (1715) 2 Vern. 706; *In re Simpsons* (1752) 1 Atk. 137.

In *Ex parte Crowder* a joint commission issued against A. and B., joint traders. Their separate creditors applied by a petition in bankruptcy (not by a bill in equity), that they might be let in under the joint commission to prove their debts against the separate estates of the respective bankrupts; alleging as a reason for this course, then apparently unusual, that the separate estates were of such small value that they would not bear the charge of taking out the two separate commissions which would otherwise be required. Lord Chancellor Harcourt ordered the petitioners to be let in to prove their separate debts upon their paying contribution to the charge of the joint commission, "and directed that, as the joint or partnership estate was, in the first place, to be applied to pay the joint or partnership debts, so, in like manner, the separate estate should be, in the first place, to pay all the separate debts; and, as separate creditors are not to be let in upon the joint estate until all the joint debts are first paid, so, likewise, the creditors to the partnership shall not come in for any deficiency of the joint estate upon the separate estate until the separate debts are first paid." Lord Harcourt's opinion is a very short one, and his reasons do not fully appear; but it seems clear that he did not suppose that he was laying down a new rule of substantive law, and it is probable that he was applying to the distribution of joint and separate estates under a single joint commission the rule which had formerly been applied when, at the same time, joint estates were administered under a joint commission and separate estates under a separate commission. It is to be observed that Lord Harcourt's rule, and the decisions which follow it, applied only to cases in which joint and separate estates were administered under a joint commission. Not uncommonly this has been overlooked. It should be noticed, also, that a petition and order were required in each case, though the order issued as of course. *Ex parte Sandon* (1743) 1 Atk. 68.

In *Ex parte Cook*, 2 P. Wms. 500, decided in 1728, a joint commission had been taken out against two bankrupt partners, under which the commissioners made an assignment both of the joint and of the

separate estate. Afterwards the separate creditors took out separate commissions; thus doing that which, in *Ex parte Crowder*, they had applied to be relieved from doing. In the conflict which thereupon arose between the assignees under the several commissions, Lord Chancellor King held that the assignment made under the joint commission passed the separate as well as the joint estate, and stated that:

"It is settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors."

This, it will be observed, is, in every detail, the rule laid down in *Ex parte Crowder*; and, though Lord King said he would not hinder the separate creditors from bringing a bill in equity for an account of the separate estate, evidently he did not consider this necessary, and eventually disposed of the whole matter in the court of bankruptcy. See, also, *Howard v. Poole* (1735) 2 Strange, 995; *Wickes v. Strahan* (1741) Id. 1157; *Twiss v. Massey* (1737) 1 Atk. 67.

The practice of taking out both joint and separate commissions was not definitely abandoned, however, and their co-existence continued to give much trouble to the courts. In *Ex parte Yale* (1721) 3 P. Wms. 24, note, it had been determined that a certificate under a separate commission discharged the bankrupt as well from his joint as from his separate debts. In *Horseley's Case* (1729) Id. 23, there were both joint and separate commissions, yet Lord King, on petition, let in the separate creditors, who had taken out the separate commissions (which were still subsisting), to prove their debts under the joint commission, in order to oppose the granting of a certificate thereunder. In 1752 Lord Hardwicke, in superseding a subsequent separate commission in favor of a prior joint commission, said that the practice of taking out both joint and separate commissions against the same persons, "being of late thought a very unreasonable one, as occasioning great confusion with regard to bankrupts' effects, has been discountenanced." In *re Simpsons*, 1 Atk. 137. For later cases, see *Ex parte Hardcastle* (1787) 1 Cox, Ch. 397; *Ex parte Gillam* (1789) 2 Cox, Ch. 193; *Ex parte Poole* (1790) Id. 227; *Ex parte Brown* (1793) 2 Ves. Jr. 67.

It remains to deal with the disposition of the joint estate and with the rights of joint creditors where no joint commission was taken out, but a separate commission or separate commissions alone existed. This state of things might arise from any one of several causes; e. g. the unreadiness of the joint creditors; their inability to procure the issuance of a joint commission because one partner was an infant or deceased, or because one partner, though insolvent, had not committed a statutory act of bankruptcy. See *Wats. Partn.* (2d Ed.) 293. In *Ex parte Baudier* (1742) 1 Atk. 98, joint creditors petitioned to be admitted to prove their joint debts under each of the separate commissions taken out against two partners; no joint commission hav-

ing been issued. Lord Chancellor Hardwicke held that, although separate creditors might, upon petition, prove their debts under a joint commission, yet joint creditors could not be admitted to prove their debts under separate commissions, but "must proceed in the common course, by taking out a joint commission." The opinion is short, and not altogether clear. The rule of *Ex parte Crowder* was formulated, and there was a recognition that where there were separate commissions the joint creditors had a right in equity (apparently not in bankruptcy) to be paid out of the surplus of the separate estates after the separate creditors had been satisfied. It seems probable that the case was rested upon a theory that the joint estate could not be properly administered under a separate commission. In *Ex parte Voguel* (1743) 1 Atk. 132, the assignees under a separate commission had in fact obtained possession of some of the joint estate, and the joint creditors brought a petition that they might have priority in its division. Lord Hardwicke refused to give complete relief under the petition filed in bankruptcy, but gave the petitioners leave to bring a bill in equity for the same purpose, and in the meantime (probably for the sake of convenience) let them in to prove their debts, without prejudice, under the separate commission. The disposition of the estate, joint or several, was not determined; but the joint creditors were assumed to have priority in the distribution of the joint estate, and the separate creditors in the distribution of the separate estate. Soon after the decision of *Ex parte Voguel* the court of common pleas decided that a separate commission might be taken out against one partner by a joint creditor. *Crispe v. Perritt*, Willes, 467. In delivering the elaborate opinion of the court, Lord Chief Justice Willes, after stating that no help in deciding the question was to be derived from the wording of any of the bankrupt acts, referred to two early cases (one under Lord Macclesfield, the other under Lord Talbot) in which separate commissions had been taken out by a joint creditor. *Ex parte Caruthers*, Cooke, Bankr. Law (8th Ed.) 26; *Ex parte Upton*, Id. 27. The lord chief justice concluded that the commission should issue as a matter of principle, and showed that in some cases great inconvenience would result if a joint creditor was not permitted to take out a separate commission. He expressly stated that the court did not determine at all in what manner the effects should be marshaled under the commission, saying that was "the proper business of the court of chancery." In *Ex parte Crisp* (1744) 1 Atk. 133, Lord Hardwicke expressly followed *Crispe v. Perritt*. See, also, the note to *In re Simpsons*, 1 Atk. 138. In Lord Hardwicke's time the practice seems to have been established as follows: If a joint commission was first taken out, separate commissions were ordinarily refused, and the distribution of both joint and separate estate was made under the joint commission according to the rule laid down in *Ex parte Crowder*. If no joint commission was taken out, a separate commission might issue on the petition either of a joint or of a separate creditor, and in such case joint creditors as well as separate were admitted to prove their debts. Sometimes, it seems, the order admitting joint creditors to prove specified that they should prove only to assent to or dissent from the certifi-

cate; but at other times, if matters took their regular course, and no further steps were taken, all creditors who had proved—both joint and separate—were satisfied ratably from all the estate which came into the hands of the assignees, both joint and separate. Usually, however, it was for the interest of one class of creditors or the other that the accounts of the joint and separate estates should be kept distinct, and an order for that purpose was obtainable by petition in bankruptcy presented either by the joint or by the separate creditors. The order to keep distinct accounts included, as matter of course, an order to apply the joint estate, in the first place, to the payment of the joint debts, and the separate estate, in the first place, to the payment of the separate debts. Green, Bankr. Law (5th Ed.; 1777) 150, note; Wats. Partn. (2d London Ed.; 1807) p. 324; Ex parte Hayward, Cooke, Bankr. Law (8th Ed.; 1745) 268; Ex parte Oldknow, Id. 259. The petitioning joint creditor seems to have been allowed, in recompense for the burden he had borne in obtaining the commission, to receive a dividend thereunder from the separate estate ratably with the separate creditors. No decisions touching this subject made by Lord Hardwicke's successors, Lords Northington, Camden, and Apsley, have been found. It appears from Cooke, Bankr. Law (1st Ed.; 1786) 5, 163, 165, that the practice of taking out a joint commission against all the partners, after separate commissions had issued against some of them, was then common; and furthermore it appears that the rights of joint creditors under a separate commission were not then clearly defined.

Lord Chancellor Thurlow seems to have been the first to lay down a different rule for dealing with the assets under a separate commission. In Ex parte Cobham (1784) 1 Brown, Ch. 576, where joint creditors petitioned to prove their debts under separate commissions against the partners, he said that:

"It would be hard that the joint creditors should come upon the separate estate, to the prejudice of the separate creditors, and still have an exclusive power of coming upon the joint estate; but the separate assignees might, if they pleased, possess themselves of the bankrupt's proportion of the partnership effects, and then he thought the justice of the case would be that both the joint and separate creditors should come in, *pari passu*, upon both funds."

As the petition was consented to, however, he made the order. In this case Lord Thurlow substantially followed the former practice, though, as reported, he seems not to have distinguished clearly between proving to deal with the certificate and proving to receive dividends. In Ex parte Hayden (1785) 1 Brown, Ch. 454, however, he changed his practice. The report is as follows:

"Upon a separate commission of bankrupt against one partner, the joint creditors petitioned, and were allowed to prove their debts, and to receive a dividend *pari passu* with the separate creditors, there being no joint estate. Ex relatione."

In the fuller report given in Cooke, Bankr. Law (8th Ed.) 261, the decision seems to have turned upon want of proof that there had been a partnership, and the absence of joint estate is barely mentioned. In Ex parte Hodgson (1785) 2 Brown, Ch. 5, it was sought to rescind the proof of a joint debt under a separate commission. Lord Thur-

low said that there was no distinction as to sole or separate debts, and "that debts, whether sole or joint, ought to be paid out of the bankrupt's estate, which is composed of his separate estate, and of his moiety of the joint estate, and therefore ordered that she [the joint creditor] should come in *pari passu* with separate creditors." In this case it seems that Lord Thurlow determined that, in the ordinary course of courts of bankruptcy under a separate commission, joint and separate creditors should share equally in the distribution of both joint and separate estates. See *Ex parte Page* (1786) 2 Brown, Ch. 119; *Ex parte Flintum*, Id. 120. These cases settled the practice. Lord Thurlow's reasoning is nowhere clearly expressed, but it was substantially as follows: If no joint commission be taken out, the assignees under the separate commission are entitled to an account of the business of the partnership, and to the bankrupt's share of the partnership estate after the joint debts have been paid. If they are unwilling to bring a bill to procure this account, then, as the debts of the partnership are at law the debts of each partner as well, and as it is admitted that joint creditors may petition for a separate commission, and, even though they do not, may yet, by order of the court of bankruptcy, be let in upon petition to prove their debts in order to allow or dissent from the granting of the certificate, it follows that they may also share equally with the separate creditors in the dividend, whencesoever that dividend is derived. But the difference between Lord Thurlow and Lord Hardwicke was one of form rather than of substance. Under Lord Hardwicke, the joint creditor under a separate commission shared equally with the separate creditors in the distribution of all the estate which came into the hands of the assignees, unless the order admitting him to prove limited him to dealing with the certificate, or unless an order was obtained upon petition for the keeping of distinct accounts. Under Lord Thurlow this order for distinct accounts could not be obtained upon petition in bankruptcy, except with the consent of the assignees. *Ex parte Tate*, 1 Cooke, Bankr. Law (3d Ed.) 307. Upon the filing of a bill in equity against the other partners for an account of the partnership business, however, the assignees under the separate commission were enjoined from paying a dividend to the joint creditors out of the separate estate. In other words, that which Lord Hardwicke had permitted in pursuance of proceedings in bankruptcy, Lord Thurlow permitted to be accomplished only by bill in equity. Lord Hardwicke thought that, upon petition for the keeping of distinct accounts, the separate estate might be reserved for the separate creditors. Lord Thurlow would reserve it only upon filing a bill in equity for an account of the partnership business. *Wats. Bankr.* (2d Ed.) 332; *Ex parte Elton*, 3 Ves. 239. Apparently, even the joint creditors were not, upon petition, permitted to obtain priority in the distribution of the joint estate which came into the hands of the assignees under a separate commission, but only upon their filing a bill in equity. Until this was filed they were paid ratably with the separate creditors out of the separate estate and the bankrupt's share of the joint estate. *Hankey v. Garrat* (1792) 3 Brown, Ch. 457; Id., 1 Ves. Jr.

236. It is further to be observed that, contrary to the statements of many text-books, the rule laid down in *Ex parte Crowder* for the distribution of assets under a joint commission was not in any way altered by Lord Thurlow. This he expressly decided in *Ex parte Marlin* (1785) 2 Brown, Ch. 15, and it appears by plain implication in *Ex parte Bate* (1785) 1 Brown, Ch. 452; *Ex parte Clowes* (1789) 2 Brown, Ch. 595; *Ex parte Hardcastle* (1787) 1 Cox, Ch. 397; *Ex parte Seddon* (1788) 2 Cox, Ch. 49; *Ex parte Bentley* (1790) Id. 218; *Ex parte Lodge* (1790) 1 Ves. Jr. 166. The same appears also from sundry forms found in 2 Cooke, Bankr. Law (3d Ed.) 140, 238.

The law as it stood in 1793 is stated in the third edition of Cooke on Bankruptcy, which was published in that year, though an appendix, bound up with the only copy I have seen, was added in 1794. Under a joint commission, the joint estate was applied primarily to the payment of the joint debts, the separate estate to the payment of the separate debts; the separate creditors, upon payment of their share of charges, being let in under the joint commission by a special order made in each case, as of course, upon their petition. Under a separate commission joint creditors, by a similar special order (as to the special order, see *Ex parte Copland*, 1 Cox, Ch. 420), were admitted to prove and receive dividends ratably with the separate creditors out of such estate, both joint and separate, as came into the hands of the assignees under the commission. Where, however, the assignees under the separate commission took joint estate, the joint creditors admitted to prove their debts under the separate commission might apply, by petition in bankruptcy if the other partners consented, otherwise by bill in equity, to have an account taken of the partnership business. If that was done, the joint and separate estates were distributed as if the commission were joint. The right of the separate creditors under a separate commission to restrain the payment of dividends out of the separate estate to joint creditors was enforceable, as has been said, only in equity.

In 1793 Lord Loughborough, afterwards Lord Rosslyn, succeeded Lord Thurlow as chancellor, and on March 8, 1794, issued a general order, often mentioned, and commonly misunderstood. It may be found in 4 Brown, Ch. 548. Among other matters, it set out that special petitions in each case for leave to prove separate debts under a joint commission created delay and expense; and it therefore ordered that the commissioners under a joint commission should be at liberty to admit proof of separate debts under the same without special order, in which case the separate creditors so proving might vote on the question of assenting to or dissenting from the bankrupt's certificate. Separate accounts were to be kept, and the rule of distribution laid down in *Ex parte Crowder* was to be followed. The only change thus made by Lord Loughborough was to permit separate creditors to prove their debts under a joint commission without the special order formerly required in each case. The provision contained in Lord Loughborough's order concerning the distribution of the joint and separate estate introduced no change in the law whatsoever, and merely stated the practice which had always been followed under a

joint commission since *Ex parte Crowder*. The order in no way affected the practice under a separate commission. See 2 *Christ. Bankr. Law* (2d Ed.) 45.

In 1796 the case of *Ex parte Elton* came before Lord Loughborough. 3 *Ves.* 238. In that case a separate commission was taken out against one of two partners, and a joint creditor attempted to prove his debt thereunder for the purpose of receiving a dividend. The lord chancellor was evidently much perplexed, and his opinion, as reported, is not altogether clear. Following what was then the last edition of *Cooke on Bankruptcy* (the third), he stated that it had been understood for some time that a joint creditor might prove and receive a dividend in a case like that before him; but he noted the argument of counsel (Sir John Scott), "that if the assignees of the separate estate think fit, or will undertake, to file a bill [to wind up the partnership, and obtain for the joint creditors payment out of the partnership assets], in such case the joint creditor admitted to prove is to be restrained from receiving a dividend" (out of the separate estate). He observed upon the likeness between the application of each class of assets to the corresponding class of creditors, and the marshaling of assets, saying that the joint creditor had two funds upon which he could go, while the separate creditor had but one. Again, he pointed out that the joint creditor might proceed directly against the joint estate by a suit at law, while for every payment made out of the separate estate in discharge of the joint debt there must be suit in chancery by those representing the separate estate to be reimbursed from the joint estate:

"Wherever my order [i. e. to permit the joint creditors to prove for a dividend] will procure an account of the joint estate, there can be no harm [i. e. because, when an account of the joint estate is taken, the rights of the separate creditors against the separate estate are secured]; for then I should give the usual directions to apply the funds, respectively, the joint estate to the joint debts, the separate to the separate debts; the surplus of each to come in reciprocally to the creditors remaining upon the other. But, unless I can do this, every order I can make, to let a joint creditor receive a dividend from the separate estate, would carry a chancery suit in the bosom of it, to have the joint estate brought into the fund, to prevent the separate estate from being exhausted [i. e. if, from the nonassent of the solvent partner, or for other reason, an account of the partnership could not be obtained by order in bankruptcy, then, according to *Hankey v. Garrat*, a bill in equity would be necessary]; and I should make the order, and in the course of ten days suspend it by preventing him from receiving the dividend."

This quotation shows plainly that there had been no question of permitting the joint creditor to receive a dividend from the separate estate ratably with the separate creditor in any case where the joint and separate estate were both before the court, but only how to deal with the difficult and exceptional case of the rights of a joint creditor where only the separate estate was before the court under a separate commission. After much reflection and further argument, Lord Loughborough finally decided that a joint creditor might not prove to receive a dividend (thus restoring Lord Hardwicke's practice); and he observed that, if the joint creditors could receive a dividend in such case, there never would be a joint commission, but they would take out a separate commission against each partner. To this rule of ex-

cluding joint creditors who had made proof under a separate commission from receiving a dividend from the separate estate ratably with the separate creditors, Lord Loughborough admitted, *arguendo*, two exceptions. The first was the case of the petitioning creditor. It has been shown that a joint creditor might take out a separate commission. Having done so, and thus having borne the brunt of the suit, he was permitted to receive a dividend like a separate creditor. "With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out." This exception had, of course, no application to the converse case under a joint commission. Again, and less clearly, in arguing concerning the marshaling of assets, Lord Loughborough said:

"It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first."

Except *Ex parte Hayden*, before referred to, this is the first suggestion of that exception to the rule concerning the distribution of joint and separate estate which has caused so much debate and perplexity for a hundred years, and is in question in the case at bar. *Ex parte Elton* was followed by Lord Loughborough in *Ex parte Abell* (1799) 4 Ves. 837, although it seems that in that case there was no joint estate.

The law as it stood at the very beginning of this century is well stated in *Cull. Bankr. Laws* (London, 1800) p. 451. After observing that the taking out of both joint and separate commissions against the same persons had been discountenanced on grounds of expense, and that such commissions could not subsist together, the author states that the various classes of creditors, with some variations and restrictions, are let in under the same commission. Under a joint commission the assignees take all the property, joint and separate. Under a separate commission the assignees take all the separate property, and take the bankrupt's interest in the joint estate in the same manner as the separate creditor takes it upon an execution against the individual partner. All creditors can prove under either a joint or a separate commission, in order to assent to or dissent from the granting the certificate. As to dividends, separate creditors, formerly by special order, but since 1794 by general order, may prove under the joint commission, and may receive dividends from the separate estate and from the surplus of the joint estate. Under a separate commission, joint creditors cannot receive dividends from the separate estate until the separate debts have been paid in full. An exception to this rule is admitted in the case of a petitioning creditor, which exception is explained, but no mention is made of any exception where there is no joint estate. See, also, 1 Cooke, *Bankr. Law* (4th Ed.; 1797) 244. The latter author, writing between the decision in *Ex parte Elton* and that in *Ex parte Abell*, seems to recognize both exceptions.

In 1801 Lord Eldon succeeded Lord Loughborough as chancellor. In *Ex parte Pinkerton*, 6 Ves. 814, note, decided within a month of his becoming chancellor, a joint creditor petitioned to prove and re-

ceive dividends under a separate commission against one of two persons, who were partners only upon the bill of exchange representing the debt which the petitioner sought to prove. There was no joint property. Lord Eldon admitted him to prove, reciting in the order that there was no joint property. He said that, "whatever he thought of a settled rule, he should adhere to it, on account of the mischief arising from shaking settled rules, but observed that it seemed very singular that the nature of the debt should turn upon the fact whether there is joint property or not." In this case the intimation somewhat hastily thrown out in *Ex parte Elton*, though disregarded in *Ex parte Abell*, was definitely formulated, and the exception to the rule of distribution in the case of absence of joint estate was established. It was recognized even more formally in *Ex parte Hill* (1802) 2 Bos. & P. (N. R.) 191, note.

In *Ex parte Clay* (1802) 6 Ves. 813, Lord Eldon followed Lord Loughborough's rule in *Ex parte Elton*, saying:

"The rule that prevailed in Lord Hardwicke's time, and down to the time of Lord Thurlow, was that joint creditors should not be admitted to prove under a separate commission for the purpose of receiving dividends with the separate creditors. Lord Thurlow altered that, upon much consideration, thinking the joint creditors ought to be admitted with the separate creditors, and left it so when he left this court. Lord Loughborough thought that was not right, and got back again, not quite to the old rule; but he settled it that they should prove only for the purpose of keeping separate accounts, but not to receive a dividend. I do not presume to say which is the best rule, except that the last is open to this difficulty: that the creditor is not a party to the proceedings under the commission. But I think it better to follow the rule that I find established, than to let it be continually changing so that no one can tell how it is. Therefore, unless some more prominent mischief can be pointed out, take the order according to Lord Loughborough's rule."

The reason for the exception to the general rule of distribution which was suggested by Lord Loughborough, and admitted by Lord Eldon, in the absence of joint estate, can be made out with reasonable probability. Lord Thurlow had, by order in bankruptcy, admitted the joint creditor to take a dividend ratably with the separate creditors under a separate commission; the dividend being paid from all the assets in the hands of the assignees, both joint and separate. If, however, the separate creditors under the separate commission would procure, by a bill in equity, the winding up of the partnership, and the application of the joint estate to the payment of the joint debts, then the chancellor, sitting in equity, would enjoin the assignees from paying a dividend to the joint creditors out of the separate estate until the separate creditors had been paid in full; thus depriving the joint creditors of the benefit of the order he has just made in bankruptcy. Lord Loughborough changed this practice, because of the inconvenience of making an order in bankruptcy for the payment of a dividend, and immediately thereafter suspending it upon a bill in equity. This change was made by Lord Loughborough in order to save bringing a bill in equity; but, where there was no joint estate, a bill in equity to take account of the partnership business would not lie, or, if barely maintainable, would be useless. Where, under Lord Thurlow, a bill in equity would have been impossible or useless, Lord Loughborough intimated an intention to refuse that order for keeping

distinct accounts which was his substitute for Lord Thurlow's bill in equity. Therefore, where there was no joint estate, there would be no order for keeping distinct accounts, and so the joint creditor would share ratably with the separate creditor in the dividend. Lord Loughborough's reasoning on this question in *Ex parte Elton* was defective, indeed, because it did not take sufficient account of the prior right inhering in the separate creditor to go upon the separate estate, but it was not unnatural. By his subsequent decision in *Ex parte Abell*, it seems that he became ready to disapprove the exception he had suggested.

Lord Eldon, when Sir John Scott, had been counsel for the joint creditor in *Ex parte Elton* and in *Ex parte Abell*, and he perceived in the changed practice inaugurated by Lord Loughborough an inconvenience which had escaped Lord Loughborough's attention. Under that practice the joint estate was to be distributed under a separate commission, and this, as Lord Eldon perceived, might not always be easy, inasmuch as the partner of the bankrupt was not a party to the commission. Lord Eldon, however, felt himself bound to follow Lord Loughborough's practice, by reason of the greater inconvenience which would arise from a change of practice with each changing chancellor. Viewing the difference between Lord Thurlow and Lord Loughborough as a difference about the boundary dividing equity from bankruptcy, rather than as a difference about the rights of creditors, he not unnaturally applied, somewhat blindly, what he understood to be the rule of *Ex parte Elton*, though his common sense warned him that the exception in the absence of joint estate, which Lord Loughborough had admitted *arguendo*, had little reason to support it.

In *Gray v. Chiswell* (1802) 9 Ves. 118, which was a bill in equity, and not a proceeding in bankruptcy, Lord Eldon gave the separate creditor priority upon the separate estate, observing that:

"It is extremely difficult to say upon what the rule in bankruptcy is founded. But, if the court aim at equality, it is extraordinary to say they shall have a better remedy in consequence of his death [i. e. in equity] than if he had lived [i. e. in bankruptcy]."

The distinction between the application of the general rule of distribution under a joint commission and under a separate commission was beginning to be obscured. In the frequent change of practice, in the confusion of equity and bankruptcy, in the anomalous rights of a petitioning joint creditor under a separate commission, and in discussion if a prior separate commission should be superseded in favor of a subsequent joint commission,—a discussion which need only be alluded to here,—the history of the general rule of distribution, of the causes which led to the rule's adoption, and of the origin of the exceptions to its application, was lost sight of. Lord Eldon's repeated grumblings, meant to be directed chiefly against the administration of the joint estate under a separate commission, were taken to be complaints against the general rule of distribution; and it came to be supposed, quite erroneously, that under Lord Thurlow the general rule of distribution had been changed. See the note to *Bolton v. Puller*, 1 Bos. & P. 548, written as early as 1805; *Ex parte*

Taitt (1809) 16 Ves. 193; *Ex parte Machell* (1813) 2 Ves. & B. 216; *Ex parte Gardner* (1812) 1 Ves. & B. 74. The earliest statement that Lord Loughborough's order of 1794 affected the distribution of estates is in Cooper, Bankr. Law (Phila., 1800) 298, 300. In that work the matter is misstated only partially.

The exception in the absence of joint estate, as the rule of *Ex parte Pinkerton* may be called, now came itself to receive fantastic constructions and to admit subexceptions. In *Ex parte Peake* (1814) 2 Rose, 54, the joint estate amounted only to £1. 11s. 6d., yet the joint creditors were not allowed to come upon the separate estate. In *Ex parte Kennedy*, 2 De Gex, M. & G. 228, the joint estate was exhausted in costs, yet it was held that the exception did not apply. In *Ex parte Kensington* (1808) 14 Ves. 447, there was a solvent partner, but no joint estate, and it was held that the separate estate should first be applied to the payment of the separate debts. Some curious learning arose as to the meaning of the words "solvent partner," and it was held that a partner who had applied to take the benefit of the insolvency acts, and had admitted £18,000 of debts and a total want of assets, was yet a solvent partner within the meaning of the subexception, because he had not been made a bankrupt. *Ex parte Morris*, Mont. 218. See, also, *Ex parte Janson*, Buck, 227. In *Ex parte Willock* (1816) 2 Rose, 392, the exception in the absence of joint estate was applied, as it seems, under a joint commission. Under such a commission the question would not often arise, for a joint commission would seldom be taken out where there was no joint estate. In *Cowell v. Sikes* (1827) 2 Russ. 191, the exception was first applied in equity.

Until 1822 the question had been unaffected by statute. In that year, by St. 3 Geo. IV. c. 81, § 10, it was provided that if a joint creditor or joint creditors of three or more persons, being partners, should be the petitioning creditor or creditors against two or more persons, being partners, all joint creditors might vote for assignees, and assent to or dissent from the certificate, but neither the petitioning creditor nor any other joint creditor should be permitted to receive a dividend out of the separate estate until the separate creditors had been fully paid. This, it will be noticed, expressly settled the rule where there were at least three partners, and the commission was issued against at least two of them on the petition of one or more of the joint creditors. Why the application of the law was made to be so limited does not clearly appear. See section 8 of the same act. By St. 5 Geo. IV. c. 98, § 104, it was provided that in all commissions against one or more of the partners of a firm, where the debt of the petitioning creditor was a joint debt, the petitioning creditor should receive no dividend out of the separate estate until all the separate creditors had been fully paid. This cut off the petitioning joint creditor from the separate estate in all cases, the joint creditors not on the petition having been cut off by the rule in *Ex parte Elton*. St. 5 Geo. IV. c. 98, practically was never in force, being repealed by an act passed the day after it took effect. 6 Geo. IV. c. 16. By section 62 of the last-mentioned act it was provided that, in all commissions against one or more partners, any joint creditor might prove his debt under the

separate commission for the purpose only of voting in the choice of assignees, and of assenting to or dissenting from the bankrupt's certificate; "but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm." This statute, while re-establishing the right of the petitioning joint creditor to receive a dividend out of the separate estate equally with the separate creditors, would seem clearly to abolish the other exception to the general rule, that in the absence of joint estate, and to establish generally that under both joint and separate commissions and in all cases, the joint estate should be applied first to the payment of joint debts, and the separate estate first to the payment of separate debts, subject only to the exception of the petitioning joint creditor under a separate commission. Section 62 obviated, of course, the necessity of a special order in each case to permit joint creditors to prove under a separate commission to deal with the certificate. See 2 Christ. Bankr. Law (2d Ed.) 92. This view of the statute is taken in Cary on Partnership, published in 1827. The author states that the right of the joint creditor to prove against the separate estate is entirely set at rest by St. 6 Geo. IV. See the American reprint of this work, pages 265, 220. Other writers saw the matter less clearly, and lost sight of the history of the rule and of its exceptions, neglecting the difference between joint and separate commissions, and between bankruptcy and equity. Thus, in 1 Deac. Bankr. (1827) 646, it is stated without qualification that the rights of joint and separate creditors under both joint and separate commissions are settled by Lord Loughborough's order of 1794. This order is said to accord in a measure with the old rule, which, though acted upon by Lord Hardwicke, was abandoned by Lord Thurlow, and restored by Lord Loughborough. In very many subsequent cases and text-books this version of the history has been recounted until it has become traditional and unquestioned, though, as has been already shown, it is quite inaccurate. This I shall venture to call the "traditional version."

Under these circumstances it was not unnatural that the intent of the legislature in passing St. 6 Geo. IV. c. 16, should be strangely interpreted. In *Ex parte Morris* (1831) Mont. 218, it was said that section 62 applied only to partnerships subsisting at the time of the bankruptcy,—a distinction which, as was pointed out in the argument of the case, deprived the section of nearly all effect, and introduced a meaningless subexception to the already fantastic exception. In *Ex parte Marston* (1839) Mont. & C. 576, 585, 587, 589, *Ex parte Morris* was much questioned, and the judges seem to have upheld the exception in the absence of joint estate by deciding that section 62 was not intended to change the method of distribution, and that it left the exception in the absence of joint estate in full force as theretofore. This had the advantage of getting rid of the subexception introduced by *Ex parte Morris* (where the partnership was subsisting at the time of the bankruptcy), but it was an audacious disregard of plain statutory language. The practice of the courts of bankruptcy

was now somewhat as follows, there being in this respect no distinction between the proceedings under a joint and under a separate commission: The joint estate was first applied to the payment of the joint debts, the separate estate to the payment of the separate debts, the joint creditors having a right to come upon the surplus of the separate estate, and the separate creditors having a right to come upon the surplus of the joint estate. The material exceptions to this rule were: (1) In the case of the petitioning joint creditor under a separate commission, as provided by St. 6 Geo. IV. c. 16, § 62, and (2) where there was no joint estate, and no solvent partner; this exception being upheld in spite of St. 6 Geo. IV. c. 16.

The confusion created by the last-mentioned exception thus ingrafted upon the general rule is well illustrated by the opinions rendered by the lords justices in *Lodge v. Prichard* (1863) 1 De Gex, J. & S. 610. A separate commission of bankruptcy issued against a surviving partner. Out of the joint estate there was paid a dividend on the joint debts insufficient to satisfy them. A suit in chancery was then brought to administer the estate of the deceased partner, who was also insolvent. The joint creditors of the firm sought to share equally with the separate creditors of the deceased partner in the distribution of his separate estate. After stating the general rule of distribution, and remarking that it applied in equity as well as in bankruptcy, Lord Justice Turner somewhat doubtingly sought its reason in the peculiarities of the law of partnership and in the rights of the partners in the joint estate, saying that it was not for him to say, now that the rule had been so long established, whether it was correct or not. Counsel had argued that the case before him fell within the exception in the absence of joint estate, because there was no joint estate yet remaining to be administered. He observed:

"In this case there was joint estate, and this rule (i. e. the exception) can be applicable only if it can be made out that the joint creditors are entitled in bankruptcy, when the joint estate has been exhausted, to come upon the separate estate for so much of their debts as may not have been satisfied out of the joint estate. I do not think, however, that the rule in bankruptcy has ever been carried, or can be carried, to this length. If it was, I do not see how any dividend could be made upon the separate estate until the joint estate was wound up, as it would depend upon the produce of that estate whether the joint creditors would come in upon the separate estate; and besides, if this effect was given to the rule, the consequence would be, as above pointed out, that the joint creditors would have a double fund to resort to, when the separate creditors could resort to one fund only, which would hardly be conformable to the ordinary rule of making a just and equal distribution."

Lord Justice Knight Bruce observed briefly:

"My opinion on the point arising in the present case has fluctuated, but I have arrived at the same conclusion as the lord justice."

From this it appears that in 1863—nearly a century and a half after the rule of *Ex parte Crowder* had been adopted—the modifications and exceptions ingrafted thereupon had so altered its aspect that two very able English equity judges doubted if a joint creditor, after exhausting the joint estate, had not the right for the unpaid balance of his debt to come upon the separate estate *pari passu* with the separate creditors. If he had this right, clearly the general rule of dis-

tribution would be limited to a mere marshaling of the joint and separate estates.

Finally, in *Re Budgett* [1894] 2 Ch. 557, Mr. Justice Chitty said that he had listened to a very learned argument tracing the history of section 40 of the bankrupt act of 1883 from the time of Lord King, and especially from the well-known order of Lord Loughborough (an argument which doubtless repeated the erroneous traditional version of that history). He then said that, in substance, the section had the same intent as the order (a statement quite erroneous, for the order applied only to joint commissions, concerned procedure only, and did not effect the distribution of estates). He then observed that there were four well-known exceptions to the order (referring to *Lindl. Partn.* [6th Ed.] 749), or rather "four cases which did not fall within the order." After stating that St. 6 Geo. IV. was passed in 1830 (a curious slip), he concluded that the order had always been interpreted with reference to the exceptions, and that, when the act of 1883 was passed, "it seems reasonable and proper to infer, and to adopt the inference as correct, that the legislature, though now for the first time it put the substance of the order (of 1794) on the statute book, intended the law to stand, on the construction of the section, in the same way that it stood previously to the passing of the act." It is probable that the law of England, both in bankruptcy and in equity, is now pretty well settled in accordance with the opinion of Mr. Justice Chitty and the statements of Lindley on Partnership, but undeniably it is rested upon a theory of historical development altogether erroneous. See, also, *In re Carpenter*, 7 Morrell, Bankr. Cas. 270; *Read v. Bailey*, 3 App. Cas. 94, 102; *Lacey v. Hill*, 8 Ch. App. 441, 444.

The very numerous cases in the state courts which have dealt with the distribution of the joint estate of a partnership and of the separate estate of the component partners have not arisen in bankruptcy, but almost altogether in equity. The general rule of distribution followed by English courts of bankruptcy is said to have been adopted in South Carolina in 1797. *Tunno v. Trezevant* (1804) 2 Desaus. 264, 270. In *Woddrop v. Ward* (1811) 3 Desaus. 203, the general rule, and not the exception of *Ex parte Pinkerton*, was applied, though there was no joint estate. See, also, *Sniffer v. Sass* (1828) 14 Rich. Law, 20, note. In later cases, however, the priority given by the general rule to the claim of the separate creditor upon the separate estate has been weakened into a mere marshaling of debts and assets. *Wardlaw v. Gray's Heirs* (1837) Dud. Eq. 85; *Fleming v. Belk* (1856) 9 Rich. Eq. 149; *Gadsden v. Carson*, Id. 252, 267; *Wilson v. McConnell*, Id. 510. The case of *Kuhne v. Law* (1866) 14 Rich. Law, 18, leaves the whole matter in doubt, and the opinion therein rehearses what has been called above the "traditional version" of history.

In Pennsylvania the question was first discussed in *Bell v. Newman* (1819) 5 Serg. & R. 78. Chief Justice Tilghman rehearsed the traditional version, and denied that the general rule produced equality. Guided by the statutes of Pennsylvania more than by the general principles of law, he held that, where there was joint and separate estate, the separate creditors should receive from the separate estate a payment equal to that received by the joint creditors from the

joint estate, and that the rest of the separate estate should be divided pro rata between both classes of creditors. Mr. Justice Gibson, afterwards chief justice, dissented vigorously, and declared himself in favor of the general rule. This, he said, was "founded in the most substantial justice," inasmuch as "the joint creditors have already an immense advantage over the separate creditors in being exclusively entitled to the partnership fund." "This exclusive liability of the partnership estate to the joint creditors is founded on no equity peculiar to themselves, but results from the nature of the contract of partnership, which requires the joint debts to be paid before the equity can be settled between the partners, each being individually liable till all is paid. Concede the present question to the joint creditors, and you give them, in effect, a monopoly of the insolvent's whole estate. What merit do they possess that the separate creditors may not lay claim to? In the usual course of transactions each class indiscriminately trusts to the whole estate, both joint and separate." "If, then, the policy of trade requires that the joint fund shall be appropriated, in the first instance, to payment of the joint debts, justice, equity, and conscience on the other hand, without interfering with that policy, demand that the separate creditors should, at least, have the miserable advantage of the same priority as regards the separate estate." The dissenting opinion of Mr. Justice Gibson is well worth study as a vigorous and independent discussion of the general principles of law upon which the rule depends. After prolonged hesitation, *Bell v. Newman* was explicitly overruled, and the general rule of distribution was definitely established in Pennsylvania. *Black's Appeal*, 44 Pa. St. 503; *McCormick's Appeal*, 55 Pa. St. 252.

In Maryland, the question first arose in *McCulloh v. Dashiell's Adm'r*, 1 Har. & G. 96, decided in 1827. Mr. Justice Archer, in delivering the opinion of the court, gave a history of the general rule, which, though not altogether full nor absolutely accurate, is fuller and better than any other to be found in any American report or text-book. He observed that it was difficult to say upon what the general rule and the exception in the absence of joint estate were founded, and he criticised especially the exception. Both, he declared, were settled and established in both bankruptcy and equity. This case has remained undoubted in the courts of Maryland.

In *Murray v. Murray* (1821) 5 Johns. Ch. 60, 72, Chancellor Kent gave the history of the general rule in England, not exactly in the traditional version, but imperfectly and inaccurately. The decision went upon another point. In *Wilder v. Keeler* (1832) 3 Paige, 167, Chancellor Walworth expounded and applied the general rule, rehearsing some part of the traditional history. He said nothing expressly about the exception in the absence of joint estate, though he expressed his disapproval of the decision in *Cowell v. Sykes*, 2 Russ. 191, in which the exception was applied by Lord Eldon. The general rule has been recognized in several later cases in the courts of New York, and in *Bank v. Stewart*, 4 Bradf. Sur. 254, the exception was expressly disapproved.

It is not necessary to discuss elaborately the history of the rule and of the exception in all those states of the Union whose courts have

dealt with the subject. The general rule has been followed or recognized in Mississippi (*Oakey v. Rabb's Ex'rs*, Freem. Ch. 546; *Irby v. Graham*, 46 Miss. 425, 430, 432); in Nebraska (*Bowen v. Billings*, 13 Neb. 439, 443, 14 N. W. 152); in Iowa (*Hubbard v. Curtis*, 8 Iowa, 1; *Miller v. Clarke*, 37 Iowa, 325); in Minnesota (*Ives v. Mahoney*, 73 N. W. 720); in Tennessee (*Fowlkes v. Bowers' Heirs*, 11 Lea, 144). In none of these states has there been found a case which deals with the exception in the absence of joint estate. Both the rule and the exception have been recognized in Alabama (*Smith v. Mallory's Ex'r*, 24 Ala. 628; *Van Wagner v. Chapman's Adm'r*, 29 Ala. 172; *Evans v. Winston*, 74 Ala. 349); in New Jersey (*Davis v. Howell*, 33 N. J. Eq. 72); in Illinois (*Rainey v. Nance*, 54 Ill. 29; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372; *Ladd v. Griswold*, 4 Gilman, 25, 39); in Missouri (*Level v. Farris*, 24 Mo. App. 445; *Hundley v. Farris*, 103 Mo. 78, 15 S. W. 312); in Rhode Island (*Colwell v. Bank*, 16 R. I. 288, 290, 15 Atl. 80, and 17 Atl. 913; *Pearce v. Cooke*, 13 R. I. 184); in Wisconsin (*Thayer v. Humphrey*, 91 Wis. 276, 64 N. W. 1007); in Maine (*Harris v. Peabody*, 73 Me. 262). The exception has been somewhat doubtfully recognized in Georgia (*Toombs v. Hill*, 28 Ga. 371; *Keese v. Coleman*, 72 Ga. 658). The rule has been recognized, and the exception disapproved, in Indiana (*Weyer v. Thornburgh*, 15 Ind. 124; *Warren v. Able*, 91 Ind. 107; *Warren v. Farmer*, 100 Ind. 593), and in Massachusetts (*Potters Works v. Minot*, 10 Cush. 592). In New Hampshire the rule has been recognized, and the exception declared to be unreasonable, though it is established in bankruptcy. If there be no preference where there is no joint estate, it is said by the court that there should be no preference where there is no separate estate. *Weaver v. Weaver*, 46 N. H. 188, 192. In Ohio the rule was disapproved in principle, though admitted to be established in bankruptcy, in *Grosvenor v. Austin's Adm'rs*, 6 Ohio, 104. In *Rodgers v. Meranda*, 7 Ohio St. 179, both the rule and the exception were approved. In *Brock v. Bateman*, 25 Ohio St. 609, where the joint estate was not sufficient to pay the costs, the exception was allowed to operate, and, in the confusion of mind caused by an attempt to reconcile the theory of the exception with the theory of the rule, the court declined to say what would happen where the partnership assets would yield to the joint creditors less than the separate assets would yield to the separate creditors. Plainly, the court was inclined to reduce the rule to a mere marshaling of assets. In Kentucky it appears to be established that the joint creditor may waive his right to proceed against the joint estate, and, if he does so, may share equally with the separate creditor in both joint and separate estate; otherwise, the separate creditor receives from the separate estate as large a dividend as the joint creditor has received from the joint estate, and thereafter joint and separate creditors are paid pro rata from the separate estate. *Bank v. Keizer*, 2 Duv. 169. The general rule has been disapproved in Vermont. The numerous exceptions ingrafted thereon, it is said, show that the rule rests on no satisfactory basis. *Bardwell v. Perry*, 19 Vt. 292. It has been disapproved in Connecticut (*Camp v. Grant*, 21 Conn. 41), and in Virginia (*Pettyjohn v. Woodroof*, 10 S. E. 715). In Kansas the matter seems to be left in some

doubt. *Fullam v. Abrahams*, 29 Kan. 725. The list above given is not supposed to be exhaustive, but it represents with some fullness the rule of distribution as administered in the courts of equity of the several states. It should be added that some of the decisions above cited rest upon the language of particular statutes, as well as upon general principles of law.

In *Tucker v. Oxley* (1809) 5 Cranch, 34, there was question concerning the right of the debtor of a bankrupt to set off against his debt to the bankrupt a debt due him from a firm of which the bankrupt was a member. The court permitted the set-off, and, in discussing the right of the joint creditor to prove against the separate estate of the bankrupt, Chief Justice Marshall made some statement of the history of the rule, not altogether full or accurate, but showing that he discriminated between bankruptcy and equity, and appreciated to some extent the reasons which determined the different practice adopted by Lords Thurlow and Loughborough. It is not necessary here to consider the decision in *Tucker v. Oxley*. The case is mentioned only for the reference made in the opinion of the court to the general rule of distribution. In *Murrill v. Neill*, 8 How. 414, the question came before the United States supreme court, not in bankruptcy, but in equity. The opinion of Mr. Justice Daniel states that "the rule in equity governing the administration of insolvent partnerships is one of familiar acceptance and practice." The learned justice then stated the history of the rule, partly in traditional version, but with some discrimination between equity and bankruptcy, though with little between separate and joint commissions. He noticed the two exceptions,—that of the petitioning creditor and that in the absence of joint estate,—which he termed "eccentric variations in the English practice"; and he further said of them, "They do not, for aught we have seen, appear to have been recognized by the courts in this country." He referred with approval to *McCulloh v. Dashiell's Adm'r*, and to *Story, Partn.* 376, and he mentioned *Tucker v. Oxley*.

To this history of the rule of distribution there should be added some short consideration of the principles upon which the rule is supposed to rest, and these can neither be found nor applied without difficulty. In several cases, and in the writings of many persons learned in the law, elaborate arguments have been made to show that the rule which gives the separate creditor a prior claim on the separate estate is unsound in principle, and works unfairly in not a few instances. *Eden, Bankr. Law* (2d Ed.) 169; 2 *Christ. Bankr.* (2d Ed.) 35; *Evans' Letter to Sir S. Romilly* (1810) p. 81; *Story, Partn.* § 376. Indeed, some of the arguments used in support of the rule rather make against it. Thus it has been said that the rule is based upon the theory that the joint creditor gives credit to the joint estate, and the separate creditor to the separate estate. The facts are often quite otherwise. A man lending money to a firm lends it upon the credit of the individual estates of the separate partners as well as upon that part of their property which is engaged in the firm business; and, on the other hand, the separate creditor of a partner—his butcher or tailor, for example—gives him credit quite as much upon the successful firm business in which he is supposed to be engaged as upon any

property in his separate ownership. It has been said that, inasmuch as the law has laid down the rule of distribution as above stated, creditors know the rule, and give credit accordingly; but this argument, if made in support of the reasonableness of the rule, is vicious by proceeding in a circle. It makes the creditor give credit to a fund because such is the law, and makes the fact that he has given credit to the fund a reason for the law. The rule has been defended upon the ground that it is, in substance, a marshaling of assets; but it goes much further than the marshaling of assets in equity, and the confusion into which this treatment of the rule—as merely a marshaling of assets—brings a court is shown by the opinions in *Lodge v. Prichard* and other cases. The rule does not carry out the mercantile theory of the partnership relation. *Cory, Accts.* (2d Ed.) 124.

The historical origin of the rule lies not improbably in an ancient practice of distributing the joint estate under a joint commission and the separate estate under a separate commission, each commission dealing with its corresponding creditors. The best theoretic defense of the rule is probably this: The operation of the law of partnership which gives to any separate partner or his assignee only his net share of the partnership assets—a rule manifestly founded in justice and convenience—usually insures to the joint creditors a priority in the application of the joint estate; and therefore this half of the rule has seldom been questioned. The priority given to the separate creditor in the application of the separate estate is a rough, but practical, offset to the inequality caused by the rule governing the application of the joint estate. See the dissenting opinion of Judge Gibson in *Bell v. Newman*, 5 Serg. & R. 78. Entirely apart from statute, however, two things are quite clear: First, that the general rule, with some variations, is established in the courts of this country and of England; and, second, that these variations, and particularly the exception in the absence of joint estate, have tended to discredit the rule, and to confuse its operations, rather than to obviate its difficulties.

Thus far the history of the development in this country of the rule of distribution has been considered apart from the bankrupt acts. The explicit provisions of these acts and their construction by the courts remain to be dealt with. The bankrupt act of 1800 (2 Stat. 19), contained no reference to the distribution of the assets of a partnership and its component partners, and, except *Tucker v. Oxley*, no decision made under that act has been found which bears upon the question. Act 1841, § 14 (5 Stat. 448), reads in part as follows:

"The assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and, after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, and net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate debts of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights

and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."

This provision, it will be seen, recognizes the general rule of distribution, and says nothing about any exception thereto. In *Re Marwick* (1845) 2 Ware, 229, Fed. Cas. No. 9,181, there was no joint fund except \$40, paid by a separate creditor for a worthless asset in order to create a nominal joint estate, and so to prevent the joint creditors from coming upon the separate estate. Judge Ware said:

"It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis, and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. This system is admitted to be not entirely satisfactory. It has sometimes been departed from, and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute which is not found to be encountered by equal difficulties." 2 Ware, 233, Fed. Cas. No. 9,181.

After saying that the general rule is based upon the theory of credit given to the different estates, the learned judge continued:

"The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a *casus omissus*, not contemplated, and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes that, when the statute covers the whole case in all its circumstances, and makes no exceptions, none can be made by the court." 2 Ware, 235, Fed. Cas. No. 9,181.

It will be perceived that the learned judge approved the general rule, disapproved the exception on principle, doubtfully recognized it upon authority, and avoided its effect by permitting its flagrant evasion.

Act 1867, § 36 (Rev. St. § 5121), is, in all essentials, the same as section 14 of the act of 1841. In *Re Downing* (1870) Fed. Cas. No. 4,044, Judges Dillon and Krekel held that the provision for distribution made by the act of 1867 did not apply where the commission was separate. The decision was rested largely upon section 27 of the act of 1867 (Rev. St. § 5091), which provides that "all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever" (with certain immaterial exceptions). In *Re Knight* (1871) 2 Biss. 518, Fed. Cas. No. 7,880, Judge Drummond seems to have followed *In re Downing*, though it is a little hard to say whether he meant to declare that, under a separate commission, joint creditors could come ratably with the separate creditors upon the separate estate, even where there was joint estate (as would be the case if Rev. St. § 5121, and the general rule had no application to a sep-

arate commission), or meant to let them come upon the separate estate only where there was no joint estate. See *In re Goedde*, 6 N. B. R. 295, Fed. Cas. No. 5,500.

In *Re Pease*, 13 N. B. R. 168, Fed. Cas. No. 10,881, Judge Nelson, of Minnesota, held that Rev. St. § 5121, was wholly inapplicable in the case of a separate commission, saying:

"We thus have a firm dissolved, no assets, and all the partners insolvent and in bankruptcy, without any voluntary or invitum proceedings being instituted to declare them bankrupt as a firm. Under such circumstances, in my opinion, the individual creditors of Pease have no prior rights to the creditors of the old firm of which he was a member. Their claims have been duly proved, and they are entitled to share pro rata with the other creditors. The equity rule in regard to the rights of firm and individual creditors does not apply, for the reason that no proceedings have been instituted against the partnership under section 5121 of the Revised Statutes."

In *Re Lloyd* (1884) 22 Fed. 88, Judge Atchison apparently agreed with *In re Knight*, though the decision went upon another question. See, also, *U. S. v. Lewis*, 13 N. B. R. 33, Fed. Cas. No. 15,595. These decisions are a return—apparently quite unconscious—to the bankruptcy practice of Lord Thurlow, and to his distinction between joint and separate commissions, but apparently without that remedial intervention of equity which, under Lord Thurlow, made the exception in bankruptcy practically inoperative.

In *Re Jewett* (1868) Fed. Cas. No. 7,304, Judge Drummond confirmed the decision of the register, which held that the exception in the absence of joint assets was applicable under the statute. In *Re Slocum*, Fed. Cas. Nos. 12,950, 12,951, Judge Wheeler, and, upon appeal, Judge Blatchford, held that the exception in the absence of joint estate was applicable under the statute of 1867; and this even where there were joint assets insufficient to pay the expense of realizing them. No reasons were given. In *Re Litchfield*, 5 Fed. 47, Judge Choate followed *In re Slocum*, and he expressly differed from *In re Knight* in holding that section 5121 applied to separate, as well as to joint, commissions. In *Re Blumer*, 12 Fed. 489, Judge Butler held that, where there were joint assets collected which might have been divided, though they were afterwards spent in the vain attempt to realize other assets, the exception did not apply. Judge McKennan concurred in the opinion. In *Re Byrne* (1868) 1 N. B. R. 464, Fed. Cas. No. 2,270, Judge McCandless affirmed the decision of a register which held that the exception in the absence of joint estate was not applicable under the act of 1867. In *Re Johnson*, 2 Low. 129, Fed. Cas. No. 7,369, Judge Lowell intimated in his opinion that the exception was not applicable, but that point was not involved in the decision. See *In re McLean*, 15 N. B. R. 333, 337, Fed. Cas. No. 8,879.

The act of 1898 differs materially from the acts of 1841 and 1867. Clauses a, b, c, d, and e of section 5 provide for the adjudication and administration of a bankrupt partnership. Clauses f, g, and h are as follows:

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual

estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after the paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

"(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

"(h) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Following *In re Knight*, it may be urged that the provisions of section 5, cl. f, apply only where a joint commission has been taken out, and that they are, therefore, inapplicable to the case at bar. But, if this be the true construction, then, under any separate commission, whether there be joint estate or not, the joint creditor will be allowed to take dividends from the separate estate ratably with the separate creditors. If this be the law, joint creditors will commonly take out separate commissions, as was pointed out by Lord Loughborough in *Ex parte Elton*. Lord Thurlow's rule, viz. that of paying all creditors ratably under a separate commission, did not prove so satisfactory even when it was tempered by the equitable remedies which he administered, that it should be readopted without those remedies. I hold, therefore, that section 5, cl. f, of the bankrupt act applies the rule of distribution to separate as well as to joint commissions, either directly or by analogy. See *In re Litchfield*, 5 Fed. 47.

Considering the plain language of the bankrupt act, which recognizes no exceptions to the general rule, the history of the exception in the absence of joint estate, the discredit and misconception which that exception has brought upon the general rule both in England and this country, the fantastic subexceptions imposed upon the exception, and the language used by the supreme court in *Murrill v. Neill*, I think that I am justified in holding that the exception is inapplicable under the present bankrupt act. If the language and decisions of some wise and learned judges are thereby disregarded, yet it has been shown that most, if not all, of those judges acted under a misapprehension of the history of the law. It is further to be noticed that section 5, cl. g, has, by permitting the joint estate to prove against the separate estate and vice versa, resolved a doubt which arose under the English law, and has enabled a court in bankruptcy to secure generally the equitable distribution of the property of the several estates. Section 5, cl. h, provides expressly for the settlement of the partnership affairs where one partner has been adjudged a bankrupt under a separate commission by directing the remaining partners to settle the partnership business; that is to say, to pay the joint debts. This provision removes, at least in part, the difficulty pointed out by Lord Eldon in the application of the gen-

eral rule to a separate commission. The decision of the referee is reversed, and the petitioning creditor is not to receive a dividend until the separate debts have been paid in full.

CARTER v. HOBBS et al.

(District Court, D. Indiana. May 18, 1899.)

No. 5,945.

BANKRUPTCY—PREFERENCES—ACCOUNTING BY PREFERRED CREDITOR.

A lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors, as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with the intention of securing to himself an advantage over the other creditors, will be set aside, on petition of the lessor's trustee in bankruptcy, as fraudulent and preferential; and the lessee will be required to account to such trustee for the net profits of the business conducted by him on the premises while the same remained in his possession.

In Bankruptcy. On petition of Walter Carter, as trustee in bankruptcy of Beecher Goodykoontz, against the bankrupt and Zachariah T. Hobbs, to set aside certain mortgages and a lease of a brickmaking establishment made by the bankrupt to Hobbs, as being preferential and fraudulent. For decision of the court overruling a demurrer to the petition, see 92 Fed. 594.

Gardiner, Barrett & Brown and Gifford & Coleman, for complainant.

Gavin & Davis and Fippen & Purvis, for defendants.

BAKER, District Judge. This is a suit by Carter, trustee, against the defendants for the purpose of setting aside two mortgages and a lease of certain real estate, on the ground that the same are severally preferential, and were executed for the purpose of hindering, delaying, and defrauding the creditors of the bankrupt, and of giving Hobbs a larger percentage than other creditors of the estate. On the 22d day of August, 1898, the bankrupt executed and delivered to Hobbs a mortgage on certain real estate described in the complaint to secure a note of even date for the sum of \$2,150, due in 30 days. On the 14th day of November, 1898, the bankrupt executed and delivered to Hobbs a chattel mortgage on certain personal property therein described to secure the payment of a note for \$1,798.67, due one day after date. The lease or agreement under which Hobbs took possession of the brick-manufacturing establishment and premises was made about the 22d day of August, 1898; and, under and in pursuance of it, Hobbs entered into possession and used the same until the 25th day of December, 1898. The defendant Hobbs answered the complaint, admitting that the two mortgages mentioned were invalid, as being preferential in their character, and that the same were void, as being within the inhibition of the bankruptcy law; but he denied that the agreement under which he took possession and used the leasehold premises was preferential, or taken by him for

the purpose of defrauding creditors or of obtaining any advantage over them. The three instruments that are assailed were executed by the bankrupt to Hobbs at about the same time, and are so nearly connected together that the court is of opinion that they were all executed with the same fraudulent purpose. Hobbs knew at and before the time that the instruments were executed, and at and before the time that he took possession of the leasehold property, that Goodykoontz was hopelessly insolvent. The court is of opinion that the instrument under which Hobbs took possession of the leasehold premises, and his possession of the same, were in fraud of the bankrupt law, and taken with the view and intent of obtaining an advantage over other creditors, and that the possession of the leasehold property must be held to be fraudulent and void as against creditors, the same as the real estate and chattel mortgage.

The court is of opinion that the defendant Hobbs ought to be charged with profits and gains received by him from the use of the leasehold property in the sum of \$2,277, and that he is entitled to a credit for expenses and disbursements made by him in the conduct of the brick business on the leasehold property in the sum of \$1,944.65, and that he ought to pay to the trustee, the plaintiff in this case, the sum of \$332.35, as gains and profits received by him in fraud of the bankrupt law. An order will therefore be entered that the two mortgages mentioned in the complaint, as well as the agreement for the leasehold interest, be adjudged invalid and set aside as fraudulent and preferential, and that the plaintiff shall have judgment in the sum of \$332.35 for gains and profits received by the defendant Hobbs on account of the use and possession of the leasehold premises. So ordered, and the clerk will prepare a decree accordingly.

In re FT. WAYNE ELECTRIC CORP.

(District Court, D. Indiana. May 16, 1899.)

No. 7.

1. BANKRUPTCY—COMMISSIONS OF REFEREE—DIVIDENDS.

A referee in bankruptcy is not entitled to receive commissions on partial payments made by the estate in bankruptcy on the claims of secured creditors; such payments not being "dividends," within the meaning of the law, and the referee not performing any of the services required of him by law in the declaration and distribution of dividends.

2. SAME.

Where the property of a bankrupt corporation, sold by order of the court, was bought by a lien creditor, who paid part of the price in bonds of the corporation held by him, and the balance in cash, *held*, that crediting the purchaser with the amount of such bonds was not the declaration and payment of a dividend in his favor, so as to entitle the referee to receive the percentage allowed him by the bankruptcy law "on sums to be paid as dividends and commissions," but was the payment *pro rata* of a secured claim.

In Bankruptcy. Augustus A. Chapin, referee in bankruptcy, presents his petition, showing that on the 18th day of April, 1899, Samuel L. Morris and Charles H. Worden, as receivers of this court, sold

the entire property of the bankrupt corporation for \$356,000; that they received in payment therefor the sum of \$185,000 in the bonds of said corporation, which were held by the purchaser, the General Electric Company, and \$171,400 in money; and the referee claims that the receipt of said sum in bonds was a dividend paid on a preferred claim, and that he is entitled to 1 per cent. thereon, as his commission, under the bankruptcy law.

BAKER, District Judge. It does not appear from the petition of the referee that any services were rendered by him in the declaration and payment of any dividend herein. He is allowed by the bankruptcy law "from estates which have been administered before him one per centum on all sums to be paid as dividends and commissions." 30 Stat. 556, § 40, subd. a. In section 39, subd. a, he is required to "declare dividends, and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable." Id. 555. These services involve a computation of the per centum to which the creditors are entitled; and a computation of the amount to which each creditor is entitled according to such per centum. He is also required by rules of the supreme court and this court to countersign all checks for dividends, and other payments by the trustee. None of these services has been performed by the referee in this case. The "dividend" which is claimed to have been paid in this case was really a payment pro rata on a secured claim. Such a payment is expressly excepted from the definition of a dividend, as it is furnished by the bankruptcy law. The law provides that "dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured." 30 Stat. 563, § 65, subd. a. It also provides that "the value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." In other words, "dividends," within the meaning of the law, are not declared and paid on secured claims. A dividend, within the meaning of the law, is declared and paid on unsecured claims only. It follows that the petition of the referee must be disallowed. So ordered.

In re STEVENSON.

(District Court, D. Delaware. May 16, 1899.)

No. 5.

1. BANKRUPTCY—TIME OF FILING PETITION.

The four months after the commission of an act of bankruptcy within which, under the provisions of the bankrupt act of July 1, 1898, a petition in involuntary bankruptcy must be filed, are to be so computed as to exclude the day on which such act was committed; hence, where the act of bankruptcy was committed October 20, 1898, the petition could properly have been filed February 20, 1899.

2. SAME--DUPLICATE.

The bankrupt act requires the filing within the specified period of four months of a petition in duplicate, one copy for the clerk and the other for service on the alleged bankrupt; and where a petitioner has within that period filed only one copy of the petition, the court has no authority after the expiration of such period to permit the filing of a second copy.

3. SAME--TIME OF FILING DUPLICATE.

The various provisions of the bankrupt act clearly disclose a legislative intent that proceedings in bankruptcy shall be conducted and closed with all reasonable expedition; and, while it is true that a petition may be filed at such time on the last day of the period of limitation as to render impossible either the service or issuance of process within that period, it was nevertheless the manifest intention of congress that the duplicate copy for service should be filed within that period, ready to be served with all convenient speed.

4. SAME.

Rule 11 in bankruptcy, prescribed by the supreme court, authorizes the court to allow corrections to be made of errors, insufficiencies and uncertainty in the petition or schedules, but not practically to repeal the legislative declaration that petitions must be filed in duplicate within the four months specified.

5. SAME--CLERK'S DOCKET.

Rule 1 in bankruptcy provides that the clerk's docket shall contain a memorandum of the filing of the petition, but does not mention a copy of the petition; and, as the petition is to be filed in duplicate, the docket should show such filing.

(Syllabus by the Court.)

In Bankruptcy.

J. W. M. Newlin and Charles G. Rumford, for petitioning creditors.
Austin Harrington and William S. Hilles, for bankrupt.

BRADFORD, District Judge. This is a motion to dismiss the petition in involuntary bankruptcy of The Importers and Traders National Bank of New York praying that Alfred P. Stevenson be adjudged a bankrupt. The motion as filed assigned four grounds, two of which were abandoned on the hearing. The remaining grounds are as follows:

"1. Because the petition in said cause was not filed within four months after the commission of the alleged act of bankruptcy, as required by law.

2. Because the petition filed in this cause was not filed in duplicate."

The petition was filed February 20, 1899, but not in duplicate, and disclosed that the act therein charged as an act of bankruptcy was committed October 20, 1898; consisting of the confession by the respondent of certain judgments in the Superior court of Delaware for New Castle County. On March 2, 1899, the counsel for the petitioner applied for and obtained leave of the court to file nunc pro tunc a duplicate creditor's petition. The court, while not satisfied as to the propriety of allowing the duplicate to be filed at that time, deemed it just that the petitioner should not be deprived of any right to which it might be entitled through such filing; the respondent having full opportunity by a proper proceeding thereafter to raise the point and have it determined. The questions involved in the motion have now been fully argued and are fairly before the court for decision. They are in substance, first, whether a petition in involuntary bank-

ruptcy, in which the alleged act of bankruptcy consisted of the confession of judgment by the respondent October 20, 1898, could legally be filed February 20, 1899; and, second, whether a duplicate copy of the petition could legally be filed after the expiration of the four months limited by the bankrupt act, if a single copy of the petition was filed within that period. No question as to the sufficiency of the petition in other respects is before the court for consideration at this time. Section 3, subd. b, of the act provides as follows:

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

The time for filing the petition did not expire before the expiration of the period of four calendar months from the date of the confession of judgment. Did or did not that period include February 20, 1899? If, in the computation of time, October 20, 1898, must be excluded, a petition could legally have been filed February 20, 1899, being the last day of the four months. There has been much conflict of opinion on the question whether in the computation of time the terminus a quo should be included in, or excluded from, the period within which by law an act must or must not be done. The decisions on this point have largely been controlled by considerations of hardship or substantial justice as disclosed in the circumstances of the several cases. The general rule, while subject to some exceptions not bearing on the present case, now is that in the absence of a provision to the contrary the terminus a quo should not be included in such period. The doctrine of many of the early cases was otherwise. Thus in *Arnold v. U. S.*, 9 Cranch, 104, the court said:

"It is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included."

And in *Griffith v. Bogert*, 18 How. 158, where it appeared that letters of administration were granted on the estate of a deceased debtor November 1, 1819, and by statute an execution sale of the lands of such debtor was prohibited until after the expiration of eighteen months from the date of the letters, the court, applying the same doctrine, held that an execution sale of such lands May 1, 1821, was valid. The court, however, said:

"If the statute in question were one of limitation, whereby the remedy of the creditor would have been lost, unless execution had issued and sale been made within the eighteen months, probably a different construction might have prevailed."

In later cases the earlier doctrine of the Supreme Court as to the inclusion of the terminus a quo seems to have been materially departed from, if not abandoned. In *Sheets v. Selden's Lessee*, 2 Wall. 177, 190, the court said:

"The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and to include the last day of the specified period. 'When the period allowed for doing an act,' says Mr. Chief Justice Bronson, 'is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation.'"

In *Best v. Polk*, 18 Wall. 112, 119, the court said:

"Another objection is taken to the certificate of Edmondson, on the ground that when it was given his term of office had expired. This objection cannot be sustained, for the certificate bears date the 2d March, 1849, and he was commissioned to hold the office of Register 'during the term of four years from the 2d day of March, 1845.' The word 'from' always excludes the day of date."

So, in *Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. 217, the rule of exclusion of the terminus a quo was applied to a statutory provision in Texas forbidding an application for the purchase of lands, set apart for the benefit of the school fund, to be entertained "within ninety days from the date of the record" of a former application for the purchase of the same lands. The present case does not involve any question of penalty or forfeiture, or possess any other feature requiring the terminus a quo to be included in the computation of time. In *Dutcher v. Wright*, 94 U. S. 553, it was held that under the bankrupt act of March 2, 1867, in computing the four months prior to the filing of a petition in bankruptcy, in which period any assignment by an insolvent debtor of his property for the purpose of giving a preference to a creditor was void, the day of such filing must be excluded. Section 35 of that act, now embodied in part in section 5128 of the revised statutes, provided, among other things, that if any person being insolvent, within four months before the filing of a petition in bankruptcy by or against him, with a view to give a preference to any creditor, made any assignment, transfer or conveyance of any part of his property, the person receiving the same having reasonable cause to believe that the person making the same was insolvent and that such assignment, transfer or conveyance was made in fraud of the provisions of that act, the same should be void, and the assignee might recover the property or its value from the person receiving or to be benefited by such assignment, transfer or conveyance. Section 48 of that act, now embodied in section 5013 of the revised statutes, contained the following provision:

"And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also."

It appeared in the case that a fraudulent assignment, transfer and conveyance had been made December 8, 1869, and that a petition in bankruptcy was filed April 8, 1870. It was contended by the respond-

ents that "the securities and property were not transferred, assigned, and conveyed within four months next before the petition in bankruptcy was filed."

The court said:

"Taken literally, it might be suggested that the phrase 'four months before the filing of the petition,' would exclude the day the petition was filed, fractions of a day being forbidden in such a computation; nor would it benefit the respondents if the rule prescribed by section 5013 of the Revised Statutes should be applied, which is, that in all cases in which any particular number of days is prescribed in that title, or shall be mentioned in any rule or order of court, or general order, which shall at any time be made under the same for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day. Where the phrase to be construed does not contain any expression to the contrary, the enactment is that that rule shall apply, leaving it to be understood that the phrase to be construed may contain words prescribing its own rule in that regard, and that if it contains any inconsistent expression to the contrary, that the rule prescribed in that section shall not necessarily control the meaning of the phrase to be construed. Apply that qualification to the rule prescribed in section 5013, and still it might be suggested that the meaning of the phrase 'within four months before the filing of the petition,' is entirely consistent with that rule. Unless the day when the notes, accounts and property were assigned, and the day when the petition in bankruptcy was filed, are both included in the computation, the defence fails, and the complainant is entitled to an affirmance of the decree. Neither argument nor authority is found in the brief of the respondents supporting any such rule of construction, and it is believed that no decided case can be referred to, where such a theory was ever adopted. * * * Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled. Still it must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases, nor is it necessary to make the attempt in this case, as the court is unanimously of the opinion that the day the petition in bankruptcy was filed must be excluded in making the computation, and that the decree of the circuit court is correct. Rev. St. § 5013."

The present bankrupt act contains a provision substantially similar to that in section 5013. Section 31 is as follows:

"Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday."

The phrase which was construed in *Dutcher v. Wright* was "within four months before the filing of the petition." The phrase to be construed in this case is "within four months after the commission of such act." In the former case time was computed backward from the terminus a quo, namely, the filing of the petition. In the present case it is to be computed forward from the terminus a quo, namely, the confession of judgment. The rule of computation is the same in each of these cases. As the terminus a quo in the former was excluded, so it must be excluded in the latter. The same principle applies to the merely converse cases. Indeed there is in the present case possibly stronger ground than in the former for the application of the rule of exclusion of the terminus a quo, as the bankrupt act now in force provides with respect to the computation of the four months after an act of bankruptcy by way of confession of judgment

that "such time shall not expire until four months after the date" of such forbidden act. Section 31 provides that "whenever time is enumerated by days in this act * * * the number of days shall be computed by excluding the first and including the last unless" &c. Section 5013 of the revised statutes provides that "in all cases in which any particular number of days is prescribed by this act * * * for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless" &c. I am unable to perceive any distinction in meaning between the phrase "whenever time is enumerated by days in this act" and "in all cases in which any particular number of days is prescribed by this act." In *Dutcher v. Wright* this rule was relied on as, not inconsistent with, but applicable to the computation of months. This could only have been done on the ground that the specification of a number of months from an event was equivalent to an enumeration of the days contained in those months, as applied to a given case. Whatever force was given to section 5013 in *Dutcher v. Wright* must be accorded to section 31 in the present case. It must be held in view of the foregoing authorities that the petition in bankruptcy could properly have been filed February 20, 1899. Even were it assumed that October 20, 1898, must be excluded from the computation, it would by no means follow that a petition could not legally have been filed February 20, 1899. The court takes judicial cognizance of the fact that February 19, 1899, was Sunday. And, altogether aside from section 31, there is high authority to the effect that where the last day of a period, during which an act is required to be done, is dies non, the act can in many cases be legally done on the following day. In *Cattle Co. v. Becker*, 147 U. S. 47, 55, 13 Sup. Ct. 220, the court said:

"As the ninetieth day fell on Sunday, the lands were not open to another application until Monday, the general rule being that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. *End. Interp. St. § 393; Salter v. Burt*, 20 Wend. 205; *Hammond v. Insurance Co.*, 10 Gray, 306."

This rule, of course, does not apply to commercial paper payable with days of grace. But the conclusion that October 20, 1898, is to be excluded from the computation of time renders unnecessary any decision of the point last suggested.

The remaining question is whether a duplicate copy of the petition could with leave of the court be legally filed after the expiration of the four months, only a single copy of the petition having been filed within that period. The duplicate copy was not filed until March 2, 1899, ten days after the four months had expired. If it could legally be filed at that time, the fact that an order was made that it should then be filed as of February 20, 1899, could not, on the principle that *utile per inutile non vitiatur*, affect the validity of the proceeding. The act provides that in involuntary bankruptcy "a petition may be filed" within the prescribed period of four months. It does not in express terms provide that no such petition shall be filed after the expiration of that period. But the proceedings constitute

a special statutory remedy, and the grant of power to file the petition within four months carries with it its own limitation, namely, that the petition can be filed only within that period. No power having been conferred to file it after that period, the effect of the act is precisely the same as if it had expressly prohibited the filing of the petition thereafter. Section 1 provides that "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named." Whenever reference is made in the act to an application in involuntary proceedings to have a debtor adjudged bankrupt the word used is "petition," not "petitions." Section 59, subd. c, provides that "petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt." Section 18 provides that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made" &c. Section 30 is as follows: "All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

Form No. 3 prescribed by the Supreme Court (18 Sup. Ct. xix.) shows that a petition in involuntary bankruptcy must be under oath or affirmation, and that it prays that "service of this petition, with a subpoena, may be made" &c., and form No. 4 (Id. xx.), being the order to show cause, directs that "a copy of said petition, together with a writ of subpoena, be served" as therein provided. When, therefore, the act provides that a petition shall be filed in duplicate, "one copy for the clerk and one for service on the bankrupt," it must be held to have intended that one petition in the form of two duplicate originals should be filed. The use of the term "copy" in such a connection is not unusual. A deed executed in duplicate is not in legal contemplation two deeds, but only one, and it is quite common to say that A holds one copy and B the other. Unless "copy" as here used means a duplicate original there would be much difficulty in construing the law. It is wholly inadmissible to assume that the act intended one sworn paper and also two unsworn copies of that paper to be filed; and on the assumption that the act intended that only one of two papers should be verified, and that the other should be merely an unverified copy of the former, nothing can be found in the law to indicate which of the two is "for the clerk" or "for service on the bankrupt." Rule 1 (18 Sup. Ct. iv.) provides that the clerk's docket shall contain a memorandum of the filing of the petition, but does not mention a copy of the petition, and as the petition is to be filed in duplicate the docket should show such filing. Whether there was a sufficient reason for requiring duplicate originals to be filed is not a legitimate question for this court. That inquiry belonged to the legislative branch of the government. There is nothing in the act or in the rules or forms prescribed by the Supreme Court which states or indicates that the duplicate copies or originals of the petition in involuntary bankruptcy may be filed at different times. On the contrary, the act requires that it "shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt," and rule 2 (Id.) pro-

vides that "the clerk or referee shall indorse on each paper filed with him the day and hour of filing" &c. As the petition cannot legally be filed unless in duplicate, and as the day and hour of filing must be endorsed on it, it necessarily follows that the duplicate copies must be filed at the same time. It was contended at the hearing that, if one of the duplicate copies should be filed and sometime thereafter the other should also be filed, upon the filing of the latter the petition could be considered as having been filed in duplicate. But the petition, unless in duplicate when presented to the clerk, would be insufficient as not conforming to the requirements of the act, and consequently he would possess no authority to file only one duplicate, and certainly could not file it until the other duplicate was presented to him. In such case the endorsement of the day and hour of filing would have reference to the time of filing the second paper presented to him, and not the first, and until then proceedings in bankruptcy could not properly be considered as having been commenced. That both duplicates should be filed together seems the fair import of the provision requiring the petition to be filed in duplicate, and of rules 1 and 2. It is also a reasonable deduction from the language employed in forms Nos. 8, 14, 15, 31, 32, 33, 34, 35, 36 and 59 (18 Sup. Ct. xxi., xxv., xxxii., xxxiii., xxxiv., xxxv., xlv.). Nothing that is here said is inconsistent with the idea that one duplicate may be deposited with the clerk to be retained, without filing, until the other duplicate is delivered to him, and that then both may be filed. But, even if it be assumed that it was unnecessary to file duplicate copies or originals of the petition at the same time, it appears in the present case that, while one duplicate was filed February 20, 1899, the other was not filed until ten days after the expiration of the statutory limitation of four months. It was claimed on behalf of the petitioner that, as the act does not require process to be served or even to issue within that period, and as a duplicate original had been filed within time, the court had acquired jurisdiction of the cause, and that the purposes of the act would be subserved by the filing of the other duplicate in such time as not to interfere with the operation of the act touching subsequent steps to be taken in the cause. But in what sense had the court acquired jurisdiction of the cause? It had, without the filing of any petition, general jurisdiction in bankruptcy over the subject matter. But it certainly had not acquired jurisdiction in personam. Nor had it within the period of limitation been placed in such a position as to be able to issue process against the respondent. There is nothing in the act or rules which clothed the court with power, on the facts disclosed in this case, to issue such process either within or on the expiration of that period. The act required the petition to be filed in duplicate within that time, one copy for the clerk and the other for service on the alleged bankrupt; and the clerk is nowhere required by the act or rules to make a copy for such service. On the contrary, the act required that the copy for service should be furnished by the petitioner, doubtless for the saving of costs, and possibly for the avoidance of delay. The various provisions of the act clearly disclose a legislative intent that proceedings in bankruptcy should be conducted and closed with all reasonable expedition. While it is

true that a petition may be filed at such time on the last day of the period of limitation as to render impossible either the service or issuance of process within that period, it was nevertheless the manifest intention of Congress that the duplicate copy for service should be filed within that period, ready to be served with all convenient speed. The provisions of the act requiring the filing of the petition in duplicate within that period and providing that upon the filing of the petition "service thereof, with a writ of subpoena, shall be made" &c. show clearly and explicitly that within the given period of four months everything must be done by the petitioner which can be done by him to permit process forthwith to issue. Some reliance was placed by the counsel for the petitioner on the provision of section 18 that the process "shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States." But the time when a writ, issued for the purpose of commencing a suit, is returnable, has no bearing on the question whether the action in which it is issued is or is not barred by the statute of limitation applicable to it. The fact that the defendant may be brought into court as soon in an action brought after the expiration of the period of limitation as in a similar action brought before such expiration, is no answer to the statutory bar. There are no elements of hardship in the case which could tend to induce the court to place a different construction on the act, even were its terms less clear than they are. To require a petitioner to file his petition in duplicate within the specified period involves no hardship or injustice. On the other hand, to adopt a different construction would inevitably open wide the door to delays, confusion, uncertainty and lack of uniformity in the administration of the law. The language of the act touching the point under immediate consideration is plain. Where a statute is in its terms clear and explicit, to seek for the legislative intention elsewhere than in the language employed is to forsake the path of legitimate judicial investigation and to enter the realm of uncertainty and mere conjecture. Different minds may entertain different views of the policy of the same statute and of the equity or hardship of its application to a given case coming within its terms. In the opinion of one judge the hardship which would result from the operation of the law in a certain case might be so great as to lead him to the conclusion that the legislature could not have intended the law to apply to that case; while another judge might hold that a precisely similar case came clearly within the operation of the law, either on account of his failure to recognize any such hardship or because, recognizing the hardship, he might still be of the opinion that the legislature intended the law to be uniform in its operation. Departure from the language of a statute, when it is plain and unambiguous, for the purpose of ascertaining its intention is thus calculated to veil that intention in a cloud of uncertainty, and too frequently operates to substitute the opinion of the judiciary as to what the law ought to have been, for the declared intention of the legislature. The appearance of the alleged bankrupt did not cure the

omission to file the petition in duplicate within the statutory period. The bar of the statute of limitations is never removed by the mere appearance of the defendant. Indeed it is necessary for him to appear in order to interpose a plea, demurrer, or in some cases a motion to dismiss. While the practice governing the manner of taking advantage of a statutory limitation varies in different places and proceedings, no question has been raised in this case as to the propriety of proceeding by a motion to dismiss; both parties agreeing on that mode of procedure. It was urged on behalf of the petitioner that under rule 11 (18 Sup. Ct. v.) the court had power to allow, by way of amendment of the proceedings in bankruptcy, the second duplicate of the petition to be filed March 2, 1899. That rule is as follows:

"The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

This rule does not, in my judgment, touch this case. Its purpose is to authorize the court to allow corrections to be made of errors, insufficiencies and uncertainty in the petition or schedules, but not practically to repeal the legislative declaration that petitions must be filed in duplicate within the four months specified. This court has no power by an order to remove the statutory bar in the teeth of the act. If it had, it would be difficult to perceive why other courts in actions of assumpsit, case or the like, barred by the general statutes of limitation, should not do the same. This would not be administration of the law, but legislation.

The petition must be dismissed with costs.

In re HOUSTON.

(District Court, D. Kentucky. May 13, 1899.)

1. BANKRUPTCY—PROVABLE DEBTS—ALIMONY.

A judgment in divorce proceedings requiring the defendant to pay alimony to the plaintiff in fixed weekly installments is a provable debt against the defendant's estate in bankruptcy, as to any installments due at the date of adjudication, and will be released by the discharge of the bankrupt.

2. SAME—ARREST OF BANKRUPT FOR CONTEMPT OF STATE COURT—RELEASE ON HABEAS CORPUS.

Where, in a divorce proceeding in a state court, a judgment has been rendered requiring the defendant to pay alimony to the plaintiff in fixed installments, and thereafter the defendant is adjudged bankrupt, and the court of bankruptcy, on his motion, issues an injunction staying all further proceedings in the state court to enforce the payment of installments of alimony already due, the state court cannot lawfully cause the bankrupt to be arrested and imprisoned for a contempt of its authority in omitting to pay such installments; and, if so arrested and committed by order of the state court, the bankrupt will be released on habeas corpus by the court of bankruptcy.

On Habeas Corpus.

R. D. Hill, U. S. Atty., Chas. S. Furber, and Herbert Jackson, for petitioner.

Theo. F. Hallam, for respondent.

EVANS, District Judge. The petitioner is brought before the court by the respondent, who is the jailer of Campbell county, Ky., in obedience to the writ of habeas corpus issued yesterday upon a properly verified petition showing that on the 3d day of May, 1899, he was, on his own petition, duly adjudged a bankrupt by the district court of the United States for the district of Kentucky; that previously thereto, namely, on the 14th day of January, 1899, his wife, Pattie W. Houston, had obtained a divorce from him by the judgment of the Campbell circuit court, and that in the proceedings therefor, and before the said adjudication in bankruptcy, the said circuit court had given judgment against him for alimony, to be thereafter paid in weekly installments of five dollars each; that this judgment for alimony was included in the schedule of the bankrupt's liabilities, and that several installments thereof were past due; that on the 9th day of May, 1899, he had applied for and obtained an order in the bankruptcy court staying and enjoining all proceedings in said action in the state court to enforce the collection of the installments of alimony then past due; that notice of said order and injunction staying said proceedings was given and was served upon the judge of said circuit court, but that notwithstanding such order and injunction, and notice thereof, the petitioner had been proceeded against by process of contempt in said state court, and, because he had not paid said installments, he was, by the judgment of said state court, on the 11th day of May, 1899, committed to and imprisoned in the county jail of said county, in violation of the laws of the United States and of his rights thereunder, and in defiance of the orders of the bankruptcy court staying said proceedings. The respondent, the jailer, without filing a written response, in open court orally agreed that the facts were as have been stated, and filed copies of the judgments of the Campbell circuit court allowing said alimony, and ordering the imprisonment of the petitioner for its nonpayment, and presented these orders as the justification of the said imprisonment.

Upon this state of facts, the case seems to the court to be a plain one. The constitution of the United States provides that that instrument, and the laws made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Const. Amend. art. 6, subd. 2. Among the powers so delegated to the congress is that authorizing it to pass a general bankrupt law. Pursuant to such power, the existing bankruptcy act (30 Stat. 544) became the supreme and only law of the land upon that subject. Under its provisions the petitioner applied for its benefits, and was duly adjudicated a bankrupt. Among those benefits was that of claiming a discharge from all liabilities of every character which by the terms of the bankrupt law were provable debts against his estate, with certain exceptions specified in the act. Section 1 of the act provides that the word "debt" shall include any debt, demand, or claim provable in bank-

ruptcy, and also that the word "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, subject to the exceptions named in the act. Whether wisely or unwisely, congress did not, in fact, in section 63, distinguish between judgments for alimony and other judgments, when including them in the list of provable debts; nor did it, in section 17, include judgments of that class among those not to be affected by a discharge in bankruptcy. The bankrupt court in this case had so decided on the motion for a stay of proceedings, and had directly passed upon the question in holding that a stay should be ordered. While, in making the order for a stay of proceedings, the court only looked at the question from the standpoint of the past-due installments of alimony, it is strongly inclined to the opinion that the peculiar form of judgment by which alimony is usually allowed may be properly classed among the unliquidated demands of the bankrupt, to be liquidated and made certain in amount pursuant to section 63 of the act; and, if the state law gave it priority, such judgments could be allowed a preference of payment out of the assets. And it should not be overlooked that the court of appeals of Kentucky, in the case of *Tyler v. Tyler*, 99 Ky., at page 34, 34 S. W. 899, in speaking of a judgment against the husband for alimony, said that it "makes him an ordinary debtor to the wife for a fixed sum of money, that his estate is liable for in the same manner that it would be for a debt due upon any contract." But whether the judgment be a fixed liability or a contingent one is immaterial in this case, because all these questions must be settled and disposed of in the bankruptcy court alone; and, while the judgment of the court thereon may be erroneous, it is not void, nor, so long as it remains unreversed, is it to be disregarded by the state court. Whether the liability be fixed or contingent, section 11 of the act authorizes the court to stay proceedings in all suits founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of filing the petition; and section 2, cl. 13, gives the bankrupt court power to enforce obedience by all persons to all its lawful orders by fine and imprisonment. The court attaches no importance to the words, "the filing of the petition against him," used in section 63 of the bankruptcy law, because it is the evident intention of the act that the debts described in that section shall be provable against a voluntary bankrupt as well as an involuntary bankrupt, and because the court, from his knowledge of the history of the act, is satisfied that these words were inadvertently left in the draft of the bill after the adjustment of the controversy between the two houses of congress over the question of whether there should be any clause of involuntary bankruptcy. Any other construction of section 63 would exclude altogether the idea that there were provable debts against a voluntary bankrupt. And, besides, the matter is concluded by the very first sentence of the first section of the bankrupt act, which provides that the phrase "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

In view of what has been stated, there does not seem to be any doubt of the accuracy of any one of the following propositions:

(1) That the authority of the bankrupt court was meant, alike by the constitution and by congress, to be supreme and exclusive, within the sphere of the powers conferred. (2) That this necessarily excludes the idea of any co-ordinate jurisdiction in the state court in questions like the one upon which this case must turn. (3) That no rule of comity can apply or be allowed to operate in such cases, because the sole jurisdiction is, by the exercise of the congressional power to pass a general bankrupt law, vested in the bankrupt court alone, and it has no authority to delegate that power, and no right to abandon it, to any other tribunal.

Coming, then, to the question in issue here, we find that a state court, in defiance of the propositions laid down, and of the order staying its proceedings lawfully made by the bankrupt court, has assumed the power, while bankruptcy proceedings are pending, to commit a bankrupt to jail for omitting to pay certain installments of alimony due under the judgment of the state court rendered before the adjudication in bankruptcy, and from which he might be discharged in the bankruptcy proceedings. This seems to the court to bring the case plainly within the provisions of section 753 of the Revised Statutes of the United States, which manifestly includes cases of this character, as well as the more general one where the imprisonment is in violation of the constitution and laws of the United States. The justification of the proceeding of the state court attempted in the argument was that the commitment of the petitioner to jail was for a mere contempt of that court, in the petitioner's refusal to obey an order of that court made for the benefit of the little children of the bankrupt; it being, as was insisted, the strongest moral and natural duty of the father to provide for them. This court has no power over the mere moral and natural duties of a father, and has no power to enforce them, as such; nor must it be influenced by pathetic fringes that may be put upon the argument respecting those duties. True, the court knows no higher duty than the one alluded to, though the moral obligation to pay every honest debt is perhaps not less strong; but the bankrupt law was intended to operate to the dissolution of the mere legal liability to pay all dischargeable debts, and the court must limit its consideration of the case to that phase of it. Of course, it is clear that a person who has been adjudicated a bankrupt may commit certain contempts against a state court, with which this court would have no power to interfere,—such, for example, as a positive indignity offered to that court in its presence, and, indeed, in a great variety of other ways; but it was held by Judge Bond, in the Electoral College Case, 8 Fed. Cas. 427, that this court can look behind the return of the officer and the commitment, and examine into the real cause of the detention. In that case it was also held that it is competent for a federal court to issue the writ of habeas corpus in favor of petitioners imprisoned for contempt by a state court, where the acts of alleged contempt were committed in the performance of duties created by the constitution and laws of the United States, in which event the petitioners are under the protection of the laws and of the constitution, and, furthermore, that where it clearly appears from the record that

the state court exceeded its powers in committing the petitioner, it is competent for a federal court to release and discharge him from imprisonment. If it be within the power of this court to release where the imprisonment is the result of the performance of duties created by the constitution and laws of the United States, it cannot be less so where the imprisonment is the result of the exercise by the petitioner of the rights conferred upon him by the constitution and laws of the United States. In this case the prisoner was exercising his right, under the bankruptcy law, and under the proceedings of the bankruptcy court, to refrain from paying an indebtedness which was provable against his estate, and from which he might be discharged in the bankruptcy proceedings. Upon further examination into the real cause of the detention, which it is certainly the duty of this court to make in this case, it clearly appears that the imprisonment of the petitioner was for no other contempt than that which consisted of his omitting to pay the judgment for alimony; that he stated at the time that he had no money to do it with, and afterwards stood mute; that he was committed for this failure to pay, and for no other cause whatever; and this was all done after the state court had full notice of the order issued by the bankruptcy court staying further proceedings in the case in the state court. If the state court, under such a state of facts, and under the guise and pretense of contempt proceedings for disobedience of an unlawful order, can enforce the payment of this character of provable debts, it may also enforce the payment of other forms of judgment or debts by a similar ruling, and thus, through the assumed power of punishing for contempt, render the bankruptcy act entirely nugatory. It cannot for a moment be admitted that the bankruptcy enactment of congress can be evaded or disregarded by any such means, or that this court is impotent to prevent it.

The court has by no means been unmindful of the delicacy of the questions involved in this case, nor of the comity which should always exist between the state and federal tribunals. That comity, particularly in matters where jurisdiction is co-ordinate, should be cheerfully recognized, and will always be, by this court, in every proper case; but the supremacy of the laws of the United States in cases where, as in bankruptcy matters, their operations are exclusive, would be but the imagination of a vain thing, if that supremacy could either be disregarded by the state courts or abdicated by the federal tribunals. It is as much the duty of the state courts as of the federal courts to recognize the supremacy of the laws of the United States, and yield thereto. It is a matter of congratulation that the instances are rare indeed where there is not only a recognition of this supremacy, but the most cheerful acquiescence therein,—an acquiescence as readily made in that case as it always is in that other class of cases where subordinate tribunals yield to the powers of those having jurisdiction to revise their judgments. The action of the state court in this instance has been the source of as much surprise as regret to this court; but the duty of this court is plain, and it must not hesitate to discharge that duty, and, if need be, even though most reluctantly, to put in operation all the powers which the laws

give to prevent or punish any obstruction of the justice of the United States, or any interference with the due execution of the orders, processes, and writs of the courts of the United States.

In the opinion of the court, the commitment of the petitioner in this case was made by the state court in violation of the petitioner's rights under the constitution and laws of the United States; that the state court, in making said commitment, was not in fact punishing, nor attempting to punish, the petitioner for any contempt of its rightful authority, but was acting without lawful power or jurisdiction to imprison the petitioner. Upon these grounds the court holds that the response of the jailer of Campbell county is insufficient, and that the petitioner is wrongfully restrained of his liberty. It results, therefore, that the petitioner must be discharged from custody, and it is so ordered.

In re STEIN.

(District Court, D. Indiana. May 25, 1899.)

No. 196.

BANKRUPTCY—FINAL DIVIDEND—RIGHTS OF SUBSEQUENTLY PROVING CREDITORS.

Where the trustee in bankruptcy has collected and reduced to cash all the assets of the estate, and has the same ready for distribution, the estate will be closed, and a final dividend, including the entire fund, will be declared and paid to creditors whose claims have been proved and allowed, notwithstanding the fact that the period of one year from the date of adjudication, within which time creditors may prove their claims, has not yet expired, and creditors proving thereafter will only be entitled to subsequently discovered assets and unclaimed dividends.

In Bankruptcy. On review of decision of referee.

George A. Kurtz and A. D. Harris, for trustee in bankruptcy.

BAKER, District Judge. In this case the referee certified that on May 17, 1899, at 10 o'clock a. m., William B. Wright, trustee of said estate, filed his report of the sale of all property belonging to said estate, showing that he has converted the whole of said estate into money, and now has the funds of said estate on deposit, as provided by law. The trustee now appears with his attorneys, George A. Kurtz and A. D. Harris, and petitions the referee that a final dividend be declared, and that the entire assets of said estate be now distributed among the creditors whose claims have been proved and allowed. It was held by the referee that a portion of said funds sufficient to meet the dividend on claims which are unproven, but which may be filed within one year, should be retained by the trustee until the expiration of one year from the date of the adjudication. Pursuant to Form No. 56, prescribed by the supreme court of the United States (18 Sup. Ct. xlv.), the referee certifies his decision on said question to the judge of this court for his opinion thereon.

The petition in bankruptcy was filed on March 27, 1899. The provisions of Bankruptcy Act, § 57, subd. n, which are cited by

the referee as the basis of his ruling, must be construed with other provisions of the law. Partial dividends are authorized and required within 30 days after the adjudication, if the money of the estate in excess of the amount of claims which have priority, and such claims as have not been, but probably will be, allowed, equals 5 per centum of the claims that are entitled to dividends. The only way in which this can be determined by the referee is by an examination of the schedules of liabilities filed by the bankrupt. Other dividends are required to be declared upon like terms, and as often as the amount of assets equals 10 per centum or more of those claims, and also upon the closing of the estate. Section 65, subds. a, b. It is expressly provided that the rights of creditors who receive partial or final dividends, or in whose favor final dividends shall be declared, shall be unaffected by the proof and allowance of other claims subsequent to the payment or declaration of such dividend; and those subsequently proved and allowed claims are entitled to dividends of an equal amount from the remaining assets, if they are sufficient to pay them, and not otherwise. Section 65, subd. c. It was evidently contemplated by congress that claims might be proved after dividends had been declared and paid, and that creditors who had been negligent in proving their claims should thereupon take their chances of obtaining an equal distribution with those creditors who had been more diligent. It was plainly the intention of the lawmakers that the creditors who proved their claims promptly should not be delayed nor prejudiced by the negligence of other creditors.

Section 47, subd. a, requires trustees "to close up estates as expeditiously as is compatible with the best interests of the parties in interest," under the direction of the court; and the court is required, by section 2, to "close estates whenever it appears that they have been fully administered by approving the accounts and discharging the trustees"; and it is also authorized, by the same section, to "reopen them whenever it appears that they were closed before being fully administered," subject, of course, to those other provisions of the law which have been cited. It is also provided by section 55, subd. f, that "whenever the affairs of the estate are ready to be closed a final meeting of the creditors shall be ordered." It is plain from these provisions of the law that it is the duty of the courts to close estates as soon as practicable. All known creditors have 10 days' notice of the first and of all other meetings of the creditors. An estate cannot be closed without a final meeting of the creditors. Section 55, subd. f. The notices of these meetings are to be given by the referee, and a notice of the declaration and payment of dividends, and of the filing of final accounts by the trustee, are also required to be given by him to all creditors. Section 58, subds. a-c. If, after all these notices, any creditor fails to prove his claim within a year after the adjudication, the law provides that he shall not be permitted to prove it at all. Section 57, subd. n. This provision is not an enlargement of his rights, but in restriction of them. It cannot be reconciled with other provisions of the law, except upon that view of it. He may prove his claim at any time within a year,

and it may be allowed, but the proof and allowance of it must be subject to the other provisions of the law. The proof and allowance of it before the end of the year will not entitle him to participate in dividends if the assets have been previously distributed by order of the referee, unless other assets are subsequently discovered, or there are unclaimed dividends, under section 66, subsd. a, b. The final settlement or closing of an estate in bankruptcy cannot be delayed when it is ready for the final settlement or closing thereof, and other creditors cannot be kept out of the money which is due them upon their claims in order to furnish the negligent creditor a further opportunity for the proof and allowance of his claim after all the assets of the estate have been converted into money and are ready for distribution. Under the bankruptcy law of March 2, 1867, second and third meetings of the creditors might be held, respectively, three and six months after the adjudication, or earlier, if practicable, and a final distribution might be ordered and made at a third meeting of the creditors, whenever held, excluding from participation therein all creditors who had not then proved their claims. Rev. St. U. S. §§ 5092-5094. A dividend which was ordered and paid at an earlier meeting of the creditors could not be disturbed by the subsequent proof of claims. Id. § 5098. Section 57, subd. n, of the present act, does not make any substantial change in these provisions, except to restrict the proof of claims for any purpose to the period named therein.

The ruling of the referee upon the question certified by him is therefore overruled, and he is directed to proceed with the settlement of the estate in conformity with this opinion.

BUTTFIELD v. BIDWELL.

(Circuit Court, S. D. New York. April 23, 1899.)

CUSTOMS LAWS—EXCLUSION OF INFERIOR TEAS—CONSTITUTIONAL LAW.

The present tariff law vests in the administrative officers of the government the power to fix the standard of quality of teas that may be imported, which does not necessarily depend on their purity and wholesomeness, and to determine finally the question whether an importation meets the requirements of the standard so fixed; and such provisions are a constitutional exercise of legislative power.

This is a suit by William J. Buttfeld against George R. Bidwell, collector of the port of New York, to restrain his action in respect to the importation of certain teas. Heard on motion for preliminary injunction.

James L. Bishop, for the motion.

Edward B. Whitney, Special Asst. U. S. Atty., and Arthur M. King, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge. Having reached a conclusion in this cause, it seems best to announce it promptly, instead of withholding it in order to prepare an elaborate opinion, because from an order

now made an appeal may be taken and perfected so as to be heard at the session of circuit court of appeals on May 24th (the last session before vacation), when the circuit justice is expected to sit.

In brief, it may be said that this court is still of the opinion expressed in the earlier cause of Cruikshank v. Bidwell, 86 Fed. 7, that, by the insertion of the word "quality" in the statute, congress intended to cover more than mere purity and wholesomeness. So interpreted, the statute is in entire harmony with the drift of recent legislation, which, to a continually increasing extent, relegates to governmental determination and control matters which have always heretofore, in this country, at least, been left to the disposition of the individual citizen, or to the operation of natural laws. The questions as to the power of congress to pass such an act, and to provide that the standard of quality should be fixed each year under the supervision of the secretary of the treasury, were passed on in the Cruikshank Case. Motion denied.

PETERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 463.

1. CRIMINAL LAW—OFFENSES COGNIZABLE BY FEDERAL COURTS.

The courts of the United States do not resort to the common law as a source of criminal jurisdiction, but can only take cognizance of such crimes and offenses as are expressly designated by the laws of congress, and of which they are by such laws given jurisdiction.

2. INDICTMENT—SUFFICIENCY—CHARGING OFFENSE IN LANGUAGE OF STATUTE.

Where a statute fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements of an offense, an indictment is sufficient which charges the offense substantially in the language of the statute.

3. SAME—DESCRIPTION OF OFFENSE.

The sufficiency of an indictment is to be tested by ascertaining whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must meet, and whether, in case other proceedings are taken against him for a similar offense, the record shows with accuracy to what extent he may plead a former acquittal or conviction.

4. SAME—REFERENCE TO AVERMENTS OF PREVIOUS COUNT.

An averment in the second or a subsequent count of an indictment, drawn under Rev. St. § 5209, that said defendant, on a date given, "being then and there the cashier of said association as aforesaid," as such cashier, committed the acts charged, is sufficient to identify and incorporate in such count the averments of the first count that the defendant was, at the time referred to, the duly elected and acting cashier of a certain national banking association, and that such association was at the time existing and carrying on business under the laws of the United States.

5. SAME—MANNER OF DESIGNATING YEAR.

The designation in an indictment of the year in which the offense is laid by Arabic figures is sufficient, and no prefix is essential; the year of the Christian era being understood as meant in all public or judicial documents in this country, unless otherwise expressed.

6. NATIONAL BANKS—FALSE ENTRIES BY OFFICERS—SUFFICIENCY OF INDICTMENT.

An indictment against a sole defendant, charging that, as cashier of a national banking association, he caused and procured the making of false entries in the books of the bank, by certain clerks under his control as

such cashier, with intent to defraud, sufficiently charges him with the offense as principal; the making of such entries by his direction being the same, in legal effect, as his making them in person.

7. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT TO SUPPORT SENTENCE.

Where a verdict of guilty is rendered on a number of counts, a sentence which does not exceed that which may legally be imposed on any one count is supported by the indictment, if any count is good.

8. SAME—PLEA OF FORMER ACQUITTAL—MANNER OF DISPOSITION.

Where a so-called "special plea of former acquittal" is made in the form of a motion to discharge the defendant and exonerate his bond, based on former proceedings in the same cause and court, so that no evidence thereon is required, and only a question of law is presented, it is not necessary that issue should be joined thereon, and it may properly be disposed of by the court, like any other motion.

9. SAME—REVIEW—WAIVER OF OBJECTION.

A defendant who, after the overruling of a special plea of former acquittal, proceeds to trial without objection as to the manner in which the plea was disposed of, waives the right to raise the question on appeal.

10. SAME—FORMER ACQUITTAL—CONSTRUCTION OF VERDICT.

In a prosecution against an officer of a national banking association, under Rev. St. § 5209, for making false entries in the books of the association, and in reports to the comptroller, the indictment containing a number of counts, some charging the making of entries with intent to injure and defraud the association, and others with intent to deceive the association, and, in case of reports, the comptroller, the jury, on the first trial, rendered a verdict, which was set aside and a new trial granted, in which they found the defendant "guilty, as charged in the indictment, in falsifying the returns to the comptroller of the currency, and also books of the * * * bank, and on the balance of the counts we do not agree." *Held*, that such verdict could not be construed as a special verdict, amounting to an acquittal.

11. SAME—TRIAL—PRESENCE OF DEFENDANT—SUFFICIENCY OF RECORD.

It is not essential that the record of a criminal trial should show the presence of the defendant at every step of the proceedings, but the presumption is that his presence, once noted, continues at least during that entire day.

12. SAME—EXAMINATION OF WITNESS—LEADING QUESTIONS.

Permitting the prosecution to propound leading questions to one of its witnesses is within the discretion of the trial court, and cannot be made the basis of an assignment of error.

13. SAME—EVIDENCE.

For the purpose of showing the falsity of an entry in the books of a national bank purporting to show a special deposit by a county treasurer of \$10,000 immediately prior to a report made to the comptroller, which was shown to have been withdrawn a few days later, the government introduced the treasurer as a witness, who testified that he did not remember whether or not he made the deposit, but, if he did so, it was from public funds in his hands as such treasurer. *Held*, that it was within the discretion of the court to permit the introduction of the treasurer's cashbook for the purpose of showing whether or not any entry of such deposit or withdrawal appeared therein, although the witness testified that, if he made the deposit, no record thereof would appear on the books of his office.

14. WITNESSES—RIGHT OF PARTY TO SHOW INCONSISTENCY IN TESTIMONY OF HIS OWN WITNESS.

While a party is not permitted to impeach his own witness, he is not precluded from showing facts inconsistent with some of the statements of the witness.

15. NATIONAL BANKS—FALSE ENTRIES IN BOOKS BY OFFICER—WHAT CONSTITUTE.

In a prosecution of an officer of a national bank for making false entries in its books with intent to deceive the bank examiner, where there

was testimony as to certain deposits made which were marked "special," and that the identical money was a few days later returned to the depositors, an instruction was correct which charged the jury that, if they found beyond a reasonable doubt that the understanding between such depositors and the defendant was that the money was only to be used by the bank for the purpose of being shown to the examiner as a part of the funds of the bank, then the entry of such sums as deposits was a false entry.

16. SAME—INTENT—INFERENCE FROM FACTS PROVED.

A finding as to the intent with which false entries were made in the books of a national bank by an officer of the bank may be based on legitimate inferences from the facts shown, and where, on the trial of a defendant for making such entries with intent to deceive the bank examiner, it is found that the entries were false; that they were made, or caused to be made, by defendant; and that their necessary effect was to deceive the bank examiner,—it may be inferred that they were made with such intent.

17. CRIMINAL LAW—TRIAL—CONSTRUCTION OF INSTRUCTIONS.

In determining whether a charge in a criminal case is misleading, it must be read and considered as an entirety.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

W. H. Bogle, W. H. Pritchard, and B. W. Coiner, for plaintiff in error.

Wilson R. Gay, U. S. Atty., and Charles E. Claypool, Asst. U. S. Atty.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. William G. Peters, the plaintiff in error, was indicted by the United States grand jury of the district of Washington for a violation of the provisions of section 5209, Rev. St., which reads as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk or agent of any association, * * * who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, * * * or to deceive any officer of the association or any agent appointed to examine the affairs of any such association; * * * shall be imprisoned not less than five years nor more than ten."

The indictment contained 46 counts. Counts 1 to 22, inclusive, have reference to alleged false entries and reports made with intent to injure or defraud the association. The remaining counts came under the other provisions of the statute, as to the acts of defendant having been committed with intent to deceive an agent appointed to examine the affairs of such association, or making false reports and statements of the bank to the comptroller of the currency.

Upon the first trial of the case the jury found a verdict as follows:

"We, the jury impaneled in the above-entitled cause, find the defendant, William G. Peters, guilty as charged in the indictment, in falsifying the returns to the comptroller of currency, and also books of the Columbia National Bank, and on balance of counts we do not agree."

Thereafter, in due time, counsel for Peters moved the court for his discharge upon the following grounds:

"Because the verdict of the jury is insufficient in form, substance, and law to authorize the entry of any judgment against the defendant other than a

judgment of acquittal, and that he be discharged, and do go hence without day."

This motion was overruled, and exception taken. Thereupon a motion was made "for a judgment of acquittal and discharge on said verdict as to counts 1 to 22 of said indictment, both inclusive"; which motion was overruled, and exceptions thereto were allowed.

Peters then made a motion to set aside the verdict of the jury and for a new trial, which was granted. The trial of the cause was continued until the next term; at which time, the cause coming on regularly to be heard—

"The defendant, William G. Peters, moved the court for leave to file his plea of former jeopardy to counts 1 to 22, both inclusive, of the indictment herein, and his plea of former acquittal to counts 23 to 46, both inclusive, of said indictment, which leave was given, and said plea was thereupon filed; and thereupon the district attorney moved the court for leave to enter a nolle prosequi as to counts 2 to 22, both inclusive, of said indictment, which was granted, and a nolle prosequi was thereupon entered, and said defendant discharged as to said counts 2 to 22. And thereupon, upon the statement of the district attorney that he intended to produce no evidence touching the matters alleged in count 1, except evidence to prove the organization of the Columbia National Bank, its location, and the appointment, qualification, and acting of the defendant as its cashier, and to prove venue, the court overruled said pleas as to count 1, and also as to counts 23 to 46, inclusive; to which action of the court in overruling said pleas as to count 1, and counts 23 to 46, inclusive, the defendant excepted, and his exception was allowed."

The case thereafter proceeded to trial on the remaining counts (23 to 46, inclusive) on defendant's plea of not guilty. The jury found a verdict thereon as follows:

"We, the jury impaneled in the above-entitled case, find the defendant, William G. Peters, guilty as charged in counts numbered 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46 of the indictment therein contained."

Motions were thereafter made for a new trial and in arrest of judgment. These motions were overruled, for the reasons given by the circuit court in *U. S. v. Peters*, 87 Fed. 984.

The rights of a defendant in a criminal case should, at all times, be carefully guarded. But courts must look at the substance, instead of the mere shadow, of the alleged errors. Courts should not be called upon to deal with "trifles light as air." We have carefully read all the testimony contained in the record, and have arrived at the conclusion that the evidence is sufficient to sustain the verdict of the jury. This being true, there must be something legal, tangible, and real affecting the essential rights of the defendant to justify the court in reversing the verdict of the jury. Error in law must be affirmatively shown. If the plaintiff in error has not been deprived of any substantial right; if he has not been misled; if he has not been prejudiced or injured in any respect,—he has no real or substantial cause for complaint simply because the old forms and precedents have not been literally followed. He presents for the consideration of this court 40 specific assignments of error, nearly equal in number to the counts originally contained in the indictment. Twenty-one of these counts were summarily disposed of for want of any proof to

sustain them. It may, in the outset, be said that at least that number of the assignments—some of which, like the counts in the indictment, are repeated, to save any question as to there being a proper statement—may likewise be disposed of. But, notwithstanding this fact, the case is left as full of points as the hide of a porcupine is of quills.

It is our duty to carefully examine all questions worthy of consideration, and it will be our endeavor to group them under as few heads as possible, and at the same time to leave none of the important points unnoticed or undisposed of.

It must be borne in mind that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial. *U. S. v. Walsh*, 5 Dill. 60, Fed. Cas. No. 16,636; *U. S. v. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *In re Greene*, 52 Fed. 104; *Swift v. Railroad Co.*, 64 Fed. 59; *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Britton*, 108 U. S. 199, 206, 2 Sup. Ct. 531.

Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute. *Ledbetter v. U. S.*, 170 U. S. 606, 610, 18 Sup. Ct. 774, and authorities there cited; 10 Enc. Pl. & Prac. 483, and authorities there cited.

Few indictments under the national banking law have been so skillfully drawn as to escape the hypercriticism of learned counsel. Many of them might, doubtless, have been made more definite and clear. Our object will be to get at the merits, if any there be, of the numerous objections urged,—to ascertain whether the defendant has been prejudiced by the course pursued by the court; whether any of his legal rights has been invaded or violated; and to brush away the cobwebs of pure technicalities with which the trial of the case, as in all criminal cases, seems to be surrounded.

The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *U. S. v. Simmons*, 96 U. S. 362; *U. S. v. Carll*, 105 U. S. 612; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144; *Evans v. U. S.*, 153 U. S. 584, 587, 588, 14 Sup. Ct. 934, 939; *Batch-*

elor v. U. S., 156 U. S. 426, 15 Sup. Ct. 446; Cochran v. U. S., 157 U. S. 286, 290, 15 Sup. Ct. 628.

The essentials of an indictment drawn under the provisions of section 5209 are clearly stated in U. S. v. Britton, 107 U. S. 655, 662, 2 Sup. Ct. 512, 518, as follows:

"(1) That the accused was the president or other officer of a national banking association which was carrying on a banking business. (2) That, being such president or other officer, he made in a book, report, or statement of the association, describing it, a false entry, describing it. (3) That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association."

See, also, Cochran v. U. S., 157 U. S. 286, 293, 15 Sup. Ct. 628.

The indictment under consideration sets forth all of these essentials in proper manner and form.

With these general observations, which are more or less applicable to many, if not all, of the points to be discussed, we will proceed to notice some of the specific grounds urged by counsel on behalf of the plaintiff in error.

1. It is claimed that the counts in the indictment, especially 23 to 46, inclusive, upon which the plaintiff in error was convicted, are radically defective, in this: That it is not in either of said counts alleged that the association, whose books and reports are alleged to have been falsified, was organized under the national banking laws of the United States, nor that it was an existing banking corporation, or carrying on the banking business, under the laws of the United States, at the time the acts of Peters are alleged to have been committed.

The first count in the indictment, in so far as it relates to the points referred to by counsel, reads as follows:

"That William G. Peters, on the second day of July, in the year of our Lord one thousand eight hundred and ninety-five, and continuously thereafter, until the twenty-fourth day of October, in said year, at the county of Pierce, in the district of Washington, was the duly elected, qualified, and acting cashier of the Columbia National Bank of Tacoma, a national banking association organized, and then and there existing, under the laws of the United States, and then and there engaged in carrying on a general banking business in the city of Tacoma, in said district, and the said William G. Peters did then and there, by virtue of his said office and employment as such cashier of said association," etc.

The counts from 23 to 46 are substantially, though not precisely, alike. We copy one of these counts in order to show more clearly the objections urged thereto:

"And the grand jury as aforesaid, on their oath aforesaid, do further present that said William G. Peters, on the 11th day of July, 1895, being then and there the cashier of said association, as aforesaid, did then and there, as said cashier, willfully and feloniously make in a certain book, then and there belonging to and in use by the said association, in transacting its said banking business," etc.

Counsel admit that a sufficient reference is made by the words "as aforesaid" to identify Peters as the duly-elected cashier, and that the term "said association" identifies the Columbia National Bank of Tacoma, but argues that they are not sufficient to identify the other portions of the first count as to the organization and ex-

istence of the bank, under the laws of the United States. We are of opinion that the references made in the subsequent counts are sufficient in law. The language used therein could not, under any reasonable construction, be held to refer to but one William G. Peters, and to but one association, the Columbia National Bank of Tacoma, and necessarily includes the entire description of the officer and of the association as set forth in the first count.

In *Blitz v. U. S.*, 153 U. S. 308, 316, 14 Sup. Ct. 924, 925, the indictment was drawn under section 5511 of the election law, and contained three counts. In the first count it was alleged:

"That on the 8th day of November, A. D. 1892, at Kansas City, in the county of Jackson and state of Missouri, there was then and there an election, duly and in due form of law had and held, for choice of representative in the congress of the United States, * * * and that at the said election one Morris Blitz did then and there unlawfully, falsely, knowingly, and feloniously personate and vote, and attempt to vote, in the name of another person, other than his own name," etc.

The latter portion of the first count was held defective, in that it failed to state that the defendant voted for a representative in congress. In the course of the opinion, in reviewing other counts, the court said:

"In respect to the third count of the indictment, but little need be said. It is clearly sufficient, for it charges that 'at said election' the defendant voted more than once for representative in congress. Such double voting is made an offense by the statute. The only question that could arise upon the third count is whether the words of the first count, referring to the election had and held on the 8th day of November, 1892, for representative in congress, can be drawn through the second count, into the third count, by the words, 'at the said election.' As the election named in the first count is the only one specifically described in the indictment, there can be no doubt that the words, 'at said election,' in the third count, refer to the election described in the first count."

The present indictment, tested by this decision, is clearly sufficient.

2. It is claimed that the counts from 23 to 46 are defective in their averments as to the time when the acts are alleged to have been committed. They vary as to the day and month. The one heretofore quoted alleges "that said William G. Peters, on the 11th day of July, 1895," etc. The contention is that there are no words to indicate that by the figures "1895" is meant "the year of our Lord one thousand eight hundred and ninety-five." The ancient rule as to the necessity of designating the era rested upon the fact that two periods were then in vogue in computing time, viz. the reign of the king and the Christian era, and unless the one or the other were designated the time would be uncertain. This rule was therefore upheld with great strictness, and a failure to observe it was held to be fatal. But in the United States no such reason exists, and the rule (although it was adopted and followed by some of the earlier decisions in this country) should not be applied, unless made a requirement by statute. "*Cessante ratione legis, cessat ipsa lex.*" When a year is stated it is not, therefore, necessary to the validity of the indictment that the era, as "in the year of our Lord," or the term "*anno Domini*," or "*A. D.*" should be added thereto, because the Christian era will be understood from the mere statement of the year in Arabic figures.

Com. v. Doran, 14 Gray, 37, 38; Engleman v. State, 2 Ind. 91, 93; State v. Gilbert, 13 Vt. 647, 651; Smith v. State, 58 Miss. 867, 871; Hall v. State, 3 Ga. 18, 22.

In Engleman v. State the court said:

"It is a fact, historically known, that Christian nations have generally adopted the Gregorian calendar, numbering the years from the birth of Christ. This is a Christian state, and has adopted the same; and when a year is mentioned in our legislative or judicial proceedings, and no mention is made of the Jewish, Mahometan, or other system of reckoning time, all understand the Christian calendar to be used. For example, the constitution of the United States declares that the importation of certain persons shall not be prohibited before the year eighteen hundred and eight, and that of Indiana declares that Corydon shall be the seat of government till eighteen hundred and twenty-five. These are important documents, demanding the greatest certainty and precision of statement, yet whoever heard of any person contending that the year of the union was meant in one of these instances, and the year of the state in the other? To hold an indictment bad for the omission of the words in question can never be necessary to the safety of any of the rights of the accused, and would tend to bring odium on judicial proceedings."

3. The objections urged that certain counts are defective, because they do not charge Peters as a principal, are without merit, in fact or in law. The indictment is drawn against William G. Peters, and no one else. He is the principal; the only person accused of committing the crime. It was drawn so as to cover almost every conceivable state of facts that might be elicited at the trial. Several of the counts allege that Peters in person made the entries which are alleged to be false; others charge that he willfully and feloniously caused and procured the entries to be made by one A. L. Andrus, who was a clerk of the banking association; another, that he willfully and feloniously caused, directed, and procured the entries to be made by one D. A. Young, who was a clerk and bookkeeper of said association, under the control of Peters as cashier. It necessarily follows that the contention of counsel that these counts do not state facts which, if true, make the said Peters guilty as principal, is, as before stated, wholly without merit. He is as guilty if he directed false entries to be made by the clerk or bookkeeper as if he made the entry in person.

In Cochran v. U. S., *supra*, relied upon by the plaintiff in error, the indictment was against the president and cashier of the bank, and the language of the opinion had reference to that particular state of the facts.

In Agnew v. U. S., 165 U. S. 36, 52, 17 Sup. Ct. 235, 241, the true rule upon this subject is clearly stated in an instruction, which was approved by the court, and reads as follows:

"The crime of making false entries by an officer of a national bank, with the intent to defraud, defined in the Revised Statutes of the United States (section 5209), includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be committed personally or by direction. Therefore the entry on a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slip is false, the entry of it in the bank, and the books of the bank, is false."

As the verdict of guilty was rendered upon all the counts, and the sentence did not exceed that which might properly have been imposed

upon conviction under any single count, such sentence is good if any such count is found to be sufficient. *Claassen v. U. S.*, 142 U. S. 140, 12 Sup. Ct. 169; *Evans v. U. S.*, 153 U. S. 584, 595, 609, 14 Sup. Ct. 934, 939. The other objections to the indictment need not, in the light of what has already been said, be discussed.

4. It is argued that the court erred in overruling the special plea of the defendant, because no issue in law was joined as to said plea. We have heretofore copied the proceedings in full in relation to this so-called "special plea." By reference thereto, it will be observed that the plea is not, in form or substance, like the ordinary plea "of a former acquittal." It is simply a motion to discharge the defendant from custody, and exonerate his bond. As was said by the learned circuit judge: "It referred solely to proceedings which had been had in the court in which the cause was pending, and concerning which the court needed no evidence, and could take none. The only question presented by the plea was a question of law." It was not a question of fact, to be disposed of by a jury. This, of itself, seems to us to be sufficient to sustain the action of the court in denying the motion or plea. But the case need not rest on that alone. It is true that the record shows that "no demurrer nor traverse to said special pleas was filed by the government." In the light of the facts in regard to the proceedings, it was not necessary. But the record also shows that "the sufficiency of said plea was passed upon by the court on the objection of the district attorney to its sufficiency, made in open court, and the defendant's counsel made no objection to its consideration by the court." And thereafter, "without any further action taken, or any other disposition of the special pleas hereinbefore mentioned, and without objection from the defendant or his counsel on that ground, a jury was duly impaneled and sworn to try said cause on the issues raised and joined by the defendant's plea of not guilty." These quotations from the record clearly show that the plaintiff in error waived his right, if any he ever had, to have his so-called "special pleas" otherwise disposed of before proceeding to a trial upon the merits. In view of the facts set forth in the record, it cannot truthfully be said that he has been deprived of the legal right to have his plea disposed of according to established legal rules.

The case of *Com. v. Merrill*, 8 Allen, 545, is not in opposition to the conclusion we have reached upon this question. There the defendant pleaded a former conviction to two indictments. When the case was called for trial, the defendant objected that the district attorney had filed no replication or demurrer to the plea, and that there was no issue to be tried. The court, in the course of the opinion, said:

"This defendant was called to trial before the jury on the indictments and his two pleas thereto, and was required, against his objection, to give evidence in support of his special plea, though there was no issue thereon; and the judge, on hearing that evidence, ruled that it did not support the plea, and thereupon ordered that the trial proceed upon the plea of not guilty. The judge treated the special plea as if it were before him on demurrer and joinder. * * * The defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial."

Here, the plea was made in the form of a motion. The defendant made no objections to the course pursued by the court, and waived his right, if any he had, by consenting to go to trial upon his plea of not guilty. The assignments of error upon this point are not well taken.

5. In connection with the point last discussed, it is claimed that the verdict of the jury on the first trial amounted to an acquittal, and that the court erred in refusing to discharge the defendant. The language of the verdict cannot be legally construed so as to sustain the position contended for by the plaintiff in error, that it is only a special verdict, and does not affirmatively show that the defendant made the entries in the returns to the comptroller of the currency, and in the books of the bank, with the intent to deceive the bank examiner or comptroller. It is a contortion of the language, unjustifiable by any known rule of interpretation, to assert, as counsel does, that the only effect of the verdict is as if it read: "We find the defendant guilty as charged in the indictment to this extent: that he falsified the returns to the comptroller, and also the books of the bank." No such limitation can be injected into the verdict. The verdict was general, not special. The jury found "the defendant, William G. Peters, guilty as charged in the indictment, in falsifying the returns to the comptroller of the currency, and also books of the Columbia National Bank." The indictment, in the counts from 23 to 46, inclusive, consisted of four distinct charges: (1) That defendant made a certain entry in the books of the bank or reports to the comptroller; (2) that the entry so made by the defendant was false; (3) that defendant knew it was false when he made it; (4) that such entry was made by defendant with intent to deceive the bank, or (in the case of the reports) with intent to deceive the comptroller of the currency. As to these counts, the jury found the defendant guilty as charged in the indictment. The other counts (from 1 to 22, inclusive) charged the acts to have been committed by the defendant "with intent to injure and defraud the association," and upon these counts the jury did not agree. These counts before the second trial were dismissed. It is apparent, from this plain statement of the facts, that the court did not err in refusing to discharge the defendant upon the counts from No. 23 to 46, inclusive. Further comment is unnecessary. But it is deemed proper to say that the recent case of *Selvester v. U. S.*, 170 U. S. 262, 18 Sup. Ct. 580, might be examined with profit. In that case the plaintiff in error was indicted for alleged violation of Rev. St. § 5457. The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second, the illegal passing and uttering of the same; the third, the unlawful passing and uttering of three pieces of like nature; and the fourth, the counterfeiting of five like coins. The record shows that, after the jury had retired, they returned into court, and stated that, while they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be, and thereafter returned a verdict as follows: "We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second, and third counts of the indictment, and

disagree on the fourth count of the indictment,"—which verdict was received and the jury discharged. All the justices agreed that the failure of the jury to return a verdict on the fourth count did not affect the validity of the verdict rendered on the other counts, or the liability of the defendant to be sentenced on that verdict. The majority of the court, after reviewing many authorities, were of the opinion that where the jury rendered a verdict of guilty on some of the counts, and the verdict was silent as to the other count, the discharge of the jury would amount to a second jeopardy as to the charge with reference to which the jury had been silent. They added: "But such, obviously, is not the case where a jury have not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed, and on account of which it has been regularly discharged, would not constitute second jeopardy." A minority of the court were of opinion that, the defendant having been sentenced under the counts upon which he was found guilty, the effect of such conviction and sentence disposed of the whole indictment, and operated as an acquittal upon the count on which the jury failed to agree. The court did not err in overruling the motion of the plaintiff in error in arrest of judgment.

6. We are now brought to a consideration of the alleged errors occurring during the second trial. It is claimed that the record does not affirmatively show that the defendant was present at "every step of the trial." We will again look at the record, and ascertain the facts upon which this claim is made. The record made on the 9th day of November, 1897, reads as follows:

"Now, on this day, this cause came regularly on to be heard; Wilson R. Gay, Esq., United States attorney, and Charles E. Claypool, Esq., assistant United States attorney, appearing for the prosecution, and D. W. Colner and W. H. Bogle, Esqs., appearing for the defendant. * * * Counsel for each side having announced their readiness for trial on the remaining counts of said indictment, a jury was called, and the following named persons were examined and duly sworn to try the case: * * * Thereupon the trial duly proceeded until the hour of adjournment, when, by consent, the jury was admonished by the court, and allowed to separate until the incoming court to-morrow morning."

The record made on the 12th day of November, 1897, after stating the presence of the judge, reads as follows:

"Now, on this day, this cause came on for further trial. The jury having been called, the trial duly proceeded to the conclusion; whereupon, after argument of counsel, the jury was duly charged by the court, and retired for deliberation upon its verdict; and thereupon, after due deliberation, the jury returns into open court, and, having been called, in the presence of the defendant, present to the court a verdict, in the words and figures following."

These are the only entries in the record referred to by counsel. It is claimed that the record of the proceedings on November 9th does not show, except by inference, that the plaintiff in error (defendant in the court below) was present when the jury was examined, and sworn to try the case, and that the record on November 12th fails to show his presence while the testimony was being introduced, or at the time when the instructions were given to

the jury. No principle of law, relating to criminal procedure, is better settled than that, in felony cases, nothing should be done in the absence of the prisoner. It is his unquestioned right "to be confronted with his accusers and witnesses." He has the legal right to be present when the jury are hearing his case, and at all times during the proceeding of the trial, when anything is done which in any manner affects his right; and, as a general rule, it is undoubtedly true that, when his personal presence is necessary to protect his rights, the record ought to show the fact of his presence. *Lewis v. U. S.*, 146 U. S. 370, 372, 13 Sup. Ct. 136, and authorities there cited. It is the duty of clerks to see that the record speaks the truth concerning this fact as well as others occurring during the trial. A strict observance of these rules by the ministerial officers charged with this duty would certainly tend to relieve the courts of much trouble and annoyance. But what must the record show? What entry must be made? In general terms, it may be stated that the minutes of the court should affirmatively show everything which is essential to the validity of a criminal trial. The record of each day should show the presence of the court and its officers, of the respective attorneys, of the defendant, and of the jury, and then state the proceedings in the order of their occurrence. We must not be understood as intimating that, if the proceedings are not entered in this precise form, the record would be defective, but simply as suggesting a proper form of keeping the minutes. Every case must, of course, stand or fall by its own particular facts, as shown by the record. When the record does affirmatively show that the defendant was present, it is unnecessary to repeat that fact "at every step" which is taken during the day. It would be absurd to require that every time a witness is sworn, a motion made, a ruling announced, an exception noted, an instruction given, leave of the court for a juror to retire in charge of an officer for a few minutes, or any other step taken, an entry in the journal must affirmatively show that "the defendant was then and there personally present." The law never requires, even in a criminal trial, vain and useless things to be done. Our attention has not been called to any case which holds that a record which omits noticing the presence of the defendant "at every step" taken during the day when his presence, as in the present case, was once regularly entered in the minutes, is insufficient. All the cases which discuss this question hold that the fact of the defendant's presence need not be repeated at each recorded step. *Jeffries v. Com.*, 12 Allen, 145, 154; *Grimm v. People*, 14 Mich. 301, 308; *State v. Wood*, 17 Iowa, 19, 21; *Folden v. State*, 13 Neb. 328, 332, 14 N. W. 412; *State v. Lewis*, 69 Mo. 92, 96; *Territory v. Yarberry*, 2 N. M. 391, 457; *Irvin v. State*, 19 Fla. 872, 891; *Lawrence v. Com.*, 30 Grat. 845, 851; *Cluverius v. Com.*, 81 Va. 787, 848; *Stephens v. People*, 19 N. Y. 549, 552; *State v. Craton*, 28 N. C. 165, 168; *Schirmer v. People*, 33 Ill. 276, 284.

As was said in *Palmquist v. State* (Fla.) 11 South. 521:

"It is not indispensable that the record should show, by a direct affirmative recital, the personal presence of the accused at each and every step taken in

the trial, although such presence is necessary. This fact will sufficiently appear if the record affirmatively shows either expressly or by reasonable intendment, or in substance, that he was present in person during the trial."

In *State v. Lewis*, the court said:

"It is also alleged that the record does not show affirmatively that the defendant was present when the verdict was rendered. It does show that he was present at the opening of the court, on the day the verdict was rendered. It never was decided by this court that the record must affirmatively show that the defendant is present at every hour of the day, or at every step of the proceeding on that day. It is sufficient that he was present when the court met, and his absence will not be presumed."

We therefore decline to indulge in the presumption that the defendant was allowed to depart after his presence was noted, and that he remained absent during the balance of the day, or that he was only present when the court was opened, or when the jury retired, or when the jury returned with a verdict, as the case may be. It is just as necessary to show that the jury and the judge were present during the trial as it is to show that the defendant was present, but their presence need not be repeated "at every step" of the proceedings. The presumption, if any is to be indulged in, would be that a presence, once noted, continues at least during the entire day. Without further elaboration, our conclusion is that the point urged by counsel is without any foundation in the facts, as shown by the record; that it cannot be sustained upon any substantial reason; and is not supported by authority.

7. It is contended that the court erred in permitting the government to ask and prove by its witness A. D. Andrus that he had testified at the first trial that certain entries alleged to be false, in the books of the bank, were in the handwriting of the defendant. The witness Andrus was the teller of the bank. He testified, generally, that he was familiar with the handwriting of Mr. Peters. When questioned as to who made the figures "20," which appeared in the bank's books, whereby a certain entry was changed, opposite the words, "Gold in vault," from "200," which was in the handwriting of the witness, to "20,200," he said: "I am not certain whose figures they are. * * * I would not like to state positively about it. * * * I should say they look very much like his [Peters'] figures." The figures in the record opposite, "Silver in tray," which were in the witness' handwriting, were "2,838.05," and were changed by placing a figure "2" in front thereof, so as to read "22,838.05." When asked as to whose handwriting this first figure "2" was, he said: "I do not know. I think it resembles his [Peters'] writing. I suppose any one could make a figure '2' good deal like that." Another entry in the book, which was made by the witness, of "2,775.02," was changed by making a figure "3" in front, so that it would read "32,775.02." When asked in whose handwriting the figure "3" was, he said: "I am not certain whose that is." And as to whether it resembled Mr. Peters' figures, he said: "I think it resembles it somewhat." In reply to similar questions concerning the figures that had been changed in the books, the witness said: "I think it looks very much like Mr. Peters' figures. * * * I think it is in the same handwriting

that the rest of those other figures were that I testified to here. Resembles those." "Q. And that is whose? A. Resembles Mr. Peters' handwriting." The witness was then asked if he did not, at a former trial, with reference to these same entries and changes, "testify positively that those figures were in Mr. Peters' handwriting." The witness answered: "I remember testifying that some figures in this book were in his handwriting, but I don't remember whether it was this figure or not." Then certain entries were pointed out to him, and his testimony at the former trial was read, where he had positively testified that the added figures were in Mr. Peters' handwriting. The witness in reply said: "Why, I think that is my testimony, if it was all taken down correctly." We have made this somewhat extended reference to the answers given by the witness for the purpose of showing that the question as to his testimony at the former trial was not asked for the purpose of impeaching the witness, as claimed. It did not tend to impeach him, for he did not at the present trial at any time state that the changes were not made in the handwriting of Mr. Peters. It was not allowed for the purpose of refreshing the memory of the witness. True, this was attempted to be done, but the court promptly and properly said to counsel: "You cannot refresh his memory of the handwriting by what he testified to at the former trial. You must test his knowledge of the handwriting at the present time." Again, the court said: "He can refresh his memory of that handwriting by examining the figures, or examining Mr. Peters' known or admitted writing or figures." And the examination of the witness then proceeded upon the lines suggested by the court. The case does not, therefore, fall within the rules announced in *Putnam v. U. S.*, 162 U. S. 687, 694, 16 Sup. Ct. 923, which relate solely to the fact that the former testimony would be inadmissible for the purpose of refreshing the memory of the witness. The questions asked the witness were leading. But, as was said in *St. Clair v. U. S.*, 154 U. S. 134, 150, 14 Sup. Ct. 1002, 1008: "In such matters, much must be left to the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him." 8 Enc. Pl. & Prac. 86, and authorities there cited.

8. The next contention on behalf of the plaintiff in error is that the court erred in admitting in evidence the cashbook of John B. Hedges, county treasurer of Pierce county. Like contentions are also made as to the admission of the books of J. W. McCauley, city treasurer, and of the books of the German-American Bank. These alleged errors will therefore be considered together, selecting the one relating to the entry, "J. B. Hedges, special," as being the most favorable to the plaintiff in error, for principal discussion.

The entries which are alleged in the indictment in counts from 23 to 46, inclusive, to be false, and the reports of the same as made to the comptroller of the currency, which are likewise alleged to be false, concern three principal transactions: (1) That a pre-

tended deposit was entered as having been made by the German-American Safe-Deposit & Savings Bank with the Columbia National Bank, in the sum of \$20,000, on July 10, 1895; (2) the other two transactions relate to the alleged deposits of \$10,000 each in the name of "J. B. Hedges, special," and in the name of "J. W. McCauley, special"; and it was contended at the trial by the government that no such deposits were in fact ever made.

In one of the counts of the indictment it was charged that, in order to make a favorable showing of the condition of the bank on the 28th of September, 1895, in response to a call of the comptroller of the currency, false entries were made, as of the 25th, to show that upon that date J. B. Hedges deposited \$10,000 "special," which was drawn out by him on the 30th of September, 1895, and that on the 26th day of September, 1895, J. W. McCauley deposited \$10,000 "special," which was drawn out by him on the 30th day of September, 1895. And under various other counts the defendant was charged with alterations of the books to make it appear that \$20,000 was, by such deposits, added to the sum total of the cash on hand in the bank. J. B. Hedges, with reference to these matters, was called as a witness on the part of the government, and, among other things, testified as follows:

"I was living in Tacoma on September 25, 1895. I knew of the existence of the Columbia National Bank. I don't remember whether on the 25th day of September, 1895, I made a deposit in the Columbia National Bank, 'J. B. Hedges, special,' \$10,000, or not. I had no such amount of my own personal money on deposit. I have made a number of deposits such as 'J. B. Hedges, special,' but I don't know whether I made a deposit on that date or not. I don't remember how it would be marked. I did have money entered to the account of 'J. B. Hedges, special.' I do not remember the dates nor the time. * * * In making deposits of that kind, I would receive a deposit slip, which I would take away with me, and hold it until I got ready for the money, and go and get the money, and then I would give the deposit slip to the officers of the bank, and they would give me the money. * * * I always returned the slip and took the money. * * * When I took \$10,000, if I ever did, to any bank, during the fall of 1895, it was public funds,—state, county, and different funds going to make up that amount. When I took an amount like that from the public repositories, I would go and put it in my own name, 'special,' I kept no record at all of it in my office. No record was necessary. * * * If the records of the bank would show that there never had been, or pretended to be, more than one deposit in my name marked, 'J. B. Hedges, special,' that would not refresh my memory, or aid me to say that I never had made any, or, if at all, more than one; it would have no weight with me."

After giving this testimony, his cashbook as county treasurer was produced; and after he had testified that he believed the book to be correct, and that he had had general supervision of it and checked it up, and had therein kept the transactions of his office, he was allowed, over the objection of the plaintiff in error, to testify as to the entries of his books on September 24th to September 30th, inclusive, and from this evidence it did not appear that any sum of \$10,000 had been entered upon his books, either as deposited in the bank, or as drawn from the cash on hand, or as restored to the cash on hand. After some testimony concerning said entries, the witness adhered to his former testimony in regard to having made a deposit about that time, and again stated that, if such deposit was made, his testimony

concerning the same would not in any way be affected by the fact that no entries thereof had been made in his book.

The testimony of Mr. Hedges, county treasurer, and of Mr. McCauley, city treasurer, which is in many respects similar in its general character, exhibits upon its face, to use a mild term, a most remarkable and extraordinary transaction on the part of these officials, intrusted, as they were, with public funds. Neither of these witnesses testified positively about taking the sum of \$10,000 to the Columbia National Bank, or to Mr. Peters, the cashier, and receiving a deposit slip therefor at the date mentioned. They say they do not remember; might have done so. Both were unwilling to swear positively either that they did or did not make such a deposit at the time mentioned. McCauley testified:

"To save my life, I couldn't tell you whether I made a deposit of \$10,000 or not. I would not say that I did not. * * * I made deposits, and took a deposit slip made out by the cashier and delivered to me. * * * I have a faint recollection that I did make one or more deposits in the Columbia National Bank, and received a deposit slip on which the word 'special' was written, but I would not testify positively. * * * I have had a good deal of trouble in the last two years, * * * and my memory has been somewhat weakened."

From such statements it is apparent that the United States attorney was surprised at the general trend of the testimony of his own witnesses, and sought, in various ways, to bring out all the facts regarding this matter. The books were not offered as substantive evidence against the plaintiff in error, but were introduced and allowed for the purpose of showing what the witness did or did not do with reference to this money; what accounts thereof he kept, or what entries he made, if any. Courts are vested with much discretion in the admission of testimony, under such circumstances. The books were admissible in order to inform the jury as to all the facts, so that they might judge, from all the circumstances and surroundings, of the probabilities or improbabilities, and reasonableness or unreasonableness, of the statements made by the witness that he might have made such a "special deposit," although he could not positively swear that he did. The government had the right to have the witness explain all the facts, so that the jury could, from the whole story, ascertain the truth. The object, end, and aim of all jury trials is to ascertain the truth; and, if the jury has the right (which is unquestioned) to take into consideration the witness' manner on the witness stand,—his hesitation and refusal to make any positive statement, for want of recollection,—we see no substantial reason why they might not consider that the books kept under his supervision, and of which he testified he believed to be correct, might not also be considered, in order to enable them to determine the truth. Was it reasonable to believe, from all the testimony, that Hedges did make a special deposit of, and took a deposit slip for, \$10,000 on the date mentioned, without making any note thereof on his own books, which would naturally be supposed to speak the truth, and show where the money of the county could be found, if it had been taken away and deposited in a bank or elsewhere? Of course, the witness had the right to explain why no entry was made upon his books; and the jury had

the right to consider whether the explanation, as given by him, was or was not reasonable and satisfactory. The rule against impeaching one's own witness has never been extended so as to preclude counsel from eliciting all the facts from the witness, even though some of the facts thus drawn out might appear to be inconsistent with some other portions of his testimony. There is a clear distinction as to the principles of law which prohibit a party from impeaching his own witness and the right of a party to show an inconsistency in some portions of his testimony. In *Hickory v. U. S.*, 151 U. S. 303, 309, 14 Sup. Ct. 334, 336, the court said: "The party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness." See, also, 1 Greenl. Ev. §§ 443, 444; 1 Thomp. Trials, § 515; 29 Am. & Eng. Enc. Law, 812, and authorities there cited.

9. Finally, it is claimed that the court erred in the instructions given to the jury. On this point numerous objections are urged and argued at great length by counsel. It would serve no useful purpose to notice these points seriatim or to discuss the same in extenso. As before stated, the contention of the government, from the beginning to the end of the trial, was that the amounts represented by the entries alleged to be false had never been deposited in the bank. The weight of the evidence sustains this contention. The teller, book-keeper, clerks, and other employes of the bank, whose special duties required them, either to handle the money or make an entry thereof in the books, testified it was not there. They did not see it. The accustomed places where the ordinary deposits were kept did not show any such amounts at the time indicated by the entries in the books of the bank which are alleged to be false. The plaintiff in error, however, testified that it was there, and he had the right to have instructions given covering that theory of the case.

Peters, after denying that he personally made any of the entries in the book which are alleged to be false, testified as follows:

"I have no recollection of this deposit of twenty thousand dollars that appears to have been made by the German-American Bank in the Columbia National Bank on July 10, 1895. I have not now the least recollection about that transaction. * * * When I made the reports, I believed them to be true, and I still believe it. I did not direct any of those entries to be made by any one, with reference to this twenty thousand dollars deposit by the German-American Bank."

Referring to the account of "J. B. Hedges, special," under date of September 25, 1895, he said:

"That deposit of \$10,000 was actually made by Mr. Hedges. He made it on the date it is shown there,—the 25th. I recollect the circumstances under which that deposit was made. I remember that about that time, or a few days before * * * I went up to Mr. Hedges' office, and had a talk with him about the general affairs of the bank, and we had considerable of a conversation regarding the business of the bank, particularly with reference to getting additional money for the bank. * * * At that time I suggested that if it was convenient for him that I would like to have him make an additional deposit, anywhere in the neighborhood of ten thousand dollars. He afterwards made this deposit. It was late in the afternoon. He made it in gold coin. I gave him a deposit slip as evidence that the deposit had been made. * * * When he brought it down to the bank, he told me that he might want it in a few days again, and he did not want us to use it unless it

became necessary for us to do so. I told him that I did not think that we would require it, and that I would not use it unless it did become necessary. * * * I put it in the safe of the bank. I don't think I could remember whereabouts in the safe. * * * I afterwards paid that money out to Mr. Hedges, somewhere about a week afterwards,—I think the end of the month."

With reference to the account of "J. W. McCauley, special," he said:

"I did not make any of the entries of that transaction. I know that Mr. McCauley made the deposit represented by that entry. He made it with me. Refreshing my recollection from the book, I would say that he made it on the 26th of September. I had a similar talk with him as that I had with Mr. Hedges with reference to the bank, and what we were doing, and it was in response to that conversation that he subsequently made the deposit. I gave him the slip to evidence the deposit, the same as I had given Mr. Hedges. He made the deposit in gold coin. I suppose he brought it in a gold-coin sack. * * * I suppose it was about the same as stated on the book, 'J. W. McCauley, special.' When it was fresh in my memory, I did cause entries of those accounts to be made. I put the money that I got from Mr. McCauley in the safe. I don't have any particular recollection as to whereabouts in the safe I put it. I presume it was in the same form as when I received it. I afterwards paid it to him again. * * * I returned to both of these gentlemen, Hedges and McCauley, the same sacks and the same money. * * * I did not use any of these moneys in the business of the bank. I didn't make any of the entries upon the books with reference to either of these transactions. I instructed Mr. Young to make the slips and enter them upon the books. I do not remember the date. I think it was a day or two after we received it. * * * I didn't give him this direction until 2 or 3 days later. I can't tell you why I did not make it out that night; I just didn't. I didn't think to make it out at that time. I put the money in the safe. I didn't hide it. It was not necessary to hide it. I could not tell you what amount of money the bank had on hand before I got that twenty thousand dollars. * * * I mean to say that with that bank in that condition I might have in the safe twenty thousand dollars or ten thousand dollars from the night of the 25th, and ten thousand dollars from the night of the 26th, and not think to tell the bookkeepers, and not enter it in my books, until two or three days afterwards, and then have the book entries made. Those entries were not made for the purpose of having the bank show a larger amount of money than it had, nor for the purpose of making these reports to the comptroller of the currency. I probably showed the twenty thousand dollars that was in the safe to McCauley and Hedges. I did not show it to any one else."

The charge of the court with reference to these transactions is substantially the same. We copy but one, which is as follows:

"Concerning the Hedges transaction, there is testimony to the effect that that particular sum of ten thousand dollars was left with the bank by J. B. Hedges, for which he received a deposit slip in his name, marked 'special,' but with the understanding between him and the defendant that, if the bank should need to use the money, it might do so. You are to determine from the evidence what was the nature of the use that was so permitted to be made; and if the evidence convinces you, beyond a reasonable doubt, that the use so permitted, and as understood by the defendant, was to make a showing of said money, if necessary, to any bank examiner or officer of the government, as if the same were money belonging to the funds of the bank, then you are instructed that the entry of said money upon the books of the bank, as appears in the evidence in this case, was a false entry; but if you find that the use so permitted was that the money was to be considered a loan to the bank, or that it might be considered a loan to the bank, or that it should be mingled with the funds of the bank, as an ordinary deposit, subject to withdrawal by check, in the ordinary course of business, the entry of such item on the books would be lawful and proper."

The jury could not have been misled, as counsel claim, by the use of the words, "a loan to the bank," to be "mingled with its funds," as an "ordinary deposit." These words were used to illustrate the point that, if the money was left with the bank to be used by it in its legitimate banking business, "the entry of such item on the books would be lawful and proper." This portion of the charge was certainly as favorable to the plaintiff in error as the law or the evidence would warrant. It was the character of the transaction, not the name given to it, that determined its true nature; and the jury were to decide, from all the facts, whether the acts of the cashier, in making, or causing to be made, the entries in the books of the bank, in relation thereto, were "honest" or "criminal."

It is argued by counsel that the court erred in giving certain instructions, one inconsistent with the other, in relation to the question of intent. It is true that this question was referred to in different portions of the charge. The court seems to have taken extra pains to inform the jury as to the law upon that subject; but in so doing there was no uncertainty or inconsistency. The intent of the defendant, as charged in the indictment, must, of course, be proven, either by direct, positive, or independent evidence, or by such facts and circumstances as would enable the jury to draw the inference of guilt, as they legitimately are allowed to draw other inferences, from any of the facts in evidence which to their minds fairly prove its existence. The evidence in this case was, notwithstanding the lack of memory upon the part of some of the witnesses for the government, so clear as to leave no reasonable doubt in the minds of the jury as to the inferences and presumptions which naturally flowed from it, viz. that the offense as charged, in making the false entry on the books of the bank, was committed by the plaintiff in error herein with intent to deceive the bank examiner, and that the false reports made by him were made with the intent to deceive the comptroller of the currency. The charge of the court fairly, in language to which no possible exception could be taken, submitted this question to the jury. The court also properly charged the jury that "every one is presumed to intend the necessary consequence of his own deliberate act, and if you believe from the evidence that the entries described in the indictment were false, and that the defendant made, or caused them to be made, and that the necessary result of such entries was to deceive the examiner by the entries in the books, then the defendant is guilty as charged under that count." Is it not reasonable to presume that a cashier of a bank who wrongfully makes or causes such entries to be made intends the legitimate consequences of his unlawful act? Is it not manifest from the entire charge that the jury could not have been misled by the language used in another part of the charge, that "any and every false entry upon the books used in the transaction of its current business is calculated either to mislead its officers or work injury to the bank"? This was but a general statement. Another portion of the charge was so defi-

nite and direct that the jury could not possibly have been misled. Among other things, the court said:

"The counts charging the defendant with making false entries in the books of the bank allege that such entries were made, or caused to be made, by the defendant, with the specific intent on the part of the defendant to deceive any agent who might thereafter be appointed by the comptroller of the currency to examine the affairs of said association or bank. The offense charged is a statutory one, and the specific intent alleged in the indictment is a substantive or essential part, and one of the ingredients of such offense; and before you can convict the defendant on any of such counts you must find as a fact, beyond any reasonable doubt, that he not only did the acts charged, but that he did them with the specific intent on his part to deceive any agent who might thereafter be appointed by the comptroller of the currency to examine the affairs of the bank. It will not justify a conviction for you to find from the evidence, if you should be so inclined, that he did the acts charged with some other intent, no matter how wrongful it might be."

The instructions given in the following cases support the charge of the court, and also the general views we have expressed in regard thereto. *U. S. v. Harper*, 33 Fed. 471, 481; *U. S. v. Means*, 42 Fed. 599; *U. S. v. Allis*, 73 Fed. 165, 171. The charge must be read and considered in its entirety; and, so read and considered, it is manifest that the jury could not possibly have been misled in regard thereto.

It is argued that the court erred in not giving a correct definition of a "special deposit." The facts of this case did not call for any legal definition of a "special deposit," as that term is understood in legitimate banking business. The transactions, if they occurred as testified to by Peters, cannot, from any legal standpoint, be classed as legitimate. The intent with which an act is done is often more clearly and conclusively shown by the act itself than by any words or explanation of the actor. It is no defense to a wrongful act, knowingly and intentionally committed, that it was done with an innocent intent. It is often the case that the actions of men speak their intentions more clearly and truthfully than do their words. It is apparent, from the testimony, that the "deposit slips" were not given or received for the purpose of making an entry of any legitimate business of the bank. They were not, according to the evidence of Hedges, McCauley, and Weisbaugh, to be entered in the books of the county treasurer or city treasurer, or the German-American Bank. The irregular and extraordinary method of conducting the business was resorted to, if at all, for the purpose of covering up a transaction that would not bear the light of day, and cannot be recognized, by any court, as legitimate. The money did not belong to the bank, and, if left there to be used in the manner testified to by the witnesses, could not, in any legal sense, be designated as the money of the bank, whether called a "loan" or a "special deposit." The entry on the bank's books was evidently designed and intended to deceive the bank examiner, and was, to all intents and purposes, under the most favorable light in which the transactions can be viewed, a "false entry," within the meaning of these words as used in the statute, and any report to the comptroller of the currency based upon such transactions would be a "false report."

Without further discussion, our conclusion is that the plaintiff in

error has had a fair and impartial trial; that he has been properly convicted upon the testimony; and that after a careful, patient, and exhaustive consideration of all the points made by counsel, whether herein specifically mentioned or not, we find no error in law in the admission of the evidence, or in the charge or rulings of the court, that calls for, or would justify, a reversal of the case. The judgment of the circuit court is affirmed.

UNITED STATES v. NIEMEYER et al.

(District Court, E. D. Arkansas. April 27, 1899.)

1. PUBLIC LANDS—CUTTING OF TIMBER—RIGHTS OF HOMESTEADER.

A homesteader, before he has become entitled to a patent to the land, is not authorized to sell timber therefrom for the purpose of obtaining money with which to hire improvements made which the law contemplates he shall make himself. He has no right to sell timber for any purpose from any part of the land except such as he intends in good faith to put into immediate cultivation; and a use of the land for grazing purposes, without plowing it up, is not cultivation, as meant by the law.

2. SAME—CRIMINAL LIABILITY FOR CUTTING TIMBER—INTENT.

If a person cuts and removes timber from lands which he knows to belong to the United States, and to be occupied under a homestead claim, under a purchase or license from the homesteader, and knowing also that the land from which it is taken is not to be put into immediate cultivation, he is presumed to have intended to take the timber unlawfully, and is subject to prosecution therefor.

This was a prosecution by the United States of A. J. Niemeyer and Charles Niemeyer for unlawfully cutting and removing, or causing to be cut and removed, timber from public lands of the United States.

The defendants were, respectively, president and general manager of the Saginaw Lumber Company, located near Malvern, Ark. They justified the taking of the timber under purchases from homesteaders occupying the lands from which it was cut. The government attacked the good faith both of the homesteaders and the defendants, claiming that the homestead entries were made for the purpose of enabling the defendants to obtain the valuable timber from the lands. There was evidence that three of the homestead entrymen were employes of the lumber company, and that the fourth made his entry at the instance of the defendants. There was also evidence that none of the lands had been put in cultivation, or cleared for cultivation.

Jacob Trieber, U. S. Atty.

L. A. Byrne, for defendants.

WILLIAMS, District Judge (orally charging jury). This is a trial for the offense of cutting, or causing to be cut, and hauling away, or causing to be hauled away, timber from the lands of the government. The defense is that the lands were homesteads, and that the timber was disposed of by the homesteaders to the parties who are charged with unlawfully having it cut. The case is out of the ordinary run of cases of this kind. It may not require any more consideration at your hands, however, because the testimony is plain, and the law at last is simple. The court will endeavor to make the law plain to you which is to govern you in making up your verdict in this case. The homestead laws of the United States are exceedingly munificent

laws, and were intended for the benefit of the citizens of the United States, for the bettering of their condition, and consequently the making of better citizens of them. These laws were passed after mature deliberation by congress, and after one or two ineffectual attempts to pass them. They were passed in the light of other land laws, and of the condition of the citizens who had availed themselves of the other laws. Before the homestead laws, there were pre-emption laws, and any one could go upon any unoccupied lands of the United States that were not in the market, and, by pre-empting, as it was called, get the first right to bid upon the lands or buy them whenever they came into the market. The congress of the United States, as I have told you, after that passed the homestead laws, which permit and encourage every citizen of the United States, or any one who has declared his intention to become a citizen, who in good faith—and that is always an important part of it—who in good faith intends to make a home for himself and his family, to go upon any 160 acres of vacant lands belonging to the government, and live upon it, cultivate it, and, after he has lived upon it continuously for five years, he may have a patent to it, which gives him the land in fee simple. The congress of the United States, or the government of the United States, as I may say, having passed a law of this kind giving to the citizen the land, certainly has a right to prescribe how he shall occupy it until his five years of continuous residence has given him the title. It has by law and by the decisions of the highest courts prescribed rules and regulations to govern his conduct while in this occupancy for the five years. Upon going upon the land after first getting his proper papers from the local land offices, he may use timber growing upon that land for the purpose of building a house upon it, and outhouses that are necessary. He may use timber for making rails to fence in the land, in order to put it into cultivation, and he may use enough for his firewood. The law goes further than that in its munificence, according to the decisions of the courts of the United States, and says that where the man in good faith has taken up a homestead, and is in good faith clearing up a part of it to put it into immediate cultivation, if there is more timber upon that piece of ground than has been necessary for the building of his house, his outhouses, his fences, and his firewood, the law does not say that he must burn it, but he may sell it; not off of the entire tract of land, but from the piece of land that he is going to put into immediate cultivation. It is immediate cultivation, not two years or three years thence, but immediate cultivation; the supreme court using a very apt phrase by saying, "Upon the ground where the plow is to follow the ax." Not only may he sell the timber from that piece of ground, but he may exchange it for lumber; that is, the timber from the piece of ground he is putting into cultivation.

Now, much of the testimony in this case is to the effect that the so-called "homesteader" sold the timber for 50 cents a thousand, took lumber in exchange, and paid for the hire of the carpenters who put up the house, and paid for digging wells, and all that sort of thing. The law does not authorize that. I said to you before that congress passed this law having in consideration the customs and

conditions of the men who had taken up pre-emption claims upon the vacant lands of the United States. It did not contemplate, and this law does not authorize, a man to take up a homestead, and sit down upon it, and do nothing, sell the timber off of it, hire men to put up a house, hire men to make the rails, hire men to cut the firewood that he burns, hire men to do everything that is done about the place, and pay for it with the timber on the place. The homesteader is expected to do something himself. The government gives him the timber to build his house, make his rails, and to keep himself comfortable in cold weather by the firewood that he cuts himself, or that he does himself; not that he hires this one and that one to do by giving them other timber from the lands to pay for these things being done. It is a question of good faith between the homesteader and the government. That question is at the very beginning of it. If you find that these men went upon the land without any intention of making it a homestead, or of making a homestead out of it, and if you find that the circumstances shown by the proof and by their conduct at the time and after that time show that they did not intend to make a homestead of it, then they had no right to do anything upon the land whatever. Every stick of timber that they would cut would be a violation of the law. It is a question of going upon the homestead in good faith, to make a home of it. On the other hand, if you find they did intend to make a home of it, then they could cut the timber and use it to the extent that I have told you, and no other. If they could not cut it themselves, they could not authorize any one else to do it; and any one else who does it under any supposed authority from the homesteader violates the law, and is amenable to the law.

Much has been said about the question of intent in this case. There must be an intention, of course, to violate the law and deprive the government of this timber; but the court calls your attention to the fact that all persons are presumed to intend the natural result of their acts. And if you find that these defendants, or any one of them, knew the condition of these lands, that they were recently homesteaded, and that the timber they obtained permission to cut was cut off of lands not put in cultivation, not going to be put in cultivation, from the very nature of things, the law says that they intended to take it unlawfully. The defendants are entitled to the benefit of all reasonable doubt that may arise upon the whole testimony in the case to the extent that, after hearing all the evidence and weighing it, you are satisfied beyond a reasonable doubt that they are guilty, it is your duty to say so; but, if you still have a reasonable doubt of their guilt, it is your duty to acquit. If, after weighing all the evidence, you are satisfied beyond a reasonable doubt—have an abiding conviction—that they are guilty, it is equally your duty to say that they are guilty. And when I say a reasonable doubt, gentlemen, I mean a doubt arising upon the testimony, not from something outside. I do not mean any far-fetched, illogical, supposititious doubt, but a reasonable doubt; such a doubt as would prevent you from acting in the most important affairs of your lives. This is the kind of a doubt to which the defendants are entitled to the benefit of. You are the sole judges of the testimony, giving it such weight as you think

it is entitled to. You are not authorized to discard the testimony of any witness unless you see some reason for doing so. If there be a conflict of testimony, it is for you to say which is true and which is false. In arriving at a conclusion as to the credibility or reliability of witnesses, you may take into consideration the knowledge they have of the matters about which they testify, and any interest they may have in the result of your verdict. There has been testimony introduced in regard to some other homestead. The court has permitted that simply to show the intent, if it showed any. But you are concerned only about the timber taken from these four homesteads, none other. If you find the defendants guilty, I understand that the value of the timber is not a debatable question. It is admitted that so many thousand feet of timber were taken from these homesteads, at 50 cents per thousand. But it is at last for you to say how much it was. You are the judges of that, also, from the testimony in the case.

The court calls your attention again to the question of the land being put in cultivation. Cultivation means cultivation. Making a stock farm or stock range of land is not putting it into cultivation. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in cultivation. That is not what the law contemplates when it says cultivation. It means plowing and preparing it for crops, or the raising of something that grows from the ground, besides grass. You are to take this case, gentlemen, and decide it according to the evidence that has been adduced here by the witnesses, weighing all the circumstances, weighing all the evidence, and taking the law as now given you by the court. You will decide it without prejudice or passion, fairly and in accordance with the law and the evidence. If you find both the defendants guilty, you will say so. If you find one not guilty and the other guilty, you will say so. If you find both not guilty, you will say so by your verdict. You will retire, and consider your verdict.

There was a verdict of guilty.

KROPFF et al. v. FURST et al.

(Circuit Court, D. New Jersey. May 15, 1899.)

1. UNFAIR COMPETITION — RIGHT TO INJUNCTION — SIMILARITY IN DRESSING OF GOODS.

Whether the manner in which a defendant dresses his goods for the market renders them so similar in appearance to those of complainant as to deceive intending purchasers, and warrant a court in interfering by injunction to prevent unfair competition, is a question to be decided on the circumstances in each case.

2. SAME—TOILET SOAPS—COMPARISON OF BARS.

Defendants were selling in the market a toilet soap put up in bars similar in size and shape to those of complainants' soap, but different in color. The bars of both kinds of soap had upon one face the words "a base de Glycerine," but on the reverse face of complainants' was the name "La Parisienne," while on defendants' was the name "Rose de

France." *Held*, that in view of the distinctive names of the two articles, which would seem more likely to guide purchasers than the size and shape of the bars, and in the absence of proof that any one had actually been deceived, a court was not justified in granting a preliminary injunction against defendants.

This is a suit in equity to enjoin alleged unfair competition in trade. Heard on motion for preliminary injunction.

Walter D. Edmonds, for the motion.

Esek Cowen, opposed.

KIRKPATRICK, District Judge. The bill of complaint in this cause alleges that the complainants have for many years been engaged in the successful manufacture and sale of a glycerine soap, which they have distinguished from other glycerine soaps on the market by the arbitrary designation of "La Parisienne," stamped on one side thereof, and the terms "a base de Glycerine" upon the other; that the said marks were combined with cakes of soap of an elongated bar shape, being parallelipeds $5\frac{1}{8}$ inches long, $1\frac{1}{8}$ inches wide, and $1\frac{1}{8}$ inches thick, divided equally in the middle by an indented line. The bill charges that the defendants are selling a soap similar in shape, size, and color, bearing on one side of the major faces thereof the term "a base de Glycerine" and upon the other the designation "Rose de France." The charge is that by the sale thereof the defendants unfairly compete in trade with the complainants, deceive intending purchasers, and induce them to buy an inferior article manufactured by other parties as the soap of the complainants. The prayer of the bill is for an injunction restraining the defendants from selling any glycerine soap of the said paralleliped shaped bar, in connection with the markings adopted by the complainants, or any colorable imitation thereof, not manufactured by the complainants. It is not contended that the complainants have any trade-mark rights either in the shape of the bar, or in the name, or in the marks, or in the color which they have adopted to designate their soap. Relief is sought solely upon the ground that the complainants having been the first to appropriate this combination of distinctive marks, and having acquired an extensive trade in the article so designated, they are entitled to be protected against those who imitate them for the purpose of unfairly inducing the public to purchase goods inferior in quality under the belief that they are the same which they have been accustomed to get from the complainants. Such contention seems to me to come within the rule laid down in *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, where the court said, "The defendants have no right to dress their goods up in such manner as to deceive intending purchasers, and induce them to believe that they are buying those of plaintiff." Recognizing the principle, I am of the opinion that the similarity which will warrant the interference of the court must be determined by the circumstances of each case. An inspection of the exhibits produced here shows the soap sold by the defendants to be like that of the complainants in size and shape, and that it bears the mark "a base de Glycerine." It, however, differs in color, and has for a distinctive name "Rose de France," instead of "La Parisienne." It would seem

that, to the trade and intending purchasers, the distinguishing mark of complainants' soap would be rather the distinctive name, than the size, color, or shape. It would be impossible to confound "Rose de France" with "La Parisienne," though, as was suggested on the argument, "La Parisienne" might also become "Rose de France." It has not been made to appear that any one has in fact been deceived or induced by similarity to buy the soap sold by defendants for that of the complainants. The testimony of Goldman does not go so far. He asked for La Parisienne soap. The saleswoman inquired if it were glycerine soap, and, upon receiving an affirmative reply, produced a bar of glycerine soap, saying:

"This is the same as La Parisienne, but it has 'Rose de France' on it. Sometimes they put those words on it, and sometimes 'La Parisienne'; but it is the same soap, made by the same firm. Will it do?"

Goldman answered "Yes," and took away the soap, to be marked an exhibit in the cause. It does not appear that Goldman was deceived. He does not say that he was induced to buy defendants' soap because it was like that of complainants in name, shape, size, or color, or any other similarity. So far as his deposition is any guide to his motive, the purchase was made in despite of the difference of name to which his attention was specifically directed, and solely upon the unauthorized representation of a saleswoman, anxious to make sale to a customer, that the Rose de France and La Parisienne were manufactured by the same firm. This assertion might have been made with regard to any glycerine soap having not only a totally dissimilar name, but in every respect of form, color, and size differing from that of complainants. The facts presented in this case do not furnish a sufficient foundation upon which to base a right to a preliminary injunction restraining defendants from making sale of soap such as is described, upon the ground of deceit, or that by so doing they unfairly compete in trade with the complainants. The motion will be denied.

**COLLIERY ENGINEER CO. v. UNITED CORRESPONDENCE SCHOOLS
CO. et al.**

(Circuit Court, S. D. New York. April 4, 1899.)

1. COPYRIGHT—INFRINGEMENT—LITERARY PRODUCTION OF EMPLOYE.

The literary product of a salaried employé, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it, and when so copyrighted the employé has no more right than a stranger to copy or reproduce it; but he is not debarred from making a new compilation from the same original sources, nor, in so doing, from making use of the experience and information gained in his employment.

2. SAME—SUIT FOR PIRACY—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted on ex parte affidavits in a suit for the piracy of a copyright publication, where the fact of piracy is not clear, but the question will be left for determination on a full hearing.

Suit for infringement of copyright. On motion for preliminary injunction.

Livingston Gifford and George H. Pettit, for the motion.

LACOMBE, Circuit Judge. The great bulk of the papers filed on this motion and the difficulties inherent in the nature of the questions involved have delayed this decision, greatly to the court's regret, far beyond the time originally intended. It is manifest that the various pamphlets declared upon are proper subjects of copyright. It seems equally clear that, under his contract, which made it Ewald's duty while a salaried employé of complainant, inter alia, to compile, prepare, and revise the instruction and question papers, the literary product of such work became the property of the complainant, which it was entitled to copyright, and which, when copyrighted, Ewald would have no more right than any stranger to copy or reproduce. There is a strong equity in favor of complainant, arising out of the fact that defendants' circular of information opens with statements evidently calculated to induce a belief that their school is the same as, or else a successor of, the complainant's. The motion, however, must be decided, not upon collateral equities, but according to the principles of the law of copyright. The fundamental question is one of fact, viz. are defendants' pamphlets compilations borrowed to a substantial extent from complainant's copyrighted compilations, or are they independent compilations from the original sources? In view of the affidavit of Mrs. Gross, the direct evidence of piracy given by Roden should not be accepted as conclusive upon preliminary motion. The judge who hears the cause at final hearing will have the benefit of cross-examination of both witnesses, and can decide whose is the more truthful statement. There are undoubtedly very many closely parallel passages. If the first work were original, it would be entirely clear that the second is a copy; but the first work is itself a compilation, using largely the language of the original books, from which it is taken. Moreover, the very nature of the subject-matter treated of in both series—arithmetic, algebra, geometry, trigonometry, etc.—is such that similarities of definition, explanation, and examples are not so persuasive as they might be were the subject history, literature, art, law, etc. Besides, it is thought that, although Ewald was not at liberty to reproduce so much of his work as had been copyrighted by the employers for whom it was prepared, even by availing of his recollection of the contents of the copyrighted pamphlets, he was not debarred, after his contract terminated, from making a new compilation, nor from using the same original sources of information, nor from availing of such information as to the needs of students and the best methods of getting in mental touch with them as he may have acquired while superintending complainant's school. And it may well be that defendants' information in that regard has tended largely to produce similarity of form and arrangement without directly borrowing from the original pamphlets. As to the respective circulars of information, much of the similarity arises from the circumstance that defendants have closely followed the complainant's system of teaching, which, of course, is not, as a system, protected by the statute. Very much of the matter contained in the defendants' circular is found in the first uncopyrighted

edition of the complainant's; but there are nevertheless many passages which seem to have been conveyed from the copyrighted edition. The answer to the question of fact upon which the case turns is not entirely clear. Even conceding full weight to the suggestions above set forth, some of the resemblances between the two sets of publications are strongly indicative of piracy. But a preliminary injunction, such as is prayed for, would be practically a judgment in advance of hearing, working irreparable damage to defendants; and it is thought best to relegate the question to final hearing. Cross-examination may give so clear a conviction as to the direct evidence as to enable the court to weigh the circumstantial evidence more correctly.

DUFF MFG. CO. v. KALAMAZOO RAILROAD VELOCIPEDE & CAR CO.

(Circuit Court, W. D. Michigan, S. D. August 3, 1898.)

1. PATENTS—PRELIMINARY INJUNCTION.

Where a patent has been sustained by the circuit court of appeals in another circuit after a serious contest, the court will award a preliminary injunction, if infringement is clear, and postpone to the final hearing all questions relating to the validity of the patent, unless there is new evidence so clear and persuasive in character as to leave no fair doubt that such former decision was erroneous, and would have been different if the new matter had been before the court.

2. SAME—JACKING APPARATUS.

The Barrett patents, Nos. 455,993 and 527,102, for a jacking apparatus, construed on motion for preliminary injunction, and held valid and infringed; the former as to claims 1 and 6, and the latter as to claim 19.

This was a suit in equity by the Duff Manufacturing Company against the Kalamazoo Railroad Velocipede & Car Company for alleged infringement of letters patent No. 455,993, granted July 11, 1891, and No. 527,102, granted October 9, 1894, both to Josiah Barrett, for a jacking apparatus. The claims involved are 1 and 6 of the earlier patent, and 19 of the later one. The cause was heard on a motion for preliminary injunction.

Kay & Totten, for complainant.

Howard, Roos & Howard, for defendant.

SEVERENS, District Judge. A motion is made in this case for a preliminary injunction to restrain the defendant from manufacturing or selling a certain kind of lifting jacks, which are alleged to be infringements of the patents of the complainant. It appears from examination that the claims in the complainant's patents here sued on have been the subject of litigation in the federal courts of the Third circuit, where their validity has been sustained by the circuit court and the circuit court of appeals upon records nearly as full as the present in respect to the defense of anticipation. *Manufacturing Co. v. Forgie*, 57 Fed. 748, 78 Fed. 626; *Id.*, 26 C. C. A. 654, 81 Fed. 865. Upon that point the question was quite elaborately considered, and evidently upon a bona fide record and strenuous controversy. The general rule of comity requires this court, in such circumstances, to

award a preliminary injunction, if there is infringement, and postpone to the final hearing the determination of the questions relating to the validity of the patent, unless there is new evidence of such clear and persuasive character as to leave no fair doubt that the former decision was erroneous in point of fact, and would have been different if the new matter had been before the court. *Electric Mfg. Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834.

The defendant here, for the purpose of obviating the consequences of this rule, submits and relies upon the Gard patents, Nos. 116,296 and 123,010, as clear anticipations of the complainant's claims. But, whatever consideration and effect may be given to those patents upon final hearing, I think it cannot be held that they constitute such clear and positive proof of anticipation as to meet the requirement of the present occasion. I think a preliminary injunction should issue as prayed.

OVERWEIGHT COUNTERBALANCE ELEVATOR CO. V. IMPROVED ORDER OF RED MEN'S HALL ASS'N OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 470.

1. PATENTS—PLEADING AND EVIDENCE—ANTICIPATIONS.

There is no error in admitting in evidence a patent of which notice has not been given, under Rev. St. § 4920, where it is introduced, not as an anticipation, but merely to show the prior state of the art, as bearing solely upon the question of infringement.

2. SAME—CONSTRUCTION OF CLAIMS—COMBINATIONS.

When a specific element is not claimed as a device by itself, but all the claims are for a combination, this is, in effect, an admission that such element was old, and was not invented by the patentee.

3. SAME—INFRINGEMENT OF COMBINATION CLAIMS.

If the invention claimed be but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable evasions of the first.

4. SAME—EXPERT EVIDENCE—JURY TRIAL.

Where, in a jury trial, the question is as to whether an element in defendant's machine is the mechanical equivalent of one of the elements in the patented machine, the mere fact that there is testimony by experts that it is such an equivalent does not necessarily require the submission of the case to the jury; for the court is not bound to accept the opinion of experts, but may draw its own conclusions from an inspection of the respective machines or models, and if, in its opinion, the evidence is insufficient to support a verdict for the plaintiff, it may instruct the jury to find for defendant.

5. SAME—ELEVATORS.

The Hinkle patent, No. 257,943, for an improvement in freight and passenger elevators, construed, and *held* not infringed.

In Error to the Circuit Court of the United States for the Northern District of California.

For opinion of circuit court, see 86 Fed. 338.

W. H. H. Hart, S. C. Denson, and H. M. Van Arman, for plaintiff in error.

M. A. Wheaton and I. M. Kalloch, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action at law to recover damages for the alleged infringement of letters patent No. 257,943, issued May 16, 1882, to Philip Hinkle, of San Francisco, Cal., for "an improvement in freight and passenger elevators." The invention claimed by Hinkle is stated in the specifications of the patent, as follows:

"My invention has reference to an arrangement for re-enforcing the lifting power of any given freight or passenger elevator without increasing the working power of the engine or motor that drives it; and it consists in the application of an overbalance counterweight for overbalancing the weight of the cage, and in the interposition between said counterweight and the cage of a self-acting brake, which prevents the superior weight of the counterbalance from being transmitted to the cage and engine power when the engine and cage are standing at rest. The self-acting brake which I use is a worm wheel and worm, which also serves as a gearing for transmitting the power of the engine or motor to the cage and counterweight, all as hereinafter more fully described."

The principle of this double-acting machine is illustrated in the specifications as follows:

"Suppose, for instance, that the cage weighs two hundred pounds and the counterweight four hundred pounds, and suppose that the worm can bear with safety a load of two hundred pounds; I can then raise four hundred pounds in the cage, besides the weight of the cage itself, and the engine will have only two hundred pounds to lift when the cage is raised, and the same amount when the cage is lowered, and the worm gears will at no time be subjected to a strain of more than two hundred pounds, whereas, with a simple balance weight, such as has heretofore been used, no more than the weight of the cage could be used as a counterbalance without having it react to lift the cage as soon as the application of power to the driving shaft ceased. In this latter case I would be able to raise a weight of only two hundred pounds on the cage. It is therefore evident that I am able, by using my overbalance counterweight, to raise twice the amount of weight on a certain size machine as heretofore, or, in other words, it enables me to do the same amount of work with an engine of half the capacity as has been heretofore required. In case it is desired to raise a load of more than ordinary weight, additional weight can be applied to the overbalance to any desired extent, within the limits of strength of the rope and mechanism."

The claims of the patent are:

"(1) In an elevator, the combination, with the hoisting drum, B, of the cage, A, and rope, C, thereof, attached to one side of the drum, B, and the overbalance weight, G, and rope, E, thereof, attached to the opposite side of the drum, B, substantially as set forth. (2) The combination, with the drum, B, and ropes, C and E, attached to the opposite sides thereof, and suspending the cage and overbalance weight, respectively, of the power shaft, J, provided with the worm, as described, and the worm wheel, I, mounted on the same shaft with B, as set forth."

The defendant in error uses what is known as the "Frazer Elevator."

The assignments of error present two questions for the consideration of this court:

1. It is claimed that the court erred in admitting in evidence, against plaintiff's objection, the letters patent No. 185,276, issued December 12, 1876, to W. D. Andrews, for an improvement in hoisting apparatus, which, it is asserted, was claimed by the defendant to be in anticipation of plaintiff's patent, on the ground that no notice had been given to plaintiff that such patent would be offered in evidence, as required by section 4920 of the Revised Statutes. It is true that counsel for the defendant insisted that the Andrews patent was a "full anticipation of the plaintiff's patent." But it was not admitted in evidence for the purpose of proving anticipation. The facts are that upon the cross-examination of Mr. Boone, a witness on behalf of plaintiff, certain questions were asked by defendant's counsel relative to the Andrews patent, which simply tended to show the state of the art, viz. that in the Andrews patent there was a counterpoise for the purpose of balancing the car and its load,—in other words, that there was in the Andrews patent the overbalance weight, which constitutes but one of the elements of the claims in plaintiff's patent. But, in any event, it is clear that no possible injury could have resulted to the plaintiff, even if the Andrews patent had been admitted in evidence, for the reason that the court did not base its instruction to the jury on the ground that plaintiff's patent had been anticipated. The validity of plaintiff's patent was not disputed. The only question considered by the court was whether, upon the facts introduced in evidence, any infringement of plaintiff's patent was shown. When plaintiff closed its case the defendant moved the court to instruct the jury to find a verdict for the defendant "upon the ground that the plaintiff has not proved any infringement," and upon the further ground that plaintiff had not shown any new invention covered by the claims of its patent. The last ground of this motion was expressly overruled by the court, and the motion, upon the first ground, was granted. From the facts shown by the record, it is manifest that the first assignment of error is wholly insufficient to justify a reversal of the case.

2. Did the court err in instructing the jury to find a verdict for the defendant upon the ground that the plaintiff failed to prove any infringement of its patent?

It was claimed by the plaintiff in the court below that there was something new produced in plaintiff's patent, on account of the overbalance counterweight. It was there, as here, argued that the only difference between the Frazer elevator, used by the defendant, and the elevator shown in plaintiff's patent, was that instead of the single drum, worm wheel, and worm shown in plaintiff's patent for transmitting the power and motion from the motor to the cage and counterbalance ropes, the defendant's machine has substituted a different form of a transmitting device. The testimony was mainly directed to this issue, and as to whether the devices or elements used by the defendant's machine were, or not, the mechanical equivalents of those described in the plaintiff's patent. The experts introduced by the plaintiff testified generally that the device in the Frazer elevator, which, it is claimed, was substituted

for the single drum, worm wheel, and worm in plaintiff's patent, was, in effect, the mechanical equivalent of those devices, and that it performed the same duties in substantially the same way. Upon this testimony the plaintiff argues that the only question in the case was one of fact,—whether or not the substituted element of the combination of the Frazer elevator was a mechanical equivalent of the elements shown in plaintiff's patent for performing the same duty; that, the testimony of the experts being to the effect that it was, it became the duty of the court to submit that question of fact to the jury; and that the court therefore erred in instructing the jury to find a verdict for the defendant. To sustain this proposition, counsel cite *Tucker v. Spalding*, 13 Wall. 455; *Keyes v. Grant*, 118 U. S. 36, 6 Sup. Ct. 974; *Humiston v. Wood*, 124 U. S. 12, 8 Sup. Ct. 347; *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833; *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199. It was admitted by the defendant at the trial that there is an overweight counterbalance in the Frazer elevator, and that its office and function are exactly the same as is shown in plaintiff's patent. It would necessarily follow that, if the plaintiff's patent is susceptible of being so construed as being for that device alone, then, of course, it would follow that an infringement was clearly proved, and the judgment should be reversed. But an examination of plaintiff's patent discloses, upon its face, the fact, beyond any possible controversy, that it does not cover the use of an overbalance counterweight as an independent device. Both of its claims are for a combination of elements. The overbalance counterweight is claimed as one mechanical element in a combination with other elements specified in the claims. It certainly cannot consistently be claimed that Hinkle invented the overbalance counterweight. He was introduced as a witness, and upon his cross-examination said:

"A counterbalance to counterpoise against the weight of a cage has been used for years and years,—probably before I was born. All hydraulic elevators used them. I used them, and other elevator builders used them. They were used simply to counterbalance the weight of the cage."

This result ordinarily follows whether there is any testimony upon the point or not. When a specific element is not claimed as a device by itself, it is, in effect, admitted that the particular element is old, and was not invented by the patentee. In 3 Rob. Pat. § 923, it is said:

"A patent claiming a combination only does not protect the elements of which it is composed. If these are old, they are already the property of the public. If they are new inventions of the patentee, his failure to claim them is a concession, so far as this patent is concerned, that they are old."

In the *Corn-Planter Patent*, 23 Wall. 181, 224, the court said:

"Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration—as conclusive, so far as that patent is concerned, as if it were expressed—that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will

speak for itself. So far as the patent in question is concerned, the remaining parts are old or common and public."

See, also, *Rowell v. Lindsay*, 113 U. S. 97, 102, 5 Sup. Ct. 507, and authorities there cited.

Every element of the combination is presumed to be material, and it is the combination of the elements that is new. As was said in *Water-Meter Co. v. Desper*, 101 U. S. 332, 337:

"Our law requires the patentee to specify particularly what he claims to be new, and, if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent."

Plaintiff's patent being for a combination, it necessarily follows that there cannot be any infringement, unless the *Frazer* elevator contains all of the elements of the combination in plaintiff's patent, or their mechanical equivalents. *Norton v. Jensen*, 33 C. C. A. 141, 90 Fed. 415, 429, and authorities there cited.

In *De Loria v. Whitney*, 11 C. C. A. 355, 364, 63 Fed. 611, 620, the court of appeals said:

"The rule, *prima facie*, is that, while the use of equivalents for an element in a combination is not lawful, yet a combination which does not include all the elements does not infringe. There may be exceptions where the nature of the invention is of such a primary or broad character that it is plain some of the elements named are unessential; in other words, where the invention is so broad that the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 310. But there is no reasonable basis for maintaining, either as a matter of law or fact, that the case is outside of the rule applied to ordinary combinations in *Water-Meter Co. v. Desper*, 101 U. S. 332; *Fay v. Cordesman*, 109 U. S. 408, 420, 421, 3 Sup. Ct. 236; *Knapp v. Morss*, 150 U. S. 221, 228, 229, 14 Sup. Ct. 81; and *Dunham v. Manufacturing Co.*, 154 U. S. 103, 14 Sup. Ct. 986."

There is a clear distinction drawn, in all of the authorities which discuss the question, between a pioneer invention and an invention merely of improvements by a combination of mechanical devices. A patentee who is the original inventor of a device or machine—a pioneer in the art—is entitled to a broad and liberal construction of his claims; but an inventor who only claims to be an improver is only entitled to what he claims, and nothing more. In other words, the original inventor of a device or machine has the right to treat as infringers all who make or use devices or machines operating on the same principle, and performing the same functions by analogous means or equivalent combinations. "But if the invention claimed be itself but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first." *McCormick v. Talcott*, 20 How. 402, 405; *Norton v. Jensen*, 33 C. C. A. 141, 90 Fed. 415, 422, 423, and authorities there cited.

Touching the question as to whether the Frazer elevator contained all the elements, or the equivalents thereof, of plaintiff's patent, and the effect of the testimony of the experts in regard thereto, the circuit court, among other things, said:

"Testimony has been introduced here that in defendant's machine it is what they call a 'differential result,' * * * but there has not been a witness who has testified in this case that has stated that the operation in the plaintiff's machine was a differential result. There are no motions there that produce that result; no two forces at work that produce that result. It is simply a drum that is set in motion. It winds in one direction and unwinds in the other; again winds up in the other direction, and unwinds as it was in the first place. The Frazer machine has been introduced in evidence. It is here. It is in evidence in this case, and we have been able to see the operations of that machine and the plaintiff's machine. I take it that it does not make any difference what declarations are made by witnesses; if the two things are different, the court should so hold. My opinion is that in this case there is nothing for the jury to decide, and, if it did decide that that was produced by the same means of hoisting in the plaintiff's machine as it was by the defendant's machine, that I ought to set aside a verdict of that kind. It is patent to me they are different. They are not the same means. It is no use to talk about the other parts of the machine, because, as I say, they are admitted to be old. It is only the combination that is new, and, if there is no equivalent used in the plaintiff's machine for every element of that combination, there is no infringement."

Reading the plaintiff's patent in the light of the conditions and usages prevailing, at the time of its inception and issuance, in the art to which the invention relates, and upon examination of the models of the respective machines exhibited to the court, we are of opinion that the conclusions arrived at by the court are correct. The motive power of the two machines is radically different, in their construction and mode of operation. The elements mentioned in the claims of plaintiff's patent are not all found in the Frazer elevator. The plaintiff's elevator operates with a single motor and with a worm gear. The Frazer elevator has no worm gear, and is so constructed that it could not be operated either with a worm gear or with a single motor. The plaintiff's elevator has a drum, around which a rope is wound and unwound. The Frazer elevator has no such drum. In the plaintiff's elevator the drum which transmits the power from the driving motor turns in one direction to raise the cage, and must reverse and turn in the opposite direction to lower the cage. In the Frazer elevator there is no drum or pulley, transmitting the power from the motors, that turns in one direction to raise the cage, and then reverses and turns in another direction to lower the cage. In the light of these and other different mechanisms, which need not be stated, we are of opinion that, notwithstanding the general opinions and conclusions expressed by the expert witnesses, the plaintiff's patent is not infringed by the use of the Frazer elevator.

The court certainly has the unquestioned right to draw its own conclusions from an exhibition and inspection of the respective machines, or models thereof, as well as from the opinions of expert witnesses. It is not bound to accept such testimony as conclusive. *The Conqueror*, 166 U. S. 111, 131, 17 Sup. Ct. 510. It considers the facts upon which the opinions of the witnesses are based, and determines

from all the evidence in the case whether the conclusions given by the witnesses are sound and substantial. The value of expert testimony generally depends upon the facts stated as a reason for their opinions and conclusions. *Green v. Terwilliger*, 56 Fed. 384, 394; 1 Tayl. Ev. § 58. More weight is given to the testimony of a witness based upon facts within his own knowledge and experience than to the testimony of a witness which is "largely the assertion of a theory." *Béné v. Jeantet*, 129 U. S. 683, 688, 9 Sup. Ct. 428. In 3 Rob. Pat. § 1012, the author, in discussing this subject, says:

"That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges, and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. * * * Their statements of fact are simply to be weighed, like those of all other witnesses, by their ability and disposition to disclose the truth; and their opinions are to be followed when, in the judgment of the jury, they are supported by the facts from which they are deduced."

See Walk. Pat. (2d Ed.) § 498.

The law is now well settled that the trial court not only has the power, but it is its duty, where the evidence is insufficient to support a verdict in favor of the plaintiff, to instruct the jury to find a verdict in favor of the defendant. This rule applies to patent as well as other cases, and is as applicable to the question of infringement as to any other material or controlling question involved in the case. In 3 Rob. Pat. § 1014, it is said:

"If an inspection of the invention practiced by the defendant, in connection with the one described and claimed in the patent, satisfies the court that there has been no infringement, * * * there is no occasion for extraneous evidence, and the court should direct the jury to return a verdict for the defendant without further inquiry. * * * Neither a court nor a jury are permitted to follow the guidance of any expert, in defiance of the results of practical operation and experiment, nor against conclusions derived by necessary inferences from established facts." Walk. Pat. (2d Ed.) § 536; *Fond du Lac Co. v. May*, 137 U. S. 395, 403, 11 Sup. Ct. 98; *Railway Co. v. Rowley*, 155 U. S. 621, 630, 15 Sup. Ct. 224; *Black Diamond Coal-Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 618, 15 Sup. Ct. 482; *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, 617; *Cramer v. Fry*, 68 Fed. 201, 212; *Chapman v. Lumber Co.*, 32 C. C. A. 402, 89 Fed. 903, 905, and authorities there cited.

This principle is recognized in *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, and is not denied in any of the other cases cited and relied upon by plaintiff. The judgment of the circuit court is affirmed, with costs.

LAPPIN BRAKE-SHOE CO. v. CORNING BRAKE-SHOE CO.

(Circuit Court, N. D. New York. April 12, 1899.)

1. PATENTS—INVENTION—BRAKE SHOES.

There is no patentable invention in chill-hardening the extremities of a brake shoe through the entire mass of the metal, instead of through only a fractional part thereof.

2. SAME—CONSTRUCTION OF CLAIMS.

A claim which is simply for a brake shoe having the metal at its extremities chill-hardened through its entire mass, instead of only a fractional part thereof, cannot, for the purpose of sustaining it, have imported into it, by construction, the particular method by which the patentee produces the chill-hardening.

3. SAME—BRAKE SHOES.

The Charles F. Wohlfarth patent, No. 543,072, for an improvement in brake shoes, is void for want of invention.

This was a suit in equity by the Lappin Brake-Shoe Company against the Corning Brake-Shoe Company for alleged infringement of patent No. 543,072, issued on July 23, 1895, to Charles F. Wohlfarth, for an improvement in brake shoes. The cause was heard on demurrer to the bill.

Joseph D. Gallagher, for complainant.

Edmund Wetmore, for defendant.

COXE, J. The bill makes profert of the patent, which is for an improvement in brake shoes. The claim is for "a brake shoe having the metal at its extremities chill-hardened through the entire mass, in contradistinction to being hardened only through a fractional portion thereof: whereby at all times during the life of the shoe, the effects of abrasion are resisted by hard metal." This is a claim for the device—qua a brake shoe—without the slightest reference to the method of producing it. The specification states that the identical article covered by the claim has been produced before except that the chill, at the ends, has extended part way instead of the entire distance from surface to back. The sole claim to invention must rest, therefore, upon the fact that the patentee made the chilled zone deeper than his predecessors. At the argument it was conceded that a shoe having chilled metal at its extremities extending from surface to back, no matter how the chill was produced, would anticipate the claim if found in the prior art, and that such a shoe if made now would infringe. In other words, the claim is for a brake shoe with a thicker sole at the ends than had been used before. It is broad enough to cover a brake shoe chilled at its ends in any manner and by any process, whether the chill blocks are applied at the bearing surface, at the back, at the end, at the sides, or in all these ways combined. It is not pretended that it involved invention to use the old chill block at the back of the shoe which was formerly applied to its surface or to use it at the end, or at the sides of the shoe. All this would be the most simple mechanical work. And yet a shoe chilled at its ends by any of these methods would be as much within the claim as if the blocks shown

in the drawings were used. Such a shoe would have the metal at its ends chill-hardened through the entire mass—the claim requires nothing more. That the claim is invalid, unless the method of producing the chill, as shown and described, is imported into it is hardly disputed. It is insisted, however, that this may be done and should be done. The claim would then read as follows:

“A brake shoe having the metal at its extremities chill-hardened through the entire mass by means of the chill blocks G and H adapted to inclose the shoe at the ends on all sides except the top,” etc.

It is argued that such a chill box produces chill lines running both horizontally and vertically, thus preventing chill cracks and intensifying the chill. Assuming that this contention is susceptible of proof the difficulty is that the claim is not for a method but for a shoe. So far as the proposition now under discussion is concerned, it is as if the specification were absolutely silent on the subject of chill blocks. The claim permits the use of any chill blocks. Where the language of a claim is clear and simple there is no room for construction. The court is convinced that if the patentee has made an invention he has failed to claim it. No patentable novelty can be found in the claim as stated in the patent. The patentee might have claimed a process, he might have claimed a novel chill block; but he has done neither. The court is, therefore, prohibited from giving him a patent limited to an article produced by means of an alleged ingenious device which is not even mentioned in the claim. Were the rule otherwise it would be a dangerous menace to public rights which might be destroyed, not by the patent emanating from the patent office, but by a different patent subsequently granted by the court. Even were there more doubt as to the correctness of this conclusion the court would still be of the opinion that it is for the interest of both parties that the question should be definitely settled before they are required to incur the large expense of preparing for a final hearing. The demurrer is allowed.

BADISCHE ANILIN & SODA FABRIK v. KALLE et al.

(Circuit Court, S. D. New York. May 8, 1899.)

1. PATENTS—PRIOR USE IN FOREIGN COUNTRY.

Under Rev. St. § 4923, mere prior use in a foreign country does not defeat a patent where the patentee is ignorant thereof, and believes himself to be the first inventor.

2. SAME—ANTICIPATION—PRIOR PUBLICATIONS.

A description which is insufficient to support a patent cannot be relied upon as an anticipation. Unless the prior publication describes the invention in such full, clear, and intelligible terms as to enable persons skilled in the art to comprehend it, and reproduce the process or article claimed, without assistance from the patent, such publication is insufficient as an anticipation.

3. SAME—EXTRINSIC EVIDENCE.

Prior patents and publications alleged to anticipate must be taken in the meaning disclosed upon their face, and extrinsic evidence is not admissible to reconstruct them, as by showing that a word having a sensible meaning in the context was erroneously used for another word.

4. SAME—PATENTABLE PRODUCTS.

If a product be patentable new and useful, the patent should be sustained, even though the article may be produced by a process substantially like those used to produce somewhat similar results in the prior art.

5. SAME—INVENTION.

The discovery that safranine-azo-naphthol, a coal-tar product, which was long believed to be insoluble, and valueless, was soluble by prolonged washing, so as to produce a cheap and valuable substitute for vegetable indigo, *held* to involve patentable invention.

6. SAME—DECISIONS BY FOREIGN COURTS.

A decision by the courts of a foreign country that the discovery of a certain process involved the exercise of patentable invention, while not binding on the courts of this country, is yet entitled to weight as the opinions of trained experts in the country of the inventor where the particular art was best understood.

7. SAME—BLUE COLORING MATTER.

The Julius patent, No. 524,254, for improvements in the manufacture of blue coloring matter, whereby a new dyestuff is prepared from safranine-azo-naphthol, *held* valid and infringed.

Livingston Gifford, for complainant.

E. N. Dickerson, for defendants.

COXE, District Judge. This is an equity suit for the infringement of letters patent, No. 524,254, granted August 7, 1894, to the complainant as assignee of Paul Julius, of Ludwigshafen, Germany, for improvements in the manufacture of blue coloring matter. The parts of the specification relied on by the complainant are as follows:

"The ultimate object of my invention consists in a new lake that may be produced as a pigment or upon fiber. It resembles vegetable indigo in color and fastness against washing and light so nearly as to form an artificial substitute for the same such as has been sought for many years by chemists. In arriving at this new lake I have made certain very essential intermediate discoveries or inventions which I also desire to secure by this patent. Thus I have discovered and recognized that a certain class of substances—(safranine-azo-naphthol bodies)—known as 'insoluble precipitates' and regarded as worthless bodies, can be rendered soluble, and then constitute a most valuable dye, and I have proved this discovery by rendering them soluble (as hereinafter further explained) and have hereby enriched the dyeing industry with a cheap dye of most excellent properties, the application of which is founded on transforming it into the above said lake. * * * The compounds resulting from the combination of the safranine-diazo compounds with the unsulphonated naphthols have been mentioned in chemical literature as insoluble precipitates. They could not be applied in the dyeing industry and have since been disregarded and fallen into the rank of useless bodies and were not included in the said German patent. * * * Make a one per cent. solution of safranine, taking one molecular proportion of the safranine used: say, about seven (7) parts of safranine T, or about six and three-fifths (6.6) parts of pheno-safranine, or about seven and seven-tenths (7.7) parts of dimethyl safranine. Diazotize by adding first a solution of sodium nitrite containing about one and four-tenths (1.4) parts of that salt, (one molecular proportion) and then twenty-three (23) parts of hydrochloric acid containing about thirty-three per cent. real acid (HCl). The solution during these operations must be kept cold with ice and stirred. Next run the mixture into an ice-cold solution of about three (3) parts of naphthol—either alpha or beta—(one molecular proportion) in about one hundred and sixty (160) parts of water and twenty-five (25) parts of caustic soda solution, containing about thirty-five per cent. of sodium hydrate (NaOH), stir the mixture thoroughly for several hours, then filter off the blackish violet precipitate of safranine-azo-naphthol thus formed. Now wash well with cold water, prolonging this until the liquor running off is deeply colored and shows that a soluble product has resulted. The paste then remaining

on the filter can be used in dyeing as such or after making up to a standard strength. Or without washing so thoroughly, my new dyestuff can also be prepared in the form of paste, (in which form it best meets the requirements of dyers) as follows: Stir the azo body, obtained as above described, with a little water and mix gradually with hydrochloric acid, until a test portion of the paste obtained is completely soluble in hot water. To prepare the new dyestuff from the quantities of safranin described in the above example, about two and one-fifth (2.2) parts of hydrochloric acid, containing about thirty-three per cent. of real hydrochloric acid (HCl) may be used at this stage of the process. The paste so obtained contains my new dyestuff in the form of a salt and can be diluted or made up to a standard strength. Instead of hydrochloric acid other acids may be used, such as acetic acid, sulphuric, nitric, oxalic, and tartaric acids, also salts which act as acids; but of these hydrochloric and acetic acids give the best results. * * * My new dyestuff, however prepared, is a soluble safranin-azo-naphthol body. It occurs in the dry form and in paste, and forms a dark-colored powder with a slight metallic sheen giving a violet-black paste. It is soluble in both hot and cold water giving violet to blue solutions, insoluble in alkalies, soluble in alcohol and practically insoluble or very slightly soluble in benzene. The dye can readily be recognized by its behavior on treatment with reducing agents, for safranin and amido-naphthol occur in the reduction products. The dyestuffs which I desire to claim generically herein may be recognized as follows: If reduced with stannous chloride and hydrochloric acid, amido-naphthol is produced and can be recognized in any suitable well-known way. On careful and moderate reduction with zinc dust and acetic acid the safranin used in the production is regenerated and shows the characteristic reactions of the members of the safranin series. * * *

"I will now proceed to describe the new lake and the manner of obtaining it.

"Example a.—Dissolve about twenty parts of my new dyestuff in the form of powder (or the corresponding quantity of paste) in about two thousand parts of hot water; allow to cool. * * *

"Example b.—To obtain the lake on cotton fiber proceed as follows:—Take the freshly boiled-out goods, pass them six times through a boiling-hot solution of sumac, and then leave them overnight in the liquid. Next wring out and pass about eight or ten times through a solution of antimony salt; wash well and wring out. Now fill the dye vat with the necessary quantity of water and add the amount of aluminium sulphate mentioned below, then enter the goods and after passing them through the liquid once or twice, remove and wring them lightly by stretching. Add about one-eighth of the dye solution through a fine sieve, pass the goods again six times through the solution, then removing them and stretching as before add again one-eighth of the dye solution, subsequently add a quarter of the dye solution and finally the remainder thereof, manipulating in the same way. * * *

"The dyed goods are of a color resembling indigo, possess a degree of fastness to light and washing exceeding that obtainable with the ordinary aniline dyes and comparing advantageously with indigo itself. The coloring matter may be applied so as not to bleed into the white."

The claims in controversy are as follows:

"(1) As an article of manufacture a coloring matter lake resembling indigo in color, which can be obtained by combining a soluble safranin-azo-naphthol body with a tanno-metallic mordant and which is very fast to light and washing; upon suitable reduction it shows the reactions of safranin, upon treatment with caustic soda it shows the reactions of tannin and it contains a metal, substantially as described.

"(2) As an article of manufacture, the herein-described blue dyestuff which can be obtained from a safranin-azo-naphthol and which may be recognized by the following characteristics: It is soluble in water, upon reduction with stannous chloride and hydrochloric acid, amido-naphthol is produced and upon reduction with zinc dust and acetic acid a safranin is produced, substantially as described."

"(4) The specific blue coloring matter (obtainable by rendering the safranine-azo-beta-naphthol hereinbefore mentioned soluble in water) which possesses the following characteristics: It is soluble in water, gives a blackish-green solution in sulphuric acid and on reduction gives alpha-amido-beta-naphthol and safranine proper, all substantially as described."

The defenses are that the patent is void for lack of invention, that it is anticipated by the prior art and that, properly construed, the defendants do not infringe.

The object of the inventor was to produce an artificial substitute for vegetable indigo which should resemble indigo in color and durability and at the same time be cheaper and more easy of manipulation. Prior to the invention safranine-azo-naphthol was believed to be insoluble, owing to the presence of alkali and salts therein, and was consequently regarded as possessing little practical value. The invention consists in rendering this substance soluble in water either by prolonged washing or by mixing gradually with hydrochloric acid, acetic acid or other similar acids or with salts which act as acids. In either event the product is a safranine-azo-naphthol body soluble in both hot and cold water and in alcohol, giving solutions varying in color from violet to blue. When combined with a tanno-metallic mordant this soluble substance produces a coloring matter lake resembling indigo in color and which is very fast to light and washing. Was Julius the first to produce this product? or, to state the question still more narrowly, was he the first to reduce safranine-azo-naphthol to solubility? for upon this discovery the entire invention rests. The de jure date of the invention is January 2, 1892, being the date of the earliest foreign patent. Is the patent anticipated? Section 4886 of the Revised Statutes provides that "any person who has invented or discovered any new and useful * * * manufacture or composition of matter, * * * not known or used by others in this country, and not patented or described in this or any foreign country, before his invention or discovery thereof" may obtain a patent. Section 4923 provides that "whenever it appears that a patentee, at the time of his application for the patent believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country, before his invention or discovery thereof, if it has not been patented or described in a printed publication." As to prior use the law limits the inquiry to this country. A prior use in a foreign country will not defeat the patent. There is no proof that Julius knew of the facts upon which the alleged prior use in Germany is based. The defense of anticipation, therefore, rests upon foreign patents and publications prior to January 2, 1892. Publications appearing since that time cannot be considered by the court.

The burden of proving anticipation rests upon the defendants and every reasonable doubt should be resolved against them. The Barbed-Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450; Coffin v. Ogden, 18 Wall. 120. Unless the prior publication describes the invention in such a full, clear and intelligible manner as to enable persons skilled in the art to comprehend it and reproduce the process or article claimed, without assistance from the patent, the publication

is insufficient as an anticipation. *Cohn v. Corset Co.*, 93 U. S. 366, 370; *Seymour v. Osborne*, 11 Wall. 516, 555; *Tilghman v. Proctor*, 102 U. S. 707, 711; *Powder Co. v. Parker*, 16 Blatchf. 295, Fed. Cas. No. 625; *Bowers v. Bridge Co.*, 91 Fed. 381, 408.

In *Tyler v. Boston*, 7 Wall. 327, the patent contained the following statement:

"The exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined by experiment." The court says: "A discovery of a new substance by means of chemical combinations of known materials is empirical and discovered by experiment. Where a patent is claimed for such a discovery it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out 'by experiment.'"

See, also, *Wood v. Underhill*, 5 How. 1; *Grant v. Raymond*, 6 Pet. 218; *Consolidated Electric Light Co. v. McKeesport Light Co.*, 16 Sup. Ct. 75.

A description which is insufficient to support a patent can hardly be relied on as an anticipation. In each instance the same precision is required. If the alleged anticipating matter leaves the description incomplete requiring extrinsic investigation to make it complete it fails as an anticipation. The principal anticipation, at least the one that has provoked the widest discussion, is founded upon an article which appeared in a French publication, the *Moniteur Scientifique*, in September, 1886, being, in fact, a reproduction of the application of Beyer & Kegel for a German patent for the "process for the preparation of blue coloring matters by the combination of diazo-safranines with the phenols." The important parts of the specification are as follows:

"Preparations of blue coloring matters by the combination of diazo-compounds of safranines, obtained by the process described below, with the phenols and their sulfo-acids.

"Description.

"The new coloring matters which we have discovered are distinguished by their beautiful indigo-blue shade. With a view of manufacturing these blues we have studied up to date the following safranines:

"A. Safranines which are obtained by oxidation, etc. * * *

"B. Safranines formed in the same reaction by substituting, etc. * * *

"Example 1. 32 kilograms of pheno-safranine are dissolved in a sufficient quantity of water and 25 kilograms of hydrochloric acid are added. On adding 7 kilograms of nitrite of sodium, the diazo compound of pheno-safranine forms, which is made to run into a liquor containing 22 kilograms of beta-naphthol. The coloring matter forms at once. * * *

"Quite analogous results are obtained with phenol, resorcine, alpha-naphthol or the other naphthol-mono-di, or trisulfo acids.

"The following table shows the shades of color given in dyeing with the new coloring matters prepared from the constituents as given:

"Diazo-safranine with:

"Molecule phenol: bordeaux, insoluble in water.

" resorcin: violet, insoluble in water.

" alpha-naphthol: blue, insoluble in water.

" beta-naphthol: blue violet, insoluble in water."

Here is direct statement that the product produced by following the Beyer & Kegel process is "insoluble in water." When the claim of invention rests solely upon the discovery of solubility it is not easy to perceive upon what principle of law or rule of logic an insoluble

product can be said to anticipate a soluble product. In 1892 Julius produced a soluble dyestuff, its chief merit being that it is soluble. In 1886 Beyer & Kegel said they had invented a similar insoluble dyestuff. It is now asserted by the defendants that this published statement voids the complainant's patent; that one skilled in the art, seeking in 1886 to produce a soluble product, would have learned how to do this from a recipe which states on its face that it produced an insoluble product. But this is not the only vulnerable feature of the Beyer & Kegel specification. It says the diazo-compound of pheno-safranine "is made to run into a liquor containing 22 kilograms of beta-naphthol." The specification is silent as to how this liquor is prepared and what are its ingredients. It is a liquor and it contains the beta-naphthol. This is all; nothing else is told. Caustic soda is not mentioned, and yet, it is substantially conceded that solubility or insolubility will result, depending upon the proportion of caustic soda employed, and that this fact was unknown at the time. We have then a prior publication which purports to give a formula for producing an insoluble compound and which omits one of the most important steps, leaving a blank where proportions should be stated with accuracy. Can it be that such a publication anticipates a patent for a soluble product which gives with minute detail all the steps necessary to accomplish that result? Is this *Moniteur* publication the concise and accurate statement which the law requires? Can it be said that it gives to the skilled chemist that precise information which will enable him, without experiment, to produce the dyestuff of the Julius patent? Would a chemist to-day, who knows nothing of the art except the *Moniteur* article and the publications which preceded it, produce a product which infringes the claims of the Julius patent? To ask these questions is to answer them. The court is familiar with no authority deciding that a patent can be overthrown by a document, which, if its statements be true, is, concededly, not an anticipation; and which becomes valuable as a defense only after its falsity is established.

The suggestion is thrown out by one of the witnesses that the statement that the Beyer & Kegel compound is "insoluble in water" is "a mistake, whether a printer's error or error of the composer I cannot say." It is contended that the statement should have been "soluble in water." There is no proof to sustain this contention, but, assuming it to be true, it is wholly beside the mark. If prior patents and publications can be reconstructed by extrinsic evidence to fit the exigencies of the case, the inquiry will no longer be confined to what the publication communicates to the public, but it will be transferred to an endeavor to ascertain what its author intended to communicate. The question is, what does the prior publication say? Not what it might have said or what it should have said. The court has simply to consider what the publication in question has contributed to the art. If it fails to show the invention which it is said to anticipate, the contention that its author knew enough to write an anticipation and intended to do so is grotesquely irrelevant. Were such a rule established the law upon this subject would be thrown into inextricable confusion. The court is inclined to the opinion that

the *Moniteur* publication is entirely consistent in its statements, needs no interpretation and is, upon its face, insufficient as an anticipation.

But it is argued that if the blank in its recipe, which undoubtedly exists, were filled by an appeal to the prior art the resulting product would be the product of the Julius patent. In other words, that a skilled chemist, in 1886, after reading the recipe, would know how to fill the blank and, with the missing link thus supplied, a soluble product would certainly be obtained. That there are many cases where an omitted step is so obvious that it may be supplied from the existing art, may well be admitted, but, for the reasons heretofore stated, it is, at least, doubtful whether this is such a case. Here the omitted step is of the essence of the invention and the art is that of a foreign country, where prior use will not defeat a patent of the United States. It would seem, then, that oral testimony intended to make good so important an omission is within the mischief of the law making the knowledge of foreigners, other than the patentee, inadmissible upon this question. Assuming the inquiry to be pertinent, how then stands the case? The chemical side of this controversy has taken an exceedingly wide range and has ramified into numberless collateral issues some of which have only a remote bearing upon the principal questions involved. The contending theories have been elaborated with a wealth of technical learning which has not failed to excite the admiration of the court. To attempt to follow the excursions of counsel through the bewildering mazes of the testimony will serve no useful purpose. A discussion of all the propositions argued would extend this opinion beyond all reasonable limits even if the court possessed the technical learning necessary to follow these labyrinthian pathways to the end. It is generally true, even in the most complicated cases, that after the testimony has passed through the analysis of a fierce judicial investigation the "precipitate" discloses a few plain, simple and controlling propositions. The duty of the court will be accomplished if the salient facts are discovered and the conclusions therefrom are correctly drawn. Unquestionably the information contained in the Holliday English patent of 1881 furnished the most specific directions, to be found in the prior art, for filling the *Moniteur* blank. Dr. Schweitzer, an expert witness called by the defendants, testifies:

"The English Holliday patent is the only one giving kind or quantity of alkali to be used in the preparation of safranine-azo-naphthol. This Holliday patent is the first printed publication on the subject, the subsequent publications do not mention the quantities or qualities any more, because these details were unnecessary for everybody skilled in the art at the date of those publications."

The patent says:

"I prepare first a solution of, say, 2 parts of naphthol. 1 part of caustic soda and 100 parts of water."

If a chemist, in 1886, had supplemented the *Moniteur* directions with the Holliday recipe the result would have been an insoluble compound, precisely as the *Moniteur* states. This proposition seems to

be conceded on all hands. Dr. Schweitzer, after examining a number of patents and publications says:

"It is seen from these publications that the average amount of alkali to be taken is about 50 per cent."

This is the same proportion stated by Holliday and leads to the same result—an insoluble product. It is doubtful if this testimony was given for the purpose of establishing an existing rule upon this subject. The defendants strenuously insist that the witness had no such intention and that a rule based upon this average is incorrect and was never adopted by the witness. In practice the defendants insist that Dr. Schweitzer adopted a very different rule, using the theoretical amount of caustic soda necessary to form the naphthol-sodium salt, and carbonate of soda to neutralize an excess of acid. It cannot be denied, however, that a chemist might have adopted such an average in establishing the amount of alkali to be taken rather than attempt a separate experiment in each instance. In any view it is important as showing the wide divergence of opinion among skilled chemists existing at the time. The Muhlhauser-Griess rule when interpreted by the complainant produces an insoluble product if used to fill up the *Moniteur* blank. If interpreted as the defendants insist it should be, it produces the product of the Julius patent. This is also true of several other recipes relied on by the defendants. In short, the prior art was in such a state of confusion and uncertainty so far as safranine-azo-naphthol is concerned that if a chemist had arrived at the correct proportion of caustic soda to produce solubility it would have been rather from chance than from any definite and reliable teaching of the art. The probabilities were in favor of his producing an insoluble product.

The proof leads to the conclusion that although some chemists might have used and, perhaps, did use the correct quantity of alkali, there was no definite and certain guide on the subject. Certainly it has not been established that such a guide existed. It is hardly an exaggeration to assert that had the chemists of 1886 attempted separately, and without a consensus, to write the proper proportions into the *Moniteur* blank there would have been almost as many recipes as there were chemists. If there were any well-known and generally recognized rule this record of over 2,000 printed pages would have been an impossibility. An almost acrimonious contest between learned experts in which after weeks and months of weary disputation they leave the field covered with dead and dying theories, is hardly consistent with the proposition that the rule in controversy was so universally recognized that no disagreement could have existed regarding it. The burden of establishing the existence of the rule was on the defendants. They have not sustained this burden. The view most favorable to them is that the subject is left in confusion and doubt. The existence of doubt defeats anticipation.

The foregoing considerations make it unnecessary to discuss in detail the other anticipatory references. Many of them are mere skeletons, the information contained is fragmentary and, in each instance, falls far short of the clear and precise statement required by the law. Before discussing the question of invention it is well that the law ap-

plicable to product and process patents should be kept in view. The supreme court say:

"A machine may be new, and the product or manufacture proceeding from it may be old. In that case the former would be patentable and the latter not. The machine may be substantially old and the product new. In that event the latter, and not the former, would be patentable. Both may be new, or both may be old. In the former case, both would be patentable; in the latter neither. The same remarks apply to processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty, or the opposite. The patentability, or the issuing of a patent as to one, in no wise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts." *Rubber Co. v. Goodyear*, 9 Wall. 788, 796.

If one discovers a new and useful product he is entitled to the full benefit thereof no matter how it may be produced. *Merrill v. Yeomans*, 94 U. S. 568. A patent for a product must produce, by the process it describes, that article and no other. If the article be old it cannot be the subject of a patent even though made artificially for the first time. "Every patent for a product or composition of matter must identify it so that it can be recognized aside from the description of the process for making it, or else nothing can be held to infringe the patent which is not made by that process." *Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 310, 4 Sup. Ct. 455, 464. A product is not patentable upon the ground that an already known article is made more perfectly by the new process or machine than it was before. If this rule were otherwise the product of each successive machine would be patentable. Improvements in degree or quality are not the subject of a patent. *Wooster v. Calhoun*, 11 Blatchf. 215, Fed. Cas. No. 18,035. "A new process is usually the result of discovery, a machine of invention." *Corning v. Burden*, 15 How. 252. "A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. Any change in form from a previous condition may render the article new in commerce. * * * When certain properties are known to belong generally to classes of articles, there can be no invention in putting a new species of the class in a condition for the development of its properties similar to that in which other species of the same class have been placed for similar development." *Glue Co. v. Upton*, 97 U. S. 3.

The claims in question cover a new article of manufacture—a product as distinguished from a process. This product may, says the patent, be produced by either of two alternative and equivalent processes, namely, by treating safranine-azo-naphthol with an acid or by washing it with cold water. The third claim of the patent is designed to cover the acid process. The washing process is not claimed as new. Applying the law as above stated to the case in hand the court understands the rule to be that if the coloring matter of the claims be patentably new and useful the patent should be sustained even though this coloring matter were produced by a process substantially like those used to produce somewhat similar results in the prior art. It was thought at the argument, and subsequent examination has confirmed the impression, that the most vulnerable part of

the complainant's patent is the part which deals with the washing process. If it did not involve discovery so to treat the body on the filter the patent cannot be upheld. On the other hand, if the use of this process can be sustained as patentable there can be little difficulty in upholding the alternative acid process, which is much more complicated and abstruse. The washing-out process is given preference by the patentee and can be readily comprehended by a layman. No special chemical knowledge is necessary. What is the washing-out process? After describing the mixture on the filter the patentee proceeds as follows: "Now wash well with cold water, prolonging this until the liquor running off is deeply colored and shows that a soluble product has resulted." This is all there is of the process as stated in the specification. The body thus washed was insoluble because it was impure. It contained alkali and salts and their presence prevented solubility. Their removal by washing made the body soluble. At least this is what the patent implies. The argument for the defendants may be summarized as follows: Julius did not invent safranine-azo-naphthol. He did not invent soluble safranine-azo-naphthol. The substance, even on the statements of the patent alone, existed in the prior art. This solubility was not recognized because the body was admixed with salts and alkali. The moment these were washed away the soluble body, which was at all times present, was revealed. The patentee did not create a soluble dyestuff, but he found it by the same method that a miner finds the grains of gold by washing away the mineral substances which hide them. Assuming that Julius was the first to subject safranine-azo-naphthol to washing, this did not involve invention. One is dealing with a substance supposed to be insoluble; he becomes curious to know whether it will dissolve in water; what is the first thought to enter his mind? Whether he be chemist or lawyer he will conclude that the best way to ascertain whether it will dissolve in water is to put it in water and await the result. Should it prove slow in dissolving, naturally, he will stir it as he stirs the sugar in his coffee when he wishes to accelerate the dissolving process. The fact that the idea of making a soluble dyestuff from safranine-azo-naphthol first occurred to the patentee does not aid him. A mere abstract idea is not patentable irrespective of the means described for carrying it into execution. If when the question arises the answer is self-evident there can be no patentable novelty in carrying out the idea. Given a new material whose characteristics are not definitely known, should the following questions suggest themselves to any person interested in ascertaining its properties, would not the following answers simultaneously occur to him? Will it melt? Subject it to heat. Will it float? Put it in water. Is it elastic? Stretch it. Is it soluble? Place it in fluid. If the washing process would occur to the ordinary dyer how much more would it occur to the learned chemist accustomed to the almost daily use of similar methods to produce similar results. The patent is addressed to a comparatively small body of men—those familiar with the dyeing art—and particularly to that select band of chemists who have made coal-tar colors a specialty. Dr. Julius is an accomplished chemist and so are most of the witnesses. The

question of invention must be considered from the point of view of these men. That which seems to the ordinary layman to involve the exercise of extraordinary mental power is to these men nothing but the everyday work of laboratory routine. When it became desirable to ascertain whether the body was or was not soluble the method of doing this which first occurred to the patentee was to wash it. The moment the necessity for the information was presented to his mind he knew exactly how to obtain it. He did not have to construct any new implements to make the test, they were ready at his hand. He knew, because he says so in the specification, that the body was insoluble because of the presence of alkali and salts. He knew, because he says so in the specification, that if he destroyed the influence of these impurities which prevented solution he would, or, at least, that he might, obtain the body in a soluble form. He knew that in order to find out the properties of the body he must have the body pure and that no simpler method was known to chemistry for producing a pure body than to wash away the impurities. In short, it is said that Julius is not entitled to a patent for discovering, by a well-known process, that a soluble body is soluble.

The court has thus endeavored to state in a concise form the argument against patentability as strongly and fairly for the defendants as the proof permits. Nothing has been omitted which, in the opinion of the court, tends to add to the force of the defendants' contention. It was thought, in view of the great mass of testimony and the elaborate and conflicting arguments and opinions presented, that the most satisfactory way of analyzing and testing the strength of the defendants' position was to reduce, briefly, their propositions to writing and compare them with the complainant's arguments similarly stated.

The question thus presented is an interesting one and for some time after the case was taken up for decision the court was in doubt as to what the answer should be. That the defendants' contention is plausible and cogent cannot be gainsaid, but the more the record has been studied—the investigation involving months of labor—the more settled has become the conviction that the defendants have not succeeded in voiding the patent and that the question must be answered in favor of the complainant. The reasons for this conclusion may be stated as follows: It is thought that an impartial mind after reading the record must reach the conclusion that the most favorable view for the defendants is that the question is involved in doubt. If there were no preponderance in favor of the complainant, if the scales of proof hung with even balance, it would still be the duty of the court to resolve the doubt in favor of the complainant. The presumption deducible from the patent itself is that it is valid. He who asserts to the contrary must prove it; the burden is on him. The defendants have not done this; they have not shown by proof which outweighs the complainant's proof that there is no patentable novelty in the process under consideration. Again, there is a distinction between invention and discovery which must not be lost sight of in dealing with process patents. Of course, a discovery to be patentable must have the attributes of an invention, but the mental

operation is somewhat different in one who invents a machine and one who discovers a process. The basic truth upon which rests a process may come to the discoverer suddenly and unexpectedly. He may not understand the law upon which the process operates, and he may be unable to explain the cause of certain phenomena, nevertheless, if he be the first to give to the world as a result of his method a new and valuable article of manufacture he is entitled to protection. The laws of nature are all old, but as men of genius become more and more familiar with their characteristics they are able to utilize these laws and make them tributary to the progress of mankind. Electricity, for instance, is as ancient as the universe, and yet it is only within the present century, almost within the present generation, that the world has been lighted up and distant peoples have been brought together by the discovery of its marvelous properties. Should an electrician, by well-known electrical methods, produce some new product which revolutionizes the art, patentability will hardly be denied him because electricity and the material on which it operated were both old. For example, should some material be discovered which solves the storage battery problem, it is hardly to be presumed that he who confers this benefit upon mankind will be denied a patent, because the material on which he operated was well known and his process had been used before on other materials to produce different results. And so a chemist who first discovers that a substance believed to be useless can, by a simple process, be transformed into an article of great value, should not be defeated by a similar line of attack. As well might it be said that the astronomer who discovers a new planet should be robbed of the credit of his achievement, because his telescope was old and other astronomers had used it to examine Saturn and Mars. The mere selection of a material, and this, too, by a process of exclusion, has been deemed sufficient to sustain patentability, and the patent law abounds in instances in which patents have been upheld where the inventor stumbled upon the discovery in total oblivion of the reason why effect followed cause.

In the case at bar it is not, then, material to know why certain results are produced or to prove that the inventor knew the reason therefor. It is enough that he has produced an entirely new and useful product by a method which, though abstractly old, had never been applied to the material in question which was supposed to be incapable of such treatment. Dr. Julius was the first to produce the blue dye-stuff of the claims. The court does not overlook the fact that the defendants insist that there was a prior use by Beyer & Kegel in Germany, but, for the reasons heretofore stated, a discussion of this question is not germane to the issue. In the eye of the patent law of this country Julius was the first to produce "indoin blue." This fact is overwhelmingly proved and must be taken as established. It is a fact of immense weight in determining the question of invention. Indoin blue was a success from the start and its sale has steadily increased. To produce a cheap, artificial, soluble substitute for indigo, possessing many of its advantages and in some respects superior to indigo, was surely no mean achievement. Learned chemists in Germany and England, and probably in other countries, had long been

experimenting to produce a result the importance of which was universally recognized, but Julius was the first to succeed. Indoin blue is now one of the leading dyes of commerce. Safranin-azo-naphthol was believed to be useless as a water-soluble dyestuff. So general was this belief that it is not surprising that experiments were few. A conservative and timid chemist would have accepted the prevailing opinion as conclusive and bent his energies in other directions. It required a man of boldness and originality to break through existing prejudices, strike out on new lines and make a discovery which his reading taught him to be impossible. The fallacy of the defendants' argument seems to be that it assumes that the chemist knew that the body upon which he intended to operate was or might be soluble. Assuming the very fact in controversy, of course, there is no invention, but the value of the discovery of Julius is based upon the proposition that neither he nor any one else knew the fact of solubility, but on the contrary the belief was universal that the body was worthless, because insoluble. It was because Julius found out that by persistent washing, a substance, as worthless as gravel or sand, could be converted into a dyestuff of inestimable value, that he made an invention of decided merit. Of course, if what Julius knew was known before and if what he did had been done before the pretense of invention would be absurd. Invention is predicated of the incontrovertible fact that solubility was unknown and that the body had never before been subjected to the Julius processes. This position is clearly and fairly explained by the leading expert witness for the complainant. He says:

"The novelty of the patent consists in securing solubility in a body previously believed to be insoluble by the application to such body in a thorough manner of the well-known process of washing. And, in that sense, there is nothing new in such process of washing, the novelty being in its application to this body, and in the unexpected result of producing solubility, or a soluble product."

Invention was sustained by the German patent office in the contest with Farbenfabriken. The decision is as follows:

"The production of valuable dyestuffs from the hardly usable safranin-azo-naphthol by converting the latter into salts soluble in water, which have hitherto not been described, is to be regarded as a patentable invention. Compare herewith the decision of the imperial court of the 27th June, 1891. (Patent Journal 1891, page 433, second column.)"

Again, in 1894 there was a stubborn opposition by five rival manufacturers to complainant's application for a patent covering the washing process now under consideration. The patent was granted, the decision being in the following words:

"The reasons advanced in the oppositions to the patentability of the process in question are not in point. The process claimed for the systematic further washing out of safranin-azo-naphthol has been regarded as an invention because it was not known as such before the application was filed, nor had it been in public use in this country, whilst on the other hand, there can be no doubt that it is in a high degree capable of technical use."

An appeal was taken, but it was dismissed in these words:

"It has not been proved that it was known before the application that the coloring matter bases produced, according to the patent No. 61,692, and re-

garded as insoluble in water, are, after sufficiently thoroughly carried out washing soluble in water. The production of these coloring matters in the form soluble in water, by continuing the washing out to a definite end, appears to be, technically, of great importance; therefore, an unexpected technical success has been achieved. The process of the application described is, therefore, a patentable invention."

These decisions are in no way controlling upon this court, but they are valuable as the opinions of trained experts in the country of the inventor and where the art is best understood. The opinions of such men, learned, able and disinterested, officially expressed after thorough examination, are persuasive to say the least.

The new dyestuff is described with all necessary technical precision in the claims. This product being absolutely new with Julius and being of great commercial value his patent should not be destroyed unless proof of undoubted cogency is presented showing that his processes were so rudimentary and axiomatic that no inventive skill was required in employing them. The court is of the opinion that the weight of testimony is to the effect that the ordinary manufacturing chemist would not have thought of applying the washing process to safranin-azo-naphthol and if he had done so he would have abandoned it as hopeless long before he reached the Julius product. If he turned to his text-books he would find nothing to encourage him to proceed. If he searched contemporaneous literature on coal-tar colors he would be convinced that it was hopeless to expect to find the prize in this barren, uncultivated and abandoned azo-naphthol field. No precedent in the prior art would help him. He would look in vain for any analogous insoluble body which had been converted into a soluble body by washing. One of the complainant's witnesses says:

"This process of converting insoluble safranin-azo-naphthol into a soluble product is to this day a unique invention. There is no other body of the naphthol-azo series which can be rendered soluble by a mere washing out with water. * * * Whatever may be the theoretical explanation of the change which occurs, it is a unique change, and I know of nothing analogous to it in the whole range of dyestuff chemistry."

In short, there was nothing to direct the chemist to the fact that safranin-azo-naphthol could be converted into a soluble coloring matter and the discovery that it could be required something more than the ordinary skill of the laboratory. Whether or not solubility is due solely to the removal of admixed impurities is left in doubt by the proof. The language of the patent certainly tends to support the affirmative of this proposition, but there are strong presumptions the other way and the precise nature of the change from insolubility to solubility, and the reason therefor, is not explained and, apparently, cannot be explained by the testimony. Whatever the reason, the fact remains that solubility results from a treatment which produces wholly unexpected and unique phenomena; a treatment which was never before applied to the body in question and which would fail of result if applied to any analogous body. The complainant's principal expert witness, Dr. Morton, says:

"All I know on this subject is that, when produced by following the process down to the point indicated the product is, as I understand the word, substan-

tially insoluble. That is, approaching in its lack of solubility ordinary stones, minerals and the like. If an attempt is made to wash this material, the first applications of water have substantially no effect upon the solubility, but when a certain point is reached, which, as I understand it, is the point at which certain mineral substances are removed from the entire mass, then it becomes substantially soluble."

The earlier washings gave no evidence of solubility and here the ordinary chemist would stop, but Dr. Julius prolonged the washing until the deep blue color evidenced the fact that the body had become soluble.

It is unnecessary to pursue the subject further. What has been said already applies also to the acid process, which, as before stated, is, in the opinion of the court, entitled to greater consideration than the washing-out process. The fundamental proposition upon which the validity of the patent rests applies equally to both processes. Dr. Julius has given to the world a new dyestuff of great value. The methods by which he accomplished this result seem simple enough now, but they were open to the chemical world and no one ever applied them to safranine-azo-naphthol before. From the refuse heaps of chemistry he took a comparatively worthless and neglected body and transformed it into a substance capable of producing wealth "beyond the dreams of avarice." One who has done so much should not be turned out of a court of equity upon the theory that his achievement was so simple that it might have been performed by the most commonplace chemist in the art. Results accomplished cannot be anticipated by results which might have been accomplished. Eliminate the work of Julius and the dyeing art would to-day, in all probability, be without indoin blue. There is nothing to indicate that any of the chemists of Germany or England were proceeding on lines which would have led to the discovery. Surely there is a persuasive presumption that one who contributes such a valuable product to the world is something more than a skilled artisan.

There is no doubt at all that the defendants infringe. Bengaline differs from indoin blue in name only and its sale as proved constitutes an infringement of claims 2 and 4. It is sold in connection with printed circulars and oral directions describing and recommending its use with a tanno-metallic mordant thus producing the coloring matter lake covered by claim 1.

There should be a decree for the complainant.

ROSE v. HIRSH et al.

(Circuit Court of Appeals, Third Circuit. May 4, 1899.)

No. 26, March Term.

1. PATENTS—INFRINGEMENT—MEASURE OF DAMAGES.

Where the patentee himself manufactures the patented article, and maintains a close monopoly, so that one desiring to use it could purchase it only from him, it is proper, in case of wanton infringement, to conclude that but for the infringement the infringer would have purchased the articles from the patentee, and consequently that the latter is entitled to all damages resulting from the loss of such sales.

2. SAME—WANTON INFRINGEMENTS.

In cases of wanton infringement, any doubt arising in respect to the sufficiency of the evidence to warrant a finding of the amount of damages is to be resolved against the infringer.

3. SAME—COMPUTATION OF DAMAGES.

In a case of wanton infringement, where it appeared that defendant had made and used a certain number of the infringing articles, and that the business of manufacturing the patented article as carried on by the patentee was one in which the expenses of manufacture could be readily computed, *held*, that he was entitled to recover the difference between the cost of manufacture, as shown by his evidence, and his established selling price, in the absence of any evidence contradicting his figures; especially when, if successful contradiction were possible, it lay within defendant's power to furnish the evidence.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Henry E. Everding, for appellant.

Wm. C. Strawbridge, for appellees.

Before ACHESON, Circuit Judge, and KIRKPATRICK and BUFFINGTON, District Judges.

BUFFINGTON, District Judge: This is an appeal from a decree entered by the circuit court of the Eastern district of Pennsylvania, dismissing exceptions to and confirming the report of a master. 91 Fed. 149. After entry by that court of a decree adjudging appellees to have infringed the first claim of patent No. 504,944, granted to John Rose, the appellant, a master was appointed to state an account of the gains and profits which the appellees received, and the damages sustained by the appellant by reason of said infringement. The master found that the appellees had used a considerable quantity of rods containing the patented device, as to which he reported: "The complainant evidently has been damaged by the defendants' use of the infringing rods, but the evidence presents no definite basis on which such damages can be assessed." He therefore reported but nominal damages, and ordered appellant to pay the costs of the accounting. To this report appellant excepted. On hearing, the exceptions were dismissed, the report confirmed, and a decree entered in conformity with the master's recommendations. The entry of said decree is here assigned for error.

The proofs show that the patented article was a completed umbrella stick. Appellees' bookkeeper testified that they had used 121 gross of such infringing rods. It is also shown that prior to November, 1894, the patented rod could not be purchased, except from appellant, who alone made them, and who maintained a close monopoly of their manufacture, and that appellees purchased such rods from him, and thus acquiesced in the monopoly of his patent from 1891 to June 20, 1894. At the latter date they ceased buying from appellant, and thereafter deliberately infringed his patent, until enjoined in this case. During the last five months they purchased, viz. from January 23 to June 20, 1894, they bought from Rose 123 gross at prices ranging from \$24 to \$28. Analysis of these bills shows that for said period the price was substantially \$24 per gross; for of 19

different invoices 15 were at \$24, and these covered 118 gross, while the two at \$26 and \$28, respectively, aggregated but $4\frac{1}{3}$ gross. There was no evidence that Rose, prior to November, 1894, sold to any one at a less price than \$24 per gross. In November, 1894, appellees began purchasing from Riehl, who was theretofore connected with appellant's business, and from him and other infringing makers, down to November, 1896, when they were enjoined, bought and used 121 gross of the infringing rods. During this time appellees were contesting the validity of Rose's patent in the present case. That the appellees regarded the rods as desirable is shown by their continuous purchase and use of them, through infringing makers, up to the time they were enjoined. Under these facts and conditions,—the appellant manufacturing rods, and maintaining, until the appellees began infringing, a close monopoly, and the appellees, who were users, having for more than three years purchased all their Rose patent rods from him alone, and having thereafter continued to use rods containing the patented device in their business,—it is reasonable to conclude that, if the appellees had not deliberately and wantonly become infringers, and wrongfully trespassed on appellant's patent rights, they would have purchased from appellant the rods they used. Moreover, the law is that in cases of wanton infringement every doubt is to be resolved against the infringer. *Rubber Co. v. Goodyear*, 9 Wall. 803. These facts unite to afford substantial, not mere conjectural, grounds on which to base the conclusion that the appellant, by appellees' wrongful acts, lost the sale of these particular rods, and to that extent assuredly was damaged. *Creamer v. Bowers*, 35 Fed. 209; *Covert v. Sargent*, 38 Fed. 237.

The appellees having, then, in fact wrongfully deprived the appellant of the sale of 121 gross of the patented article, the patentee has a right to be reimbursed for all damages resulting therefrom. While finding such was the appellant's right, the master, as we have seen, thought the evidence presented no definite basis on which damages could be assessed. When the facts and circumstances attending this case are considered, it seems to us the master was in this regard in error. The proofs show that the appellant carried on his business in a small way. He was in rented premises. The value of his plant did not exceed \$300. He was an assembler of parts made by others, rather than a manufacturer himself. He had no salesmen, carried no insurance, had no clerical help, and sold, packed, and delivered his finished product himself. His customers were few and solvent. His operations, being simple, afforded a comparatively easy basis for determining operative cost. Moreover, the bulk of the work and all of the stock were done or furnished by other manufacturers at fixed prices. For these items he produced bills, the accuracy of which is not questioned. In this way alone he accounted for \$10.01 of the total manufacturing price of \$10.37, to which he testified. These items were: Tubing, \$7.63; enameling, \$2.16; and springs, 22 cents per gross. The remaining ones were 18 cents for labor, and a like sum for running expenses. This last item, he testified, was a due proportion of his rent and other general expenses, which, as we have seen, were of an unusually simple character. The proofs show that the labor

was done by some three boys, who, while they worked by the day, were able to turn out a known amount per diem. The appellant testified that no labor book was kept, and there was therefore no failure on his part to produce any evidence bearing on the cost of labor within his power. It would therefore seem that the figures fixing these two items, to which alone any possible element of uncertainty could attach, were under the proofs reasonably certain; nor was their correctness qualified by cross-examination. But the appellant's affirmative proof on this question does not stand alone. The correctness of the figures testified to by him is strengthened and substantially corroborated by the admitted business operations of the appellees, as well as by their omission to use means without their power to contradict them, if, indeed, successful contradiction was possible. If the cost of his manufacturing operations was falsely understated by Rose, the appellees had it in their power to have contradicted him by Riehl, who had been connected with Rose in his business, who was cognizant of the cost of Rose's manufacturing, as well as of his own subsequent independent work. As a conjoint infringer with Hirsh, he was presumably hostile to Rose. Not only did they fail to call him, but they failed to call other manufacturing infringers whose output they bought, who certainly knew the actual cost of making similar rods. The fact that appellees bought like rods from those manufacturers at \$7 and \$8 per gross affords convincing corroboration that the cost of \$10.37, testified to by Rose, was correct.

The facts we have stated being in evidence, the master was fully justified in finding, as we do, and especially so in the absence of all counter proof by the appellees, that the appellant, by the appellees' wrongful impairment of his sales, was damaged to the extent of the difference between the cost price of \$10.37 and the selling price established as between these parties, viz. \$24. This, on the 121 gross wrongfully used, was \$1,649.23. On this sum interest should be allowed from May 31, 1898,—the date of the filing of the master's report. *Tilghman v. Proctor*, 125 U. S. 161, 8 Sup. Ct. 894. It is therefore ordered that the decree of the court below be reversed, and the record remanded, with directions to enter a decree in favor of the appellant, together with interest from May 31, 1898, and costs on the bill, accounting, and this appeal.

PACIFIC COAST S. S. CO. v. BANCROFT-WHITNEY CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 454.

1. ADMIRALTY—JURISDICTION IN REM—TIME OF SEIZURE.

A court of admiralty acquires its jurisdiction over a libel in rem for breach of a contract of affreightment by the filing of the libel, and it is immaterial that the vessel is not within the territorial limits of the court at that time, where she is subsequently seized therein on alias monition.

2. SHIPPING—BILL OF LADING—CONSTRUCTION.

Exceptions in a bill of lading introduced by the shipowners themselves in their own favor are to be construed most strongly against them.

3. SAME—STIPULATIONS FOR PRESENTING CLAIMS.

A provision in the shipping receipts that all claims against the steamship company or any of its stockholders for damage to the goods must be presented within 30 days from the date thereof, as a condition precedent to suing the company or its stockholders, does not cover the right to maintain a suit in rem against the ship, in which the company appears as claimant.

4. SAME—REASONABLENESS OF LIMITATION.

A provision in a bill of lading requiring all claims for damages to be presented within 30 days from the date thereof makes the period of limitation unreasonably short, and is therefore void.

5. SAME—ESTOPPEL TO DENY VALIDITY.

A shipper is not estopped to deny the validity of a provision of a bill of lading on the ground of its unreasonableness, since he does not stand on an equal footing with the carrier in accepting the bill of lading.

6. ADMIRALTY—STATE STATUTES OF LIMITATION.

In the exercise of their admiralty and maritime jurisdiction, the United States courts are governed solely by the legislation of congress and the general principles of maritime law. Accordingly, they are not bound by state statutes of limitation.

7. SAME—LIENS.

In a suit to enforce a lien given by the general maritime law for damage to cargo, a limitation of one year contained in the Code of Civil Procedure of California (section 813), which gives a lien for injuries to goods shipped on board a vessel, does not apply, although the bill of lading was signed within that state before the goods were shipped, and the freight was to be delivered at a port therein.

8. SAME—LACHES.

Mere delay for the full period of four years allowed by the state statutes of limitation, in bringing a suit in rem to recover damages to cargo, is not, of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit.

9. CARRIERS—DAMAGE TO GOODS—ASCERTAINMENT—AUCTION.

Sale by auction in a great mart of commerce is a proper method of determining the value of goods damaged in the hands of a carrier.

10. WITNESSES—RIGHT TO REFRESH MEMORY.

A witness may refresh his memory by the use of any written memorandum, although it was not made by himself, if he saw it while the facts therein stated were fresh in his recollection, and he knew that the memorandum as then made was correct.

11. INSURANCE—SUBROGATION—PARTNERSHIP—DISSOLUTION.

An insurance company which has paid a loss upon partnership goods is not prevented, by the subsequent death of one of the partners and the resulting dissolution of the firm, from maintaining a suit in admiralty, in the partnership name, to recover the amount of the loss from the carrier.

12. SHIPPING—INJURY TO GOODS—ACTIONS—CONTRACT AND TORT.

A libel alleged a delivery of goods to a carrier pursuant to a contract of affreightment; that, notwithstanding the contract, the goods were not redelivered to libelants in like good order as received, "but, on the contrary, said merchandise was returned to said port" of shipment "in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which, by reason of the negligence of" the carrier, "gained access to the interior of said ship, where said merchandise was stowed"; and "that, in consequence of the injury and damage to said merchandise, the libelants have sustained damage," etc. *Held*, that the action was not founded upon a tort, but upon the contract of affreightment, and that the claim for damages was based upon the failure of the carrier to deliver the merchandise in good condition; the averment as to negligence being merely illustrative of the manner in which the goods were damaged.

13. SAME—LIABILITY FOR INJURY.

Common carriers by water are in the nature of insurers, and are liable for every loss or damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

14. SAME—BURDEN OF PROOF.

Where merchandise is shipped, and the usual bill of lading given, promising to deliver the same in good order, the dangers of the sea excepted, and the goods are found to be damaged, the burden of proof is upon the owner of the vessel to show that the injury was occasioned by one of the excepted causes.

15. SAME—UNSEAWORTHINESS—LATENT DEFECTS.

In every contract for the carriage of goods by sea, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the vessel is the result of latent defects.

16. SAME—PRESUMPTIONS.

Although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed.

17. SAME—INJURY TO GOODS—PROXIMATE CAUSE.

Where a steamer was run upon the beach solely because a leak had been discovered which could not be controlled, and water immediately came in over her deck, so that merchandise was injured, the proximate cause of the injury was the leak, and not the stranding of the vessel.

18. EVIDENCE—PRESUMPTIONS—FAILURE TO PROVE KNOWN FACTS.

When the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, would support the inferences against him.

19. SHIPPING—PERILS OF THE SEA—EXCEPTIONS IN BILL OF LADING—BURDEN OF PROOF.

A steamer, alleged by her claimants to have been staunch, strong, and seaworthy, and fully manned, officered, and equipped, was discovered, after being only 11 hours at sea in fair weather, to have a list, due to sea water in her between-decks. The water increased so rapidly that a few hours later it was decided to run for a harbor of refuge, where the ship was at once beached to prevent foundering. *Held*, in an action for damage to the cargo, that the burden was on the carrier to show wherein and how the leak arose, so as to bring the loss within the exception in the bill of lading as to perils of the sea.

20. SAME.

That burden was not discharged by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely left in doubt the question as to how the leak arose.

21. SAME—TRIAL—POWER OF COURT TO COMPEL EVIDENCE.

Rather than decide the case on the legal presumptions arising from the proof, the court might have compelled the carrier to show the cause of the leak, if known, though inconsistent with the theory on which the parties were trying the case.

Appeal from the District Court of the United States for the Northern District of California.

This is a libel in rem, by shippers of goods shipped on board the steamer *Queen of the Pacific*, belonging to the claimants herein, to recover damages for breach of contract of affreightment. There were a large number of libels

filed, which, being of the same nature, were consolidated. The respective proctors agreed to select two cases—those of the Bancroft-Whitney Company and Hellman, Haas & Co.—for trial, as it was believed they would fairly present all the questions of law and fact that might arise in the other cases; the disposition of the others to be subject to subsequent arrangement after the final decision herein.

The libelants aver, in substance, that on or about the 28th day of April, 1888, the goods alleged to have been damaged were shipped, in apparent good order and condition, on board the steamship Queen, at the port of San Francisco, for transportation to the port of San Diego, Cal., there to be delivered in like good order and condition; that at said time the Pacific Coast Steamship Company, claimant herein, entered into a contract of affreightment with libelants for the delivery of the goods, certain perils in said agreement excepted; that the Queen sailed for San Diego with said merchandise on board; that, notwithstanding said contract of affreightment, said merchandise was not delivered to libelants, at said port, or at any other place, in like good order as received, "but, on the contrary, said merchandise was returned to said port of San Francisco in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which, by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship, where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888"; that said steamship is now in the Northern district of California; that, in consequence of the injury and damage to said merchandise, the libelants have sustained damage, etc. Exceptions were filed to the libels by the claimant of the vessel, which were overruled by the court. The Queen of the Pacific, 61 Fed. 213. The claimant then filed answers to the libels. The answers admit that the said merchandise was received on board the Queen, and was not delivered at San Diego, and that it was returned to San Francisco, and was damaged by reason of having been wet with sea water; but deny "that the same was so wet with sea water during said voyage, or by reason of the negligence of said steamship company, its officers and servants, or either of them; and deny that by reason of such, or any such, negligence, sea water, or any water, gained access to the interior of said ship, where said merchandise was stowed," or at any time, or at all; deny that at the time the libels were filed the said steamship was in the Northern district of California; and aver that for four days prior thereto, and continuously thereafter, the said ship was without the Northern district of California; deny all damages. And, for a further and separate answer and defense, the claimant alleges "that said steamship Queen of the Pacific was, when she sailed from said port of San Francisco, as in said libel alleged, stout, stanch, strong, and in every respect seaworthy, and in such condition sailed from said port of San Francisco, fully and completely manned, officered, and equipped for her intended voyage, and with merchandise on freight, and a large number of * * * passengers on board of her; that she left * * * San Francisco at about the hour of 2 o'clock p. m. of April 29, 1888; * * * that no unusual incident was known to occur during said 29th of April, 1888; that, about 1 o'clock a. m. of the 30th of April, said steamship was noticed to have a slight list to starboard; that efforts were then made to correct such list by shifting freight to port in the between-decks, and burning coal mostly from the starboard bunkers; that about 2:15 or 2:30 o'clock a. m. of Monday, April 30, 1888, water was discovered to be dropping from a point in the iron bulkhead on the starboard side of the engine room, and about six (6) or eight (8) inches above the deck of the alleyway in the between-decks of the vessel; that an examination then made resulted in water being found in the between-decks of the steamship aft, such water extending about halfway from the side of the ship to the hatch coamings, but the aperture through which such water entered the vessel could not, after diligent search for the same, be discovered; that seamen were put to work passing such water down the hatches into the hold, so as to bring it within reach of the bilge pumps, and such pumps were kept in operation, notwithstanding which the water steadily increased between-decks, and the list of the vessel became so great that about the hour of 5 o'clock a. m. it was deemed by the master of said vessel prudent to make for Port

Harford with all convenient speed, which was done, and the said vessel at about the hour of 7 o'clock a. m. of said 30th day of April, 1888, was run upon the beach at said Port Harford, at which place sea water immediately came in over her deck, and nearly filled the vessel with water, and thereby said merchandise became wet with sea water; that the beaching of said steamship was necessary to prevent and avoid a total loss of said steamship, and of all the said merchandise then on board of her, and was done by the master thereof as the result of cool deliberation, and in the exercise of a wise discretion on his part as to what was best to be done, and with the purpose of saving said vessel and cargo, and of rendering entirely safe the lives of all the persons, passengers and crew, 212 in number, then on board of said steamship; that the said Pacific Coast Steamship Company, owner of said steamship, did at all times, and immediately prior to the sailing of said steamship from the said port of San Francisco with such merchandise on board of her, exercise due diligence to make the said steamship in all respects seaworthy, and properly manned, equipped, and supplied for her then intended voyage, to wit, a voyage to San Diego and way ports, and return; that the crew of said steamship was composed, during the times referred to, of persons competent to discharge the duties pertaining to their several stations on board said vessel"; that said merchandise was delivered to, received and carried by, the claimant, under and in pursuance of the laws of the state of California, and the provisions of special contracts made by the libelants and the claimant; and that said merchandise was damaged, if at all, in said state. And, for a still further and separate defense, claimant alleges: That the libels are barred by the laches of the libelants in the prosecution of the same, by the terms of the contract alleged in said libels, which reads as follows: "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damages to, or loss of, any of the within merchandise, must be presented to the company within thirty days from date hereof, and that, after thirty days from date hereof, no action, suit, or proceeding in any court of justice shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to, or loss of, said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss." That libelants did not present, or cause to be presented, to said company, within such 30 days, their claims for the damages, or any part thereof, as in said libels alleged; nor was this, or any, proceeding commenced in any court within said 30 days, nor at any time prior to the 28th of April, 1892, at which time said steamship was not within the Northern district of California; nor was said steamship seized by the marshal under process until the 4th of May, 1892. That the libels are barred by the provisions of sections 337 and 338 of the Code of Civil Procedure of the state of California. That the same are barred by laches on the part of libelants, by delay in the prosecution of the same for such length of time as constitutes, and is, a bar to a recovery thereof in a court of admiralty.

Under the issues as thus presented, the proctor for libelants at the trial contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment, and, after offering some testimony as to the damaged state of the shipment of Hellman, Haas & Co., rested their case. Thereupon claimant moved for a judgment in his favor, which was overruled by the court (The Queen of the Pacific, 75 Fed. 74); and then the claimant introduced evidence in support of the averments in the answer. This evidence did not disclose the cause of the leak, nor the exact locality where the water gained access to the vessel. The court, upon the final hearing, rendered a decree in favor of libelants. The Queen, 78 Fed. 155.

George W. Towle, Jr., for appellant.
Milton Andros, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). The libel of each libelant is in rem against the steamer Queen of the Pacific, owned by the claimant, to recover damages for a breach of contract of affreightment, for the safe delivery of certain merchandise, in apparent good order and condition, at the port of San Diego. There are two libels, but in the discussion we shall mainly refer to but one, and the Queen of the Pacific will be mentioned as the "Queen." By a reference to the pleadings, it will be observed that there are numerous preliminary questions as to the right of the libelant to recover. These will first be discussed.

1. It is argued by the appellant that, the libelant having failed to prove that the steamer Queen was within the Northern district of California at the time the libel was filed, the court had no jurisdiction to enter any decree. This question rests upon the averment in the libel that the steamer was within the district, and the averment in the answer of the claimant that it was not. It is claimed that no evidence was offered in support of these averments, and that the burden of proof was upon the libelant to make proof in regard thereto. The learned judge who tried this case, in his opinion, stated that there was some evidence to the effect that the steamer was within the district at that time. But, be that as it may, we are of opinion that its presence or absence at that time, in the light of the other facts to which we shall refer, is wholly immaterial in order to confer jurisdiction. Conceding that no jurisdiction can be conferred in such a case until there is a seizure made within the limits of the territorial jurisdiction of the court, it does not follow that the steamer must be within such limits at the time the libel is filed. The court acquires its jurisdiction over an action upon a maritime contract of affreightment by the filing of the libel. It obtains jurisdiction over the res by a seizure of the steamer, made at that time or thereafter, within the district. The facts are that the monition was first returned not served, the steamer being without the jurisdiction of the court. An alias monition was thereafter issued, and returned served within the district. The court, having jurisdiction of the subject-matter, obtained jurisdiction over the res when it was attached by the marshal upon the alias monition. The jurisdiction of the court over the cause of action is different from its jurisdiction over the person or over the res. The jurisdiction acquired in the first case is obtained by service of process on the person; and in the second, by a seizure of the res. After the libel is filed, and process issued thereon, the court cannot proceed until, in the one case, the person has been served or appears, and, in the other, until there is an actual seizure of the res. In *Cooper v. Reynolds*, 10 Wall. 308, 316, the court said:

"By 'jurisdiction over the subject-matter' is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause

depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

There are numerous cases where process in rem has been issued by a federal court where the res was within the hands of a state court of co-ordinate jurisdiction. In such cases the federal court refused to dismiss the libel, but postponed action thereon until the proceedings in such court of co-ordinate jurisdiction were terminated. *The E. L. Cain*, 45 Fed. 367; *Moran v. Sturges*, 154 U. S. 256, 279, 14 Sup. Ct. 1019; *Ex parte Chetwood*, 165 U. S. 443, 460, 17 Sup. Ct. 385; *Ex parte Johnson*, 167 U. S. 120, 125, 17 Sup. Ct. 735. It must be admitted that in such cases the res is as much without the jurisdiction of the federal court as if it were without the district.

The objection to the jurisdiction of the court is not well founded.

2. The appellant claims that the proceedings against the Queen in rem are, in substance and effect, proceedings against the Pacific Coast Steamship Company, within the true intent and meaning of the special contract set out in the pleadings, and that the claimant is released by the 30-day clause of the special contract. This contention cannot be sustained. As a general rule, it may be conceded that a proceeding in rem cannot be maintained against an offending steamer, where there is no liability upon the part of the owner of the steamer to pay the libellant's claim. But the libellant is not compelled to proceed directly against the owner. He may enforce his lien against the steamer. There is a clear distinction between the two proceedings. A proceeding in rem is to enforce a lien against the offending steamer, irrespective of the ownership of it, and no personal judgment can be entered against the shipowner as such. The decree in a proceeding in rem is enforced directly against the res, by a condemnation and sale thereof, or against the obligors on the bond that stands in the place of the res, and for the purposes of the judgment is the res, while a proceeding in personam is direct against the shipowner to enforce his personal liability for a debt, wholly irrespective of any lien on the ship, growing out of the maritime contract on which the proceeding is founded. The present proceeding is not against the claimant company, or its stockholders, to enforce the payment of a debt, but it is to foreclose a lien against a steamer in which they claim an interest. The fact that the company appears and interposes a claim to the steamer does not change the legal nature of the proceeding from one in rem to one in personam, so as to bring it within the terms of the special contract on the back of the bill of lading, which are to be *contra proferentes*. In *Leon v. Galceran*, 11 Wall. 185, 189, where a writ of sequestration had been issued, under the laws of the state of Louisiana, against a vessel, to enforce the payment of the seamen's wages, the court said:

"Neither the writ of sequestration nor the process of attachment is a proceeding in rem, as known and practiced in the admiralty, nor do they bear any analogy whatever to such a proceeding, as a suit in all such cases is a suit against the owner of the property, and not against the property as an offending thing, as in case where the libel is in rem in the admiralty court to enforce a maritime lien in the property."

The contract relied upon by appellant is in the nature of a statute of limitations, prohibiting, after the lapse of a certain period, the bringing of any suit or proceeding against the Pacific Coast Steamship

Company, or against any of its stockholders, to recover damages for loss or injury to the merchandise specified in the bill of lading. It will be observed that nothing is said in the contract against the right of the shipper to enforce any lien against the ship. Is it not fair to presume that, if the steamship company intended to include in this limitation a proceeding in rem against its steamship, it would have expressed this intention in language unambiguous, clear, definite, and certain? The fact that it has not done so is to be construed most strongly against it. The rule of strict construction is always applied to such exceptions. Conditions in policies of insurance furnish the true rule upon this subject. The courts have universally held that as the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language, in the various provisions of the policy, in such a manner that the insured cannot be mistaken or misled as to the duties and burdens thereby imposed; and in case of any doubt or uncertainty as to the meaning of the words, or of inconsistent or contradictory provisions in the policy, they are to be construed most strongly against the company. *Palmer v. Insurance Co.*, 1 Story, 360, Fed. Cas. No. 10,698; *Steel v. Insurance Co.*, 51 Fed. 715, 722, and authorities there cited. In *The Caledonia*, 157 U. S. 124, 137, 15 Sup. Ct. 537, the court said: "As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly against them."

We are of opinion that the 30-day clause in the bill of lading has no application to this proceeding; but, even if it could be held that the limitation clause in the contract was applicable, it would not constitute a bar, because the limitation of time therein specified is unreasonable. Admitting that a common carrier of goods has a right to adopt rules fixing the time within which the shipper must present his claim or bring his action for damages, it does not follow that this is an arbitrary right, or that the clause in the bill of lading in the present case is reasonable. The date of the bill of lading is the date when the goods were received. The carrier might, in transporting the goods, meet with unavoidable accidents, or delay in delivering the same at the port designated, and might thereafter lose or damage the goods. The amount of the damage, if only partial, could not probably be ascertained for several days or weeks, depending upon the special circumstances of the case, and it would be unjust and unreasonable to limit the time of instituting proceedings from the date the goods were received. The limitation ought, in justice and fairness to all parties concerned, to be limited, at least, from the time when the loss or damage occurred. If not, to the time when the shipper had knowledge thereof; and a reasonable time thereafter should be given, within which the claim must be presented, or action brought thereon.

The appellees are not estopped from enforcing this rule of construction against the steamship company. As was said in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 9 Sup. Ct. 471:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to

higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld,—such as those exempting a carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against. * * * But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abrogation of the essential duties of his employment.”

In *Express Co. v. Darnell* (Tex. Sup.) 6 S. W. 765–767, a limitation clause of 60 days from the time when the bill of lading was given was held to be unreasonable. The court, in discussing this question, said:

“Any reasonable limitation contained in the bill of lading would be upheld by the court. But it has been decided by this court that an unreasonable restriction is not valid, even in cases to which our statute does not apply. *Railroad Co. v. Harris*, 67 Tex. 166, 2 S. W. 574. Is this a reasonable limitation? We think not. If it had been stipulated that a claim should be made in 60 days from the ascertainment of the loss, the case would have been different. But to require a shipper to give notice of his claim within a short period of the date of the bill of lading, without reference to the time when a loss for the breach of the contract accrued, is to impose a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed.”

3. The questions raised by appellant as to the applicability and effect of the sections of the Code of Civil Procedure and statute of limitations, and the alleged laches of the libellant in the diligent prosecution of his claim, will be considered together.

The fact that the bill of lading was signed within the state of California, before the goods were shipped on board the *Queen*, and that the freight was to be delivered at a port within the state, does not bring the contract within the provisions of the statutes of California. The libelants did not bring this suit to enforce any lien given by the state statute; and hence the provision of section 813 of the Code of Civil Procedure of California, relative to the time of bringing actions against steamers, vessels, and boats, which declares that “such liens only continue in force for the period of one year from the time the cause of action accrued,” as well as the other provisions of the Code cited by counsel, have no application. These libels were brought under, and by virtue of, the maritime laws of the United States. In the exercise of their admiralty and maritime jurisdiction, the United States courts are governed solely by the legislation of congress and the general principles of maritime law, and are not bound by state statutes. *New Zealand Ins. Co. v. Earnmoor Steamship Co.*, 24 C. C. A. 644, 79 Fed. 368; *Willard v. Dorr*, 3 Mason, 91, Fed. Cas. No. 17,679; *Brown v. Jones*, 2 Gall. 477, 481, Fed. Cas. No. 2,017; *The Key City*, 14 Wall. 653.

In *The J. E. Rumbell*, 148 U. S. 1, 12, 13 Sup. Ct. 500, the court said:

“The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the

admiralty jurisdiction of the national courts a subject not maritime in its nature." *The Glide*, 167 U. S. 606, 622, 17 Sup. Ct. 930.

The question of laches, however, is applicable to courts of admiralty, and should be governed by the general principles of equity in regard thereto. No general principle of equity is better settled than the one which declares that a party must not be permitted to sleep over his rights, to the prejudice of the party against whom he makes a claim, who by the delay may be deprived of the evidence and means of effectively defending himself. But the question as to what is to be considered a reasonable time has not been, and cannot be, settled by any precise or definite rule, that would be applicable to all kinds and classes of cases. The proper solution of the question depends, to a great extent, upon the facts and circumstances of each particular case. What would be laches in one case might not constitute laches in another, where the facts are different. Mere lapse of time is not always the true criterion to follow, although it often constitutes an important factor. State statutes of limitations are often adopted by analogy. But in some cases courts have held a party guilty of laches for failure to bring his suit within a reasonable time, although the statute of limitations has not expired. Others have declined to dismiss the suit on the ground of laches, even where not brought within the time required by analogy of the statutes of limitation at law. The court, in determining the question, must necessarily be governed by the exercise of its sound legal discretion, with special reference to the facts.

In *The Key City*, 14 Wall. 653, 659, Mr. Justice Miller, in delivering the opinion of the court, said:

"The authorities on the subject of lapse of time as a defense to suits for the enforcement of maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made, without specifying them more particularly. We think that the following propositions, as applicable to the case before us, may be fairly stated as the result of these authorities: (1) That, while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. (2) That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case. (3) That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under a shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued."

In *Southard v. Brady*, 36 Fed. 560, the court said:

"It is true that there is no statute of limitations in admiralty; but courts of admiralty, like those of equity, will not lend their aid to enforce stale demands. Exceptional circumstances will sometimes lead a court of admiralty to pronounce a claim stale after a lapse of time less than the local statutory period of limitations. Where there is nothing exceptional in the case, the court will govern itself by the analogy of the common-law limitations." *Bailey v. Sundberg*, 1 C. C. A. 387, 49 Fed. 583, 586.

The Code of Civil Procedure of California limits the time for the commencement of actions as follows:

"Sec. 337. Within four years. An action upon any contract, obligation, or liability, founded upon an instrument in writing, executed in this state."

This proceeding was instituted on the last day of that period of time. There are no facts or circumstances which indicate that by reason of the delay appellant has been prejudiced in any of its legal rights, or prevented in any manner from making any defense that it could have made if there had been no such delay. No witnesses were absent by whom the facts could be established. In brief, there were no difficulties encountered in the path of having a fair trial. There are no special or exceptional facts or circumstances, which so often appeal to the conscience of the courts in such cases, that would, in equity, justify us in holding these libelants guilty of such laches as to deprive them of their right to maintain their libels because of their delay in instituting the proceedings herein.

4. The special contracts provide that:

"It is understood that in the settlement of any claim for loss of, or damage to, any of the above-mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

Appellant objects to the methods pursued by the libelants in making the proofs on this point,—both as to the cash value, and of the depreciation of value on account of the damages. The objections are purely technical. There is no showing or pretense that the result reached is erroneous. The damaged goods were sold at public auction, and it is claimed that such a sale does not represent the true market value of the damaged goods. Why not? No showing is made by appellant that any greater value could have been obtained at private sale, or that the public auction was not fairly conducted. What was the use of going through the formula and expense of having the goods appraised? The same objections could perhaps have been urged with as much, or greater, force against an appraisement, as against a public auction after due and timely notice.

In *The Columbus*, 1 Abb. Adm. 37, Fed. Cas. No. 3,041, Betts, J., said:

"Sale by auction is, in the great marts of commerce, so commonly resorted to by merchants to ascertain the value of deteriorated merchandise, that it may almost amount to a usage of trade. It furnishes, cheaply and promptly, all the accuracy which can be expected in any known measure of damages; and it is peculiarly fitting, in cases of this character, that the court should sanction and sustain it as the method best adapted to protect the interests of all parties concerned."

In *The Columbus*, 1 Abb. Adm. 97, Fed. Cas. No. 3,042, the same judge said:

"To all reasonable intents, this method of fixing the amount of injury or loss is just as obligatory on him and the vessel as a submission to arbitration, or an adjustment by mutual agreement between the parties. It does not appear that any witness, knowing the condition of the goods, considered the sale prices at all below their marketable value. The sale at auction, under such circumstances, was properly admissible as evidence of the value of the goods when landed."

The objections made upon these points were properly overruled.

5. It is claimed by appellant that the court erred in allowing the witness Haas, when testifying as to the cost of the goods, to refresh his memory from a memorandum marked "Merchandise on Steamer Queen," which the witness said was the bill, or a copy of it, which was handed to the agents of the steamer, of the goods shipped on the Queen. The facts in relation to this memorandum, as shown by the testimony, are as follows:

"By Mr. Andros: Q. Do you know what goods were shipped on board of her? A. I know by the bills. Q. Please to state— Refresh your memory from that paper, and state what they were. Mr. Towle: I object to any testimony from that paper. Mr. Andros: Q. In whose handwriting is that? A. This is in the handwriting of a clerk of ours, who was with us then, and who is with us now, in Los Angeles. The Court: Q. Do you know anything about that paper yourself? A. Nothing more than I told the young man to make it out at the time. He made it under my supervision. Mr. Andros: Q. I will ask you to see, as I read this, whether it corresponds with what is on the back of this bill of lading. * * * Mr. Towle: We object to that as irrelevant, immaterial, and incompetent, whether it agrees with the memorandum or not. Mr. Andros: I propose to prove the cost price of these goods by Mr. Haas, and I want to simply identify these goods by that memorandum, so that he may testify as to the cost. Mr. Towle: So far as it has a bearing upon the question of price, if the witness proposes to testify from that memorandum as to prices, we shall object to that. We object to these questions. If the witness is to testify, he can as well testify from the items on the bill of lading as from the memorandum which agrees with those items. The Court: His memorandum probably has the prices attached. Mr. Andros: Yes, sir. Q. '50 cases of canned vegetables.' What was the price of this, Mr. Haas? Mr. Towle: Are you testifying from your memorandum, or from your own knowledge? A. I am testifying from the memorandum. Mr. Andros: Q. Did you at the time know the cost of these goods? A. Yes, sir. Q. Did you buy them? A. Yes, sir. Q. Bought them yourself here? A. Either bought them myself, or they were bought under my supervision. Q. So at that time you did know what they cost? A. Yes, sir. Q. Did you subsequently instruct that memorandum of that cost to be made? A. Yes, sir. Q. At the time that you made that memorandum yourself, or had it made under your supervision, were the figures therein mentioned the true cost of those goods? A. Yes, sir. Mr. Towle: We ask that that answer be stricken out. * * * We submit that the only memorandum that can be used is one made by himself at the time. * * * The Court: Or under his direction. The Witness: It was our book-keeper. Mr. Towle: But he directs somebody to make up a memorandum and that paper, and presents them to him. That does not authorize him to testify from it. The Court: He goes further than that. He said he knew it to be correct. * * * The Court: I understood you to say that you knew that the charges there were correct at the time? A. Yes, sir."

We have made this quotation because it shows, as clearly as any words we might express, that the objections made by appellant are absolutely untenable. The law is well settled that a witness may be permitted to refresh his memory by the use of any written memorandum, although it is not made by himself, if he saw it while the facts therein stated were fresh in his recollection, and knew that the memorandum, as then made, was correct. 1 Greenl. Ev. (15th Ed.) §§ 436, 437; Com. v. Ford, 130 Mass. 64, 66, and authorities there cited; Huff v. Bennett, 6 N. Y. 337, 339; Jones, Ev. § 880, and authorities there cited; Milling Co. v. Walsh, 108 Mo. 277, 284, 18 S. W. 904.

6. Appellant argues, with reference to the libel of the surviving partners of the firm of Hellman, Haas & Co., that if the loss sustained

by them was paid by the Magdeburg General Insurance Company prior to the dissolution by the death of Jacob Haas, one of its members, the surviving partners have no authority to sue, because their authority was limited to a settlement of the partnership affairs as provided by sections 2458-2462 of the Civil Code of California. The contention is that under such conditions, the insurer, having paid the loss, and thereby become subrogated to the partnership rights, during the lifetime of Jacob Haas, had the right to sue in the partnership name, so long as the partnership existed, but that it could not sue, as it did in this case, in the name of the surviving partners. This contention cannot be sustained upon reason or authority.

In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 9 Sup. Ct. 469, where the libel was filed by the insurance company, the court said:

"The question of the subrogation of the libellant to the rights of the shippers against the carrier presents no serious difficulty. From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated, in a corresponding amount, to the assured's right of action against the carrier or other person responsible for the loss, and, in a court of admiralty, may assert in his own name that right of a shipper. *The Potomac*, 105 U. S. 630, 634; *Phenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176."

In *Hall v. Railway Co.*, 13 Wall. 367, 370, the court said:

"In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for nonperformance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

See, also, *U. S. v. American Tobacco Co.*, 166 U. S. 468, 474, 17 Sup. Ct. 619.

In the face of these authorities, it is apparent that the question as to who shall bring the suit is one to be determined between the shippers and the insurance company. It is no concern of the appellant whether the libel is brought in the name of the shippers, or in the name of the insurance company. In either event the right of the claimant in its defense would be identical. If the insurance company became subrogated to the right of the partnership during the lifetime of all the partners, the death of one subsequent to the loss, and its payment by the insurance company, would not prevent it from recovering from the carrier for the damage sustained to the goods. The insurance company had the right at its election to use the name of the surviving partners of the firm in bringing this suit, or to have instituted the suit in its own name. If it were brought for the benefit of the insurance company, it stands, in law, the same as if it were brought in its own name,

and its right to maintain the suit cannot be questioned by the claimant.

There are other minor points discussed by counsel, which we have examined, but do not think necessary to discuss. It is enough to say that they are without merit.

7. It is contended by appellant that no negligence on the part of the ship was proven by appellees; that the presumption of negligence from the goods being wet was overthrown by proof on the part of appellant that the steamer was seaworthy when she sailed, and that there was no negligence of the master or crew on the voyage; that these facts, which are not disputed, cast upon the libelants the burden of proving some specific negligence, which they have failed to do; that the libels, while they allege the execution of the contract, are based, not upon a breach of contract per se, but upon negligence, and negligence only, as the occasion and foundation of the alleged damages. Upon these points the respective proctors have exhibited great and commendable industry in the citation of authorities which it is claimed support their views, and have furnished the court with convincing evidence of their skill, ability, and learning in the arguments which they have elaborately made in their briefs. In the light of their respective contentions, it becomes important to first determine the true nature and character of the libels,—whether they are to be construed to be actions upon torts, as claimed by appellant, or actions upon contracts, as claimed by appellees. The question is important. But, upon a careful examination of all the cases, we are of opinion that it is not difficult of solution. There is no apparent conflict in the authorities cited. The differences which at first blush might seem to exist are, upon close examination, found to be based upon different facts as to the allegations contained in the libels. Some refer to common-law actions, others to proceedings in admiralty; some are cases of collision, and others upon contracts for affreightment. Discretion, judgment, and patient consideration must be brought to bear in order to determine which are applicable, and which are not, to the pleadings and facts in the present case. We have, in the statement of facts, copied the averments in the libels. They need not be repeated. It is essential to bear in mind that proceedings in admiralty are not the same as in the courts of the common law. As was said by Mr. Justice Story in *The Adeline*, 9 Cranch, 244, 284, “no proceedings can be more unlike than those in the courts of common law and in the admiralty.” In actions at common law the pleadings are to be construed strongly against the pleader, and often strictly, without regard to the real substance of the action; but in admiralty the rule is different. All courts of admiralty agree in regarding substance as of more importance than form, in the proceedings which come before it; and therefore any process in admiralty is, in general, if not always, sufficient, which distinctly brings the substance of a case, and the actual parties, before a proper court in such way as to permit the questions of the case to be investigated, its merits ascertained, and justice done. 2 Pars. Adm. 369.

The criticism of appellant is based upon the language in the libel, “that, in consequence of the injury and damage to said merchandise by sea water, * * * the libelant has sustained damages.” And he argues that while the libels, by way of inducement, show a failure

to perform the special contracts, they do not claim any damage as resulting therefrom, and that, by the selection of the libelants, the damages alleged are limited to the alleged negligence of the servants of the Pacific Coast Steamship Company in permitting the sea water to flow in upon the goods, and that such averments show that the action is founded upon a tort, and not upon a contract, and that, if there was no negligence, the libelant cannot recover any damages. We are unable to agree with the views thus expressed. On the other hand, we are of opinion that the proceeding is founded upon the contract of affreightment, and that the claim for damages is based upon the failure of the steamship company to deliver the merchandise in good order and condition, and that the averments in the pleadings as to the negligence are merely illustrative of the manner in which the goods were damaged. It cannot, it seems to us, be legally said that the mere mention of the word "negligence," as used in the pleadings, changes the character of the proceeding from one on a contract to one in tort. If there is an express contract, and the act complained of is a breach of it, the action is clearly founded on a contract. The libelants had the privilege of selecting the form of the proceeding,—whether in tort or upon the contract; and, having elected to rely upon the contract, they are entitled to all the rights and privileges pertaining thereto.

The authorities cited by appellant in the collision cases and cases at common law are not, in our opinion, applicable to this case. The other cases do not sustain his position.

In *Legge v. Tucker*, 1 Hurl. & N. 500, which is referred to with approbation by the court in *Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 398, 17 Sup. Ct. 120, the action was, in form, an action on the case, for the negligence of the livery stable keeper in the care and custody of a horse; and it was held that the foundation of the action was a contract, and that, in whatever way the declaration was formed, it was an action of assumpsit. Pollock, C. B., said:

"Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit."

Watson, B., said:

"The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is whether, if that were struck out, any ground of action would remain. *Williamson v. Allison*, 2 East, 452. There is no duty independently of the contract, and therefore it is an action of assumpsit."

In *Baylis v. Lintott*, 8 L. R. C. P. 345, the action was against a carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage. The declaration alleged that in consideration that the plaintiff, with her luggage, would become a passenger in such carriage, the defendant promised to carry the plaintiff and her luggage safely, but did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of said luggage was lost. The court held that the cause of action set forth in the declaration was "founded on a contract."

In *Fleming v. Railway Co.*, 4 Q. B. Div. 81, 83, the material parts of the statement of claim were (1) that the plaintiffs delivered to the defendants, as common carriers of goods for hire, a parcel of goods of the plaintiffs, to be carried by the defendants from Sheffield to Dundee, for reward to the defendants; (2) that the defendants, as such common carriers as aforesaid, accepted the said parcel of goods, to be by them taken care of, and safely and securely carried and delivered to the plaintiffs at Dundee; (3) that the defendants did not take care of, and safely and securely carry and deliver to the plaintiffs, the said parcel of goods, but, not regarding their duty in that behalf, so carelessly and negligently conducted themselves with respect thereto that the said parcel of goods was and is wholly lost. The court said:

"The question is whether the plaintiffs are entitled to costs in an action in which they have recovered a sum not exceeding £20, and in which they charge the defendants as common carriers. According to *Bryant v. Herbert*, 3 C. P. Div. 389, we have to determine whether the action 'is founded on contract' or 'on a tort'; and, whether we are to decide this question by looking at the form of the pleadings or at the facts, it is clear that this action is 'founded on contract.' * * * These allegations seem, in effect, to amount to a charge that, in consideration of the payment of hire, the defendants promised to carry safely the plaintiffs' goods; and this would clearly have been, under the old forms of pleading, a declaration in contract."

The law upon this subject is well expressed in *Schouler, Bailm.* p. 557, as follows:

"Concerning the Form of Action. This, at common law, may be *ex delicto* or *ex contractu*. So long as the common-carriage occupation was considered simply as a public duty, its breach was deemed tortious, and the carrier suable in an action on the case founded upon the custom of the realm, but, when contract began to assuage the rigor of public policy, it became established that the carrier should be held liable in *assumpsit* on his undertaking; and hence the modern usage to lay hold of the advantages of the action *ex contractu*, while preserving those likewise of that more ancient remedy against carriers, *ex delicto*, which the practice of earlier centuries commended. Where the transaction and the character of the loss require the plaintiff to show a contract, express or implied, with the carrier, to support his action, contract is the true remedy; otherwise the preferable form of action is tort."

In a proceeding of this character, and under the facts established in this case, the following principles of law are well settled:

(1) That common carriers by water, like common carriers by land, are in the nature of insurers, and are liable for every loss or damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. *Niagara v. Cordes*, 21 How. 7, 22, 26. In *Hall v. Railway Co.*, 13 Wall. 367, 372, the court said:

"When a loss occurs, unless caused by the act of God or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct or breach of duty in relation to every loss not caused by excepted perils. Even if innocent in fact, he has consented by his contract to be dealt with as if he were not so."

(2) That where merchandise is shipped, and the usual bill of lading given, promising to deliver the same in good order, the dangers of the sea excepted, and they are found to be damaged, the

onus probandi is upon the owner of the vessel to show that the injury was occasioned by one of the excepted causes. *Rich v. Lambert*, 12 How. 347, 357; *Nelson v. Woodruff*, 1 Black, 156, 169; *The Majestic*, 166 U. S. 375, 386, 17 Sup. Ct. 597, and authorities there cited; *The Lydian Monarch*, 23 Fed. 298; *The Mascotte*, 2 C. C. A. 399, 51 Fed. 605; *The Compta*, 4 Sawy. 375, 377, Fed. Cas. No. 3,069; *Hunt v. The Cleveland*, 6 McLean, 76, Fed. Cas. No. 6,885; *Ang. Carr. § 202*; *Chit. Carr. *142*; *Lawson, Carr. §§ 245, 247*.

(3) That, in every contract for the carriage of goods by sea, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the steamer is the result of latent defects. *The Caledonia*, 43 Fed. 681, 685; *Work v. Leathers*, 97 U. S. 379; *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823; *The Caledonia*, 157 U. S. 124, 130, 15 Sup. Ct. 537.

(4) That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed. *Higgie v. American Lloyds*, 14 Fed. 143, 147; *The Gulnare*, 42 Fed. 861; *Work v. Leathers*, 97 U. S. 379; *The Planter*, 2 Woods, 490, Fed. Cas. No. 11,207a; *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Walsh v. Insurance Co.*, 32 N. Y. 427, 436.

Appellant contends that the stranding of the *Queen* is the causa proxima of the damage, and was a sea peril, within the meaning of the special contracts relieving the *Queen* from all liability for damage resulting from "dangers of the sea," and that upon the established facts "that a thoroughly seaworthy vessel, without negligence on the part of her crew, springs a leak 12 hours after she sails, she not having, so far as is shown, encountered anything unusual upon the voyage, what is the presumption relating to the leak? Was it the result of accident? Was it the result of a sea peril? That it must be presumed to have resulted from the one or the other, seems evident." We are of opinion that the stranding of the ship at Port Harford was only incidental in causing the damage. The steamer was run to the beach, not because of high winds or boisterous weather, or any danger of the sea, but from the fact that a leak had been discovered which could not be controlled. The fact, if it be the fact, that the merchandise was not wet with sea water until the steamer stranded at the beach, is wholly immaterial. It was the leak in the steamer that was the cause of the damage, and the real and only question necessary to be discussed is whether that leak was occasioned by a peril of the sea, or came within any of the exceptions mentioned in the shipping receipt, or, if the cause of the leak is not shown, then, upon the presumptions which the law raises as to the burden of proof; and we shall confine our discussion to those points.

The argument on behalf of appellant is based upon the erroneous theory that its obligation to libelants was discharged when it introduced evidence at the trial that the *Queen* was an absolutely

seaworthy steamer when she sailed, and was properly manned, officered, and equipped on her voyage, and that appellant was not guilty of any negligence in the use of the steamer or the handling of the goods. In order to overcome the prima facie case made by the libelants, so as to relieve itself from all responsibility, the law imposed upon appellant the burden of establishing that the damage to the goods was occasioned by some of the exceptions mentioned in the shipping receipt; and in this respect it has failed to meet the requirements of the law. What are the facts? The libelants simply introduced their shipping receipts as evidence of the apparent good order and condition of the merchandise when delivered to the steamship company, the damaged condition of the goods when returned to San Francisco, and that the goods were then of less value than when shipped. Appellant then introduced evidence which tended to support the averments in its answer as to the absolute seaworthiness of the Queen when she sailed; the competency of her master, officers, and crew; the fact of a leak being discovered about 11 hours after the Queen sailed from San Francisco; that every attempt was made, consistent with prudent navigation and good seamanship, to discover the aperture or place through which the water entered the steamer, and the circumstances of her being compelled to put into Port Harford, and her being there beached, substantially as alleged in claimant's answer. The evidence shows that the leak was on the starboard side of the vessel, and was first discovered by the water tender, who noticed a small amount of water on the floor of the engine room, in a place that should have been dry. It was dropping from a point in the iron bulkhead on the starboard side of the engine room, a few inches above the deck of the alleyway in the between-decks of the vessel, coming from a water-tight compartment on the starboard side. This condition of affairs was immediately reported to the captain, and prompt measures were at once taken to ascertain the precise locality and cause of the leak, and to arrest its progress. But all of the efforts of the officers and crew in this direction proved ineffectual; and the captain then, in the exercise of a wise discretion, as alleged in the answer, and shown by his testimony, ran the steamer upon the beach at Port Harford. The evidence is as dumb as an oyster as to the cause of the leak. There is no evidence that the Queen, after she sailed from the port of San Francisco, met with any accident or injury, or tempestuous winds or boisterous weather, which would have caused the leak. The captain, it is true, stated that they had some boisterous weather, but, upon his cross-examination, admitted that it was only the ordinary weather usually met with, and to be expected, at that season of the year. There was no evidence tending to show that the leak could be rationally attributed to any accident or injury produced by the state of the weather then prevailing. From this brief, but substantial, review of the testimony, it is apparent that the real and efficient cause of the leak is not disclosed by the evidence. It does not affirmatively appear that the cause of the leak was not *within the knowledge* of the claimant. It is true that in appel-

lant's brief it is said, "The cause of the aperture has not been explained, nor does it appear that it was within the power of any one to explain it." Again appellant says, "Claimant showed the fact of the leak, and that it did not know—could not know—what cause it was that had produced it." We have been unable to find any testimony in the record that supports these statements. But, on the contrary, the record shows that pending the examination of Capt. Alexander, of the Queen, as a witness, the court, of its own motion, put to him several questions,—among others, the following:

"Q. I will ask you another question, to which there may be an objection made by counsel, and you need not answer it until I determine the objection. After the Queen of the Pacific was raised at Port Harford, did you discover the cause of the leak? Mr. Towle: We object to that. The Court: What is the ground of your objection? Mr. Towle: The objection is that it is not a part of our case, and is not the theory on which we are trying it,—as to what may have been discovered after the vessel had been on the rocks. (After argument.) The Court: I appreciate the fact that you are trying the case very carefully, and on a very narrow margin. I think, for the time being, I will sustain Mr. Towle's objection to the question put by the court. Mr. Towle: I would like your honor to withdraw the question. Mr. Andros: I would prefer that the objection be sustained. The Court: I do not want anything that the court does to change the theory of the case. I will withdraw the question for the present, and will see what may come hereafter. I do not know what I may do hereafter."

This action upon the part of the claimant is significant,—especially in view of the fact that it appears from the evidence that after the Queen was beached at Port Harford, and while she was partially submerged, a diver was sent down to examine her bottom and ascertain what was wrong with the steamer. He stopped the leak, all the bulkhead doors were secured from the inside, a cofferdam was built around the forward hatch, the water was pumped out, and the steamer floated. Forty-eight hours thereafter she returned to San Francisco, without any leak occurring on the return voyage; and upon a thorough examination at the Union Iron Works, on the dry dock, she was found to be in a perfectly seaworthy condition. Considering these facts, not alone upon probabilities and conjecture, but in the light of reason, and of the objections that were made to the question asked by the court, is it not fair to presume that the claimant had knowledge of the real cause of the leak, and that its failure to show what the cause was is a strong circumstance tending to show that, if the truth had been disclosed, it would not have relieved the claimant upon any of the grounds of exemption from liability in the shipping receipts or bills of lading?

In *Railway Co. v. Ellis*, 4 C. C. A. 454, 54 Fed. 481, 483, the court said:

"Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him; and the jury is justified in acting upon that conclusion. 'It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof which it was in the power of one side

to have produced, and in the power of the other side to have contradicted.' *Blatch v. Archer*, Cowp. 63, 65. It is said by Mr. Starkie, in his work on Evidence (volume 1, p. 54): "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

We are of opinion that the court, notwithstanding the objection of Mr. Towle, would have been justified in requiring the witness to answer the question, even if it were not in precise harmony with the theory upon which the parties were proceeding in the case. Why not? If it were within the power of the court to ascertain the truth, why should it be withheld or suppressed because the proctors desired to burden the court with the legal presumptions arising from the failure to show a fact which, if shown, would make the solution of the question as to how the case should be decided easy and plain? The court ought not to have been compelled to decide the case upon the presumptions of law until it was affirmatively shown that the claimant could not, after diligent search, introduce any evidence as to what caused the leak. Why should the court be required to indulge in presumptions, of its own motion, as to the cause of the leak, and then be criticised for so doing, when the appellant carefully, cautiously, and designedly refrained from shedding any light thereon, or offering any evidence in regard thereto; assigning as the reason therefor, that such facts would be inconsistent with the theory upon which the case was being tried? If appellant had introduced any testimony that it had tried to ascertain the cause of the leak, and had been unable so to do, that would, perhaps, have introduced another theory; but if Capt. Alexander had been allowed or compelled to answer the question asked by the court, and the examination continued on this new theory, the presumptions are that the truth as to the cause of the leak would have been discovered, and the case would have then been decided upon the facts, instead of presumptions.

In *The Compta*, 4 Sawy. 375, Fed. Cas. No. 3,069, which is cited and relied upon by both parties, and which, in several respects, bears a close analogy to the case in hand, the court said:

"This action is brought to recover damages for injuries to goods shipped on board the above vessel, and consigned to libelants under various bills of lading, which are appended to the bill. At the hearing, the shipment of the goods, and their delivery in a damaged condition, were admitted. It was also admitted that the damage was by sea water. The burden of proof was thus cast upon the carrier to show that the damage was occasioned by one of those causes from the effects of which he is exempted, from the terms of the bill of lading, or by the general rules of law."

After stating that the defense set up in the answer was perils of the sea, and that the contention of the defendant was that the ship encountered such violent gales and heavy seas "as to strain and damage her, thereby causing her decks to leak and admit water to the cargo," and the facts in relation thereto, the court further said:

"It may, I think, reasonably be concluded that the weather experienced by the vessel was such as might, possibly, have produced, on a staunch and sea-

worthy ship, the effects attributed to it by the claimants, but that it was not of such unusual and extreme severity as to justify the assumption, without further evidence, that it caused the leaks which occasioned the damage. The carrier, to make good his defense, is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did. This proof can be afforded either by showing a sea peril of such a character that injury to the vessel, however stanch and seaworthy, would be its natural and necessary consequence, or by the direct testimony of those who observed its effect upon the ship, or by proving her condition on her arrival; or he may exclude every other hypothesis of causation, by satisfactory proof that she was tight, stanch, and seaworthy at the commencement of the voyage."

The broad statement is clearly made that it is the duty of the owner, in order to relieve himself, "to show that the damage arose from a sea peril." It necessarily follows that, if such facts are known to him, he must prove them. "It is not enough for him to show that it might have arisen from that cause. He must prove that it did." If the facts are unknown to him then the other methods of proof suggested by Judge Hoffman may be resorted to, —their sufficiency, of course, to be determined by the court. Common sense and sound reason appeal strongly to the conscience of the court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumptions.

In *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, the vessel was bound from Weymouth, Mass., to Savannah, Ga., and her cargo was damaged by reason of the loss of the cap covering the bilge-pump hole; and it was alleged that this pump had not been properly screwed down, but negligently and improperly fastened, and left insecure, by those in charge of the steamer. The defense was that it was displaced by a peril of the sea. The district court entered a decree in favor of the libellant, which was reversed by the circuit court. The supreme court reversed the decision of the circuit court, and affirmed that of the district court. It appeared in that case that almost immediately after the commencement of the voyage the steamer encountered a storm of unprecedented violence, from the effects of which she took in 18 inches of water, which came in contact with the cargo, and soaked it to some extent. The court said:

"Assuming, as we must, that the damages awarded by the district court resulted from the loss of the cap and plate covering the bilge-pump hole, the question to be determined is whether that loss was occasioned by a peril of the sea, or by the condition of that covering as it was when the vessel entered upon her voyage. If, through some defect or weakness, the plate and cap, and the screws which secured it, came off, or if the cap and plate were so made or so fastened as to be liable to be knocked off by any ordinary blows from objects washed by the sea across the decks, then the vessel was not seaworthy in that respect, and the loss could not be held to come within the exception of perils of the sea, although the vessel encountered adverse winds and heavy weather. * * * The obligation rested on the owners to make such inspection as would ascertain that the cap and plates were secure. Their warranty that the vessel was seaworthy in fact did not depend on their knowledge or ignorance, their care or diligence."

Upon all the evidence contained in the record, we are of opinion that the court did not err in its conclusion that the burden of

proof rested upon the claimant to show that the leak, which was the direct cause which led to the damage of the goods by sea water, occurred by the danger of the sea, and that in the absence of any such proof the presumption of the law is that the damage was occasioned either from the unseaworthiness of the steamer, or from the carelessness or negligence of the officers and crew on board. In either event the claimant and the steamer would be liable. The decree of the district court is affirmed, with costs.

THE CITY OF CLARKSVILLE.

(District Court, D. Indiana. May 4, 1899.)

No. 422.

1. SHIPPING—LOSS BY FIRE—EFFECT OF STATUTE.

Rev. St. § 4282, governing the liability of vessel owners for loss by fire "happening to or on board the vessel," has no application to a case where goods were destroyed by fire after they had been unloaded from the vessel onto a wharf boat.

2. CARRIERS—CONTRACT LIMITING COMMON-LAW LIABILITY.

The provision of section 196 of the Kentucky constitution, prohibiting common carriers from contracting for relief from their common-law liability, does not prevent a carrier from stipulating where goods shall be delivered, nor from contracting that, after they had been so delivered for transshipment by a connecting carrier, its common-law liability as a carrier shall cease.

3. ADMIRALTY JURISDICTION—MARITIME CONTRACTS—CONTRACTS TO PROCURE INSURANCE.

A contract by a carrier by water to procure insurance on goods received for transportation is not a maritime contract, creating a maritime lien, and a court of admiralty has no jurisdiction of a suit for its breach.

This is a libel in rem, in admiralty, on an alleged contract, civil and maritime, against the steamboat City of Clarksville, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening, for their interests therein. The amended libel articulately propounds in substance as follows:

(1) That the steamboat is enrolled at the city of Evansville, Ind., and is of more than 20 tons burden, and is engaged in commerce upon the navigable rivers of Kentucky and Indiana, and has been so engaged for a long time, in carrying freight, and in making contracts therefor, from Bowling Green, Ky., to Evansville, Ind., and to other places upon the navigable waters of the United States.

(2) That on or about April 1, 1896, libelants had a quantity of tobacco which they desired to ship to the firm of Kendrick and Ryan, doing business under the name of the "Central House," in Clarksville, Tenn. That on or about February 1, 1896, the steamboat, by its duly-authorized agent, solicited libelants to ship their tobacco by and upon it from Bowling Green, Ky., to the Central House, at Clarksville, Tenn., and then and there agreed with them, in consideration of shipping on this steamboat, and of the money to be paid for the carriage of the tobacco, that it would cause the tobacco to be insured against loss by fire in the consignee's open fire policy from the time such tobacco was received by the steamboat until the same was delivered to the consignee at Clarksville, Tenn. That in pursuance of said agreement, on or about April 7, 1896, libelants delivered to the steamboat at Bowling Green, Ky., seven hogshheads of tobacco, of the value of \$150 each, to be carried by

the steamboat and delivered to the consignee. That thereupon the steamboat, by its master duly authorized thereunto, delivered to libelants three bills of lading, one of which is as follows:

"Steamer City of Clarksville.

"Shipped in apparent good order and condition, by N. C. [meaning libelants], on board the good steamer the City of Clarksville, the following articles described below, which are to be delivered in like order, without unavoidable delay, the dangers of navigation, fire, explosion, and collision excepted, on the wharf boat or landing at the port of Evansville, Indiana, twenty feet from the water's edge, where carrier's responsibility shall cease, with privilege of lightering, towing, storing, reshipping unto Clarksville, Tennessee, or assigns, he or they paying freight for said goods at the rate of 15 cents per hundred pounds, and charges, \$2.00. But not responsible for breakage of castings, or glassware; mud, wet, and old damaged baggaging; nor for the leakage or breakage of liquor or decay of perishable articles; nor for unavoidable accidents to, or escape of, stock. No claim for damages after freight leaves the levee.

"In testimony whereof the owner, clerk, or master of said boat hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished, the other stands void. Dated at Bowling Green, Ky., this 8th day of April, 1896.

"Marks and Consignments.

"N. C.

"Central House, Clarksville, Tenn.

"Insured in consignee's open fire policy.

"April 8, 1896."

Articles.

1 Hhd. Tobacco.

17#

W. W. Server, Master.

That each of said three bills of lading is a copy of the other, except as to date and number of hogsheads of tobacco described therein. That the master, being duly authorized thereunto, in pursuance of the verbal agreement above stated, indorsed in writing upon each bill of lading, before delivering the same to libelants, the words, "Insured in consignee's open fire policy," and signed the name, "W. W. Server, Master" of said steamer, to such indorsements.

(3) That, at and before the time the contract of affreightment was made, the constitution of Kentucky, in which state said contract was made, contained this provision: "Sec. 196. No common carrier shall be permitted to contract for relief from its common-law liability." That the court of appeals of Kentucky, which is the highest court of judicature of said state, by its decisions since the adoption of said constitution, holds that the above-quoted constitutional provision is self-executing, and that it became of full force and operative as the law of Kentucky as soon as the constitution was adopted, and that it is, and remains, in full force, and applies to all contracts made by common carriers since the adoption of said constitution.

(4) That the steamboat took possession of the tobacco for the purpose of shipment, and carried the same to the port of Evansville, Ind., and landed the same on the wharf boat at said port for the purpose of being transshipped on another steamer to Clarksville, Tenn. That while the tobacco was on said wharf boat, and on or about April 15, 1896, it was totally destroyed by fire. That the undertaking by said steamboat to insure said tobacco in the consignee's open fire policy was without any authority whatever from said consignee, and said consignee had no policy of fire insurance upon said tobacco, and said tobacco was never insured in any open fire policy or otherwise of said consignee, and said steamboat altogether failed to perform its undertaking to have said tobacco insured. That said tobacco was shipped by them upon said steamboat solely in consideration of said undertaking on the part of said steamboat that said tobacco would be insured in said consignee's open fire policy, and, had it not been for such agreement, libelants would not have shipped said tobacco on said steamboat. By reason of the premises, the libelants have sustained damages in the sum of \$1,050, and interest on said sum since April 15, 1896.

(5) That all and singular the premises are true. Wherefore process is prayed against the steamboat, etc., and that the damages be decreed to be paid, etc.

The master and owners of the steamboat filed answer and exception in substance as follows:

(1) They admit the allegations of article 1 of the libel to be true.

(2) They admit that the steamboat, at the times mentioned in the libel, received certain tobacco from the libelants at Bowling Green, Ky., consigned to Clarksville; that the steamboat issued to libelants certain bills of lading, as described in the libel; that said bills of lading bore an indorsement as stated in the libel, which indorsement was put on by respondents' agent; that said tobacco was carried to the port of Evansville, and while lying at said port, awaiting transshipment to Clarksville, the same was destroyed by fire; that respondents received from libelants the stipulated price for carriage.

(3) As to all other matters alleged in said libel, they deny that the same are true, and state that the facts attending the shipment were as follows: Neither the steamboat nor respondents had any agent to solicit freight from libelants; that, if any one did solicit freight from them for the steamboat, it must have been a teamster, who represented his own business, and not respondents or their steamboats; that the first respondents knew about this tobacco was from the libelants themselves, who asked respondent Server to give them the rate to Clarksville; that Server gave them the rate, and libelants delivered to the steamboat, at her landing in Bowling Green, the tobacco in the libel mentioned, for shipment under the terms of Server's offer; that nothing was said to respondents, or to any agent of the steamboat, about insurance till after the delivery of the tobacco to the boat; that after such delivery libelants requested respondents' agent to make the indorsement set out in the libel on said bill of lading, so that the libelants might have insurance; that the indorsement was made after the contract of affreightment had been completed, and was no part thereof, and was no promise or agreement of respondents or their boat, and was wholly without consideration; that the indorsement was made because there is a general custom among tobacco shippers for the consignee to carry open insurance, for which the consignor is charged by him, but for the consignor to obtain the benefit of such insurance it is necessary for the bills of lading, when delivered by the boat to the shipper, to bear the indorsement stating, in effect, that the shipper claims such insurance, and signed by the master of the boat.

(4) Respondents say the court has no jurisdiction of the matters contained in the libel, the same not being matters of admiralty and maritime jurisdiction, the said libel being filed to enforce a claim for damages arising out of the nonperformance by said steamboat, its owners and agents, of a contract to procure insurance, which is not a maritime contract, and respondents and exceptants pray the same advantage thereof as if the same were separately and formally pleaded to said libel.

The master heard the cause, and found and reported the facts substantially as set out in the libel, and recommended a decree in favor of libelants for \$1,050, with interest thereon from April 15, 1896. The respondents have filed numerous exceptions to the finding and report of the master, but, after an attentive examination of the evidence, I am satisfied with his finding and report of the facts. If the libel states a good cause of action within the jurisdiction of a court of admiralty, I am of opinion that the same is made out by the evidence, and that there ought to be a decree for the libelants, as recommended by the master.

Gilchrist & De Bruler, for libelants.

Posey & Chappell and R. J. Meyler, for respondents.

BAKER, District Judge (after stating the facts as above). Two grounds of liability are relied upon by the libelants: First. It is insisted that the steamboat could not limit its liability as a com-

mon carrier by reason of the prohibition in the constitution of the state of Kentucky above quoted, and that it is responsible as such common carrier. Second. It is further insisted that the steamboat is responsible on the ground that it became an insurer of the tobacco from the time of its delivery, and remained responsible for its loss by fire until it was delivered to the consignee at Clarksville.

The first section of the act of congress (Rev. St. § 4282) approved March 3, 1851, does not apply to the facts of this case. This section is copied from the second section of Act 26 Geo. III. c. 86, which received a judicial interpretation by the court of queen's bench in *Morewood v. Pollok*, 18 Eng. Law & Eq. 341. It was there held that the act did not extend to the case of a fire occurring on a lighter in which cotton was being conveyed from the vessel to the shore. This decision is in conformity with the language of the act which limits its operation to a fire happening to or on board the vessel. Without a departure from the plain reading of the words of the act, I cannot extend it to a fire happening on board of the wharf boat lying alongside the shore. The constitution of the state of Kentucky would be inoperative in any case to which the above statutory provision extended. The act of congress was passed in pursuance of an express grant of power, and such act is valid and operative, anything in the constitution or laws of the state of Kentucky to the contrary notwithstanding. The act of congress, however, is inapplicable to the present case, because the loss did not happen from a fire to or on board the vessel. It is equally evident that the provision of the constitution of the state of Kentucky relied upon does not apply because the loss happened after the delivery of the goods on the wharf boat, where the libelee's responsibility as a carrier was at an end, and its only responsibility was that of a wharfinger or warehouseman. This is the express agreement contained in the bill of lading. The constitutional provision does not attempt to limit the right of a carrier to stipulate where the delivery of the goods shall be made, nor does it prohibit the making of a contract for relief from its common-law responsibility as a carrier when it has made a delivery of the goods pursuant to the terms of its bill of lading. There is no allegation in the libel imputing the loss to the negligence or want of care of the libelee. It does not proceed on the theory of a loss arising from want of care.

If any recovery can be had, it must be upon the ground of a breach of the contract to procure insurance, or on the ground of a false representation that the tobacco had been insured. There is no claim that the respondents were, or were to become, themselves the insurer. They were not in the insurance business, and never had been. Their business was only that of a carrier and forwarder. The bill of lading so imports. There was nothing in the circumstances or in the negotiations of the parties that gives any countenance to the idea that the steamboat or its owners meant to become the insurer themselves, or to charge the boat or its owners as insurers, nor anything in the libel or proofs to indicate that the libelants expected either the boat or its owners to become insurers of the tobacco. The libel alleges that it was agreed in consideration of shipping the

tobacco on the steamboat, and of the money to be paid for its carriage, that the steamboat would cause the tobacco to be insured against loss by fire in the consignee's open fire policy from the time that it was received at the landing at Bowling Green until the same was delivered to the consignee at Clarksville. It is then averred that, in pursuance of said agreement, the libelants delivered the tobacco to the steamboat for carriage. The breach of the contract is averred thus: That the undertaking by the steamboat to insure the tobacco in the consignee's open fire policy was without any authority from the consignee, that the consignee had no open fire policy, and that the tobacco was never insured in any open policy of the consignee or otherwise, and that the libelee wholly failed to perform its undertaking to have said tobacco insured. It is to be observed that the contract of affreightment had been fully performed by the carriage and delivery of the tobacco without damage on the wharf boat at Evansville, Ind., as stipulated in the bill of lading. No action could be maintained on the bill of lading for failure to deliver. The only thing left unperformed was in failing to insure in the consignee's open fire policy. The failure of libelants to allege or prove that the amount for which the tobacco was to be insured was stated or agreed upon is a circumstance tending to support the respondents' contention that it was libelants' duty to forward the bill of lading to the consignee and have him effect the insurance. I do not care, however, to dispose of the case on this ground.

The facts of this case clearly distinguish it from the case of *Rosenthal v. The Louisiana*, 37 Fed. 264. That was a libel for a failure to deliver pursuant to the contract of affreightment, and the verbal agreement to insure the goods before they were placed on board was incidental to the main contract for the breach of which the suit was brought. The agreement set out in the present libel is simply a contract or undertaking to procure insurance.

A contract of insurance effected on goods transported by water, whatever doubts may have been at one time entertained, is now firmly settled to be a maritime contract. *Insurance Co. v. Dunham*, 11 Wall. 1. But a contract to procure insurance, such as this contract is alleged to be, is not a maritime contract, nor is it a contract of insurance. It is on the other side of the line dividing contracts which are maritime from those which are not maritime. A suit to recover damages for the breach of a contract to procure insurance is purely a common-law action, and is not within the jurisdiction of the admiralty. *Marquardt v. French*, 53 Fed. 603. Such a claim does not differ in principle, so far as concerns the jurisdiction of a court of admiralty, from a suit by a shipping broker to recover compensation for services in procuring a charter party (*The Thames*, 10 Fed. 848); or by an agent employed to solicit freight (*The Chrystal Stream*, 25 Fed. 575); or for compressing cotton preparatory to shipment (*The Paola R.*, 32 Fed. 174); or for buying a ship, and traveling on her to look after the owner's interest (*Doolittle v. Knobeloch*, 39 Fed. 40); or from a contract with the owners to supply their ships for the period of one year with provisions (*Diefenthal v. Hamburg-Amerikanische*

Packetfahrt Actien-Gesellschaft, 46 Fed. 397); or from a contract for building a ship. In *The Havana*, 54 Fed. 201, 203, it is held that money loaned to a shipowner to enable him to pay necessary bills for advertising in newspapers the excursions of the steamer, in order to keep up her business, was not within the admiralty jurisdiction, because such advertising was not a service rendered directly to or upon the ship, but belonged to that preliminary class of services rendered wholly on land, and not deemed maritime, and hence not giving rise to a maritime lien.

In my opinion, the contract by the steamboat to procure insurance for the libelants in the consignee's open fire policy does not create a maritime lien, and hence is not within the jurisdiction of a court of admiralty. Nor can a court of admiralty entertain jurisdiction of a libel to reform a policy of marine insurance, nor to enforce the execution of a policy of marine insurance agreeably to the terms of an oral contract. Such reformation or enforcement can only be obtained in a court of equity, upon a bill filed for such purpose. A suit brought upon a policy of marine insurance, where loss occurs outside of the expressed limits of the policy, and where the libel is based upon alleged false and fraudulent representations leading up to the making of the policy, is not within the jurisdiction of a court of admiralty. Such a suit is one based upon false and fraudulent representations, by which the libelant was induced to accept the policy supposing he was insured when he was not. *Williams v. Insurance Co.*, 56 Fed. 159. Under the facts set out in the libel, and supported by the proof, the agreement of the steamboat must be regarded as a contract to procure insurance, or as a false and fraudulent representation or warranty that it had procured insurance; and, in either aspect, it does not disclose a state of facts creating a maritime lien enforceable in rem, within the jurisdiction of a court of admiralty. Whether a libel in personam against the owners would lie it is unnecessary to determine.

The report of the master will be set aside, and the libel dismissed. So ordered.

THE STRATHDON.

(District Court, E. D. New York. April 29, 1899.)

1. SHIPPING—CONTRIBUTION IN GENERAL AVERAGE — LIABILITY OF CARRIERS.

The fact that the owners of a vessel cannot maintain an action against the owners of the cargo for contribution in general average for the ship's loss by fire because the fire was caused by the negligence of one of their crew, which is imputable to them, does not protect them from a similar action by the owners of the cargo for contribution.

2. SAME—EXCLUDING LOSS TO SHIP.

Although the owners of a vessel have been adjudged exempt from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, under section 3 of the Harter act, on the ground that they exercised due diligence to make the vessel seaworthy and in fit condition for the voyage, and were without personal negligence or fault, they cannot maintain an affirmative action against the owners of the

cargo for contribution in general average to the ship's loss; but where they are invited to such an adjustment by an action brought by the sole owner of the cargo, the ship's loss must be taken into consideration, as the effect of excluding it would be to make the same act for which they are acquitted of responsibility by the statute the basis of an indirect recovery of a part of the damage which was in issue in the direct action.

This is an action by the sole owners of the cargo of the steamship Strathdon to recover contribution from the ship owners to damage to the cargo resulting from a fire on the vessel during the voyage.

Black & Kneeland, for cargo owners.

Convers & Kirlin, for the Strathdon.

THOMAS, District Judge. On November 1, 1893, the ship Strathdon, bound from Java to New York, while passing through the Suez Canal, was set on fire between decks by the overheating of the donkey boiler, through the neglect of the man in charge thereof, and without the personal negligence of the ship owners. The means employed to extinguish the fire caused the losses which are the subject of adjustment in this action, which is brought by the owners of the cargo, which is a single interest, to recover contribution from the ship owners. The facts are fully stated in the action between the same parties, involving the question of the carrier's liability for the whole loss. See 89 Fed. 374. In that action the court adjudged that the claimants were free from negligence and liability. The present questions come up on exceptions to the report of a special commissioner, to whom all the issues in this action were referred. The commissioner determined: (1) That the questions in issue should be decided according to American law, although the ship was of English registry, and sailed under a charter party made in England, which stipulated for the application of the English law, and the observance for the purposes of average of the York-Antwerp Rules of 1890; (2) that the owners of the ship, on account of the negligent act of their servant, whereby the fire occurred, cannot recover contribution from the cargo owners for the ship's losses, and that, as a consequence, no action can be maintained against the ship owners for contribution towards the losses of cargo. The conclusion reached by the court renders it unnecessary to review the finding of the commissioner that the question in issue should be decided according to the American law. The following discussion relates (1) to the claimants' contention that no action whatever can be maintained against the ship owners for contribution towards the losses of cargo; (2) to the claim of the owners of the cargo that the losses of the ship owners must be excluded from the adjustment, in case one be directed. As to the first inquiry, the claimants' position is this: If the fire had not been caused by the negligence of the person in charge of the donkey boiler, the owner of the ship would have been liable to contribute in general average towards the losses of the cargo; but, as the fire was caused by the negligence of the person in charge of the donkey boiler, the carriers (owners of the ship), under *The Irrawaddy Case*, 171 U. S. 187, 18 Sup. Ct. 831, could not recover contribution for

their losses from the cargo, and that, as a consequence, the cargo owners cannot recover contribution towards cargo losses from the carriers. This contention of the claimants is not approved. It is true that under *The Irrawaddy* Case the carriers could not affirmatively demand contribution, because, notwithstanding the exculpation from the payment of damages for the loss of cargo accorded them by the fire and Harter acts, they are deemed guilty of constructive negligence when they seek to recover contribution for the ship's losses. But this imputed negligence does not exempt them from an action for contribution in general average at the instance of the cargo owner for cargo loss. The cargo owner has such action if the carriers be free from such imputed negligence; and can it be asserted logically that the carriers, when free from negligence, are liable to the cargo owners, but that this liability is discharged because the carriers are negligent, and such negligence caused the loss? According to such a contention, it is better to be negligent than unoffending. By it the carrier may plead his own wrong to escape an obligation that would be due from him, if he were without fault. The contention that a debtor may absolve himself from a debt by showing that his wrong was the occasion of the obligation violates essential principles, and cannot be otherwise than vicious. Without further discussion, the conclusion respecting the first inquiry is that the owner of the cargo may maintain an action for contribution for the losses of the cargo, although the carriers could not have maintained a similar action for the ship's losses. Thereupon the second inquiry arises: What losses should go into the adjustment,—the cargo losses alone, or both the ship's and cargo's losses? Now, the libelants' contention is that, as the carriers could not assert a claim for contribution, the owners of the cargo (there is a single ownership of the cargo) may invite an adjustment, and exclude the carriers from any beneficial participation, but, on the other hand, impose upon them the burden of contribution. This contention is based upon the theory that the status of the carriers is that of wrongdoers, whether they seek or are invited to a general average adjustment. For the purpose of reaching a correct conclusion the principles underlying general average may be considered briefly. When, in a sea adventure, the master of the ship, or some person of equivalent authority, voluntarily and necessarily makes a sacrifice of the ship or cargo, in whole or in part, for the purpose and with the result of saving the residue, or the lives of those on board, from a common, impending peril, the ship, cargo, and freight earned must contribute proportionally to the part thereof saved towards making good the loss suffered and the expenses necessarily incurred thereby. The contribution is called general, gross, or extraordinary average. *The Star of Hope*, 9 Wall. 203; 3 Kent, Comm. v. 232; *Ord. de la Mar.* (1683) bk. 3, tit. 7, and arts. 1-3; *Birkley v. Presgrave*, 1 East, 220, 228; *Walthew v. Mavrojan*, L. R. 5 Exch. 116, 120. The broad and equitable nature of the rule primarily contemplates ratable contribution from all interests saved towards all interests sacrificed. 1 Pars. Shipp. & Adm. p. 338; Ben. Adm. p. 166,

§ 295; Abb. Shipp. (13th Ed.) p. 635; Id. (5th Ed.) pp. 347, 348. The spirit and intention of this law is to place the persons interested, as far as may be, in the same relative position which they occupied before the peril was met, or "in order to recoup the loser, and place him once more on a footing with his co-adventurers." Macl. Shipp. (4th Ed.) p. 688. This intendment involves necessarily reciprocity of obligation and right, mutuality in taking and receiving payment. But, as stated by Judge Brown in *Heye v. North German Lloyd*, 33 Fed. 60, 64, while "reciprocity is undoubtedly the ordinary rule in general average," there are exceptions to this "reciprocity of right and obligation," as in the case of cargo carried on deck (*The Paragon*, 1 Ware, 322 [see annotations to same in 18 Fed. Cas. 1,085]; *Triplet v. Van Name*, 2 Cranch, C. C. 332, Fed. Cas. No. 14,176; *Heye v. North German Lloyd*, 33 Fed. 60, 65), goods shipped without the master's knowledge, the baggage of passengers, clothes of seamen, provisions for the ship, and munitions of war (Id.). These exceptions all turn upon the nature of the goods, the place or circumstance of their carriage. Is there another exception, based on the cause of the impending danger, and the relation thereto of the person whose goods are sacrificed? If the fault of the owner of the ship or cargo was the proximate cause of the peril, he could not invoke the benefit of the law of general average. But when he is brought in at the instance of the cargo owner, his fault, if it existed, was not formerly a matter of consideration. This happened for reasons now to be stated. In *Carv. Carr. by Sea*, § 373a, it is said:

"The earlier view appears to have been that, where there had been fault, the sacrifice was not to be regarded as a general average act; and, consequently, that no contributions were to be made, but the person in fault was to be looked to. This view is not now taken. 'The Rhodian law, which in that respect is the law of England, bases the right of contribution, not upon the causes of the danger to the ship, but upon its actual presence.' And thus innocent sufferers from a general average sacrifice, necessitated by neglect or other improper conduct, may claim contributions from other innocent co-adventurers."

The thought here conveyed is that the innocent cargo owner, damaged by sacrifice occasioned by the ship's negligence, is not required to find his remedy against the guilty ship before or instead of resorting to his innocent co-adventurers for contribution; but it is not implied, and probably was not in the writer's mind, that the ship owner could not be made a party to such contribution; nor was it considered whether he might participate in the average, if made such a party. The ship owner at fault was not included as one of the contributees, because he was liable for the whole loss, and therefore there was no occasion for considering his rights or duties in a general average adjustment instituted by his co-adventurers. When he paid the damages upon the theory that he was at fault, he was discharged from further payment in general average, and the sum paid by him was considered in any adjustment between the other co-adventurers. *The City of Para*, 69 Fed. 414; *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 349, 74 Fed. 564, 569. If he did not pay,

and fault was ascribed to him, a general average suit was not the form of remedy, because thereby he would be called upon to pay only a portion of the damages for which he was liable. Hence it is not strange that occasion for decision of the question here involved has not arisen. Undoubtedly, the liability of the owners of the ship for sacrifices caused by her negligence precludes them from asserting affirmatively a right to recover contribution for her loss occasioned thereby. This is the former and present rule. *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831; *The Nicanor*, 40 Fed. 361, 44 Fed. 504; *The Agathe*, 71 Fed. 528; *Snow v. Perkins*, 39 Fed. 334. The libellants contend that, as a consequence of this rule, it must be held in the present case that the carriers, declared innocent by the statute, absolved from all liability by the statute, defended by the statute from all payment of damages based on a claim of breach of duty, and so adjudged by the court, must respond in damages, as if for breach of the same alleged duty, in an action for general average contribution; and that in so responding they are not only subject to the usual adjustment of all losses and savings, which is undoubted, but that they must be excluded from recovering any of their losses, and, on the other hand, contribute for the losses of their co-adventurers. That is to say: (1) Should A., cargo owner, sue B., ship owner, in a direct action to recover \$2,000 total damage to cargo, he may not recover, because B. has been guilty of no breach of duty owing to A. (2) But A. may institute an action for general average, and recover from B. (a) whatever sum B. should contribute under the usual rules of reciprocity obtaining in general average; also (b) a certain additional sum upon B.'s nonexistent breach of duty, which recovery is effected by excluding B.'s losses from the average upon the theory that he is a wrongdoer. This last sum, so alleged to be recoverable in general average, is some portion of the sum which would be recoverable in a direct action if there had been an actionable breach of duty, and which is not recoverable in such direct action because there is no breach of duty whatsoever. Hence, by this theory, A. may recover in general average pro tanto on the theory of B.'s guilt what the public law declares that A. should not recover at all, for the precise reason that B. is innocent. Hence, if B.'s loss is \$2,000 and saving \$2,000, and A.'s loss is \$2,000 and saving \$2,000, under the usual rules of reciprocity A. can recover nothing from B.; but if B. be regarded as at fault, and thereby excluded from participating, except to contribute, he must pay to A. one-third of his loss, or \$666.66. This is just one-third of the whole sum that A. is not permitted to recover in a direct action. It is no answer to this palpable evasion of the statutes to say that A. is not recouped for all his losses by B., but only for a part of them. His recovery, so far as it extends, is based on a nonexistent legal wrong; and a general average action, which is declared not to be based on tort (*Ralli v. Troop*, 157 U. S. 386, 403, 15 Sup. Ct. 657), is so far based on a tort, which has no being in fact, as to allow A. to recover not only the usual average contribution, but additional damages based on B.'s alleged wrong. A clear evasion of the statute results from such doc-

trine. The proof of the evasion does not rest upon theory alone, but upon mathematical demonstration.

But it is urged that the libelants' claim is the logical outcome of *The Irrawaddy Case*. On the contrary, it is considered that the supreme court suggested no holding that supports any such perversion of the statutes. In *The Irrawaddy Case*, B., ship owner, sued A., cargo owner, for contribution. The old rule was invoked that B.'s sacrifice was caused by the negligence of B.'s servants. To this it was answered that the Harter act relieved B. from liability based upon the negligence of his servants. To this it was replied that the Harter act relieved B. from paying any damages based upon his servant's negligence, but did not authorize him to maintain an action for contribution to his own losses against his co-adventurers. In that case the ship owner was claiming (1) that the Harter act relieved him from the obligation to pay the cargo owner's losses, which no one disputed; (2) that the Harter act authorized him to initiate an action in general average to recover pro tanto the losses of his ship, which was denied upon the theory that relief from liability for the loss of the cargo owner did not give him a right to maintain an action to recover for the ship's losses. The decision is tantamount to this: The ship owner may use the Harter act to shield himself from any claim for damages made against him, based upon breach of duty, but may not use the act as the basis of an action in his own favor. The decision does not practically diminish the benefit of the Harter act. That act gives immunity, under suitable states of fact, from claims based on constructive negligence. It does not confer causes of action upon the ship, but deprives cargo owners of causes of action against the ship. The benefit of the act is left whole and sound by the supreme court. Now, it cannot matter in what form of action the cargo owner seeks to recover damages from a ship owner protected by the statutes. He can no more do so under the guise of an action for general average contribution than in a direct action, provided in the former case he seeks to exclude the ship owner from the situation of a creditor; otherwise, the Harter act is not left untouched, is not left whole and sound for the ship owner's protection, but is violated quite as obviously and grossly as if the action had been direct, save as respects the amount of the recovery. In such case the cargo owner asserts and establishes something besides general average. He asserts and establishes a particular average, in a general average proceeding, and recovers thereon. In *The Irrawaddy Case* the supreme court could declare that by its holding it left the Harter act in full effect, and the ship owner in full enjoyment of it, and in full protection from it. That is literally true. In the present case, if the libelants' contention prevail, the actual result would be that (1) the ship owner would be deemed guilty of actionable negligence; (2) by reason of such negligence an action could be maintained against him to recover a sum of money from the payment of which the statute acquits him. This court, in an action between the same parties, has decided that the claimants were not negligent, and that they shall pay no damages based upon an allegation of negli-

gence. The court is now asked to adjudge, in an action between the same parties, that the claimants were negligent, and should pay damages therefor. The judgment in the first action, until reversed, is forever an estoppel between the parties as to the fact of the claimants' negligence; and it is thought that no instance exists in jurisprudence of the anomaly presented by the libelants' contention that, notwithstanding the estoppel between the parties, the fact found by the judgment in the first case against the libelants may be disregarded, and the opposite thereof, viz. that the claimants were negligent, and that they should pay damages by reason thereof, should be found and invoked in their behalf. The supreme court in *The Irrawaddy Case* could say to the ship owner, "All that the Harter act gives you is reserved to you by this decision." Such could not be said if the libelants' views were adopted here; and because it cannot be said, and because the opposite view is practically consistent with *The Irrawaddy Case*, this court has arrived at the following conclusions:

1. The fire and Harter statutes intend to relieve ship owners, in case of compliance therewith, from any liability to cargo owners for injury to cargo.

2. Such statutes do not give the ship owner any new right to sue the cargo owner for injury to the ship caused by the peril.

- 3. The cargo owner cannot, under the guise of an action for contribution in general average, recover upon the basis of the ship owner's alleged constructive negligence a portion of the damages, which upon the same alleged grounds he could not recover in a direct action.

4. While the ship owner, freed from liability by the statutes, may not invoke an action for general average adjustment, to obtain payment of his own losses, the cargo owner may do so; but, as the statutes prevent his recovering any damages based upon the ship owner's alleged negligence, the cargo owner may not, in the adjustment invoked by him, derive any benefit from such alleged negligence.

5. In such case the usual rule of reciprocity of right and obligation exists, and the adjustment should be made as if there was no negligence in the case, there being none in fact on the part of the owners.

There is some contention respecting the valuation of the ship. This subject was not presented orally. A fuller history than that disclosed by the briefs is needed for intelligent decision, and the matter is left for further presentation. It is now decided that the libelants may maintain the action, and recover, if they shall show some balance due to them on an adjustment based on the property lost and saved by the ship owners and by the cargo owners, irrespective of any element of negligence by the officers and crew of the ship.

THE BARNSTABLE.

(Circuit Court of Appeals, First Circuit. May 11, 1899.)

No. 249.

SHIPPING—CONSTRUCTION OF CHARTER PARTY—RISK OF COLLISION.

A provision of a charter party that "the owners shall pay for insurance on the vessel," to be given any effect as between the parties, must be construed as requiring the owners to insure against all such losses as would otherwise fall on the charterer; and, where the owners failed to procure insurance, they made themselves insurers, and cannot cast upon the charterer the burden of paying damages recovered against the vessel for collision, against which they might have insured.

Appeal from the District Court of the United States for the District of Massachusetts.

J. Parker Kirlin, for appellant.

Charles T. Russell, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

WEBB, District Judge. Little need be added to the careful opinion of the district judge in this case (84 Fed. 895), which is a case of contract between the owners and the charterers of the steamship Barnstable. There can be no controversy as to the terms of the charter, for it is in writing and is in evidence. The difference relates to the twenty-second article of the charter, which is in these terms: "The owners shall pay for the insurance on the vessel." What are the obligations imposed by this provision of the contract?

In argument there has been some discussion concerning the mutual relations, under the charter, between the parties. The owners contend that the charterers were bailees, and held to all the liability of bailees, and this contention the charterers controvert. We do not think that the determination of that question will aid in the decision of the case; for whether or not, in the full and strict sense, the charterers were bailees, they would be, independently of this insurance clause, chargeable with some of the risks of the ship, while the owners would bear others. Assumption by the owners of insurance against risks affecting themselves alone would be of no advantage to the charterers, who would, in no event, be answerable for losses arising from such risks, and had no interest in insurance against such losses. The insertion of this clause in the charter has no meaning unless it be to make such insurance as would profit the charterers, which could only be effected by insurance against losses which would fall upon them, against all risks attaching to them. This insurance clause must have been intended for their protection, and could have been understood by them in no other way, and the agreement of the owners was not to partially, but wholly, protect them, and to relieve them of the expense of insuring themselves. In effect, it said to the charterers: "Your only responsibility will be to pay the hire of

the ship; all other things shall be our care and at our charge." If, having so agreed, they chose to take the hazard of loss, and to save the cost of a policy, they made themselves insurers, and, after the loss, cannot throw it upon the charterers. The decree of the district court is affirmed, with interest, and the costs of this court are adjudged to the Boston Fruit Company, appellee.

ULSTER S. S. CO., Limited, v. CAPE FEAR TOWING & TRANSPORTATION CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1899.)

No. 744.

1. SALVAGE—SERVICES.

Services of tugs in towing a steamer from an offshore sand bar, on which she had grounded, in connection with their carrying out the steamer's anchors to enable her to assist in getting off the bar, are in the nature of salvage services, authorizing compensation on that basis.

2. SAME—COMPENSATION.

An allowance of \$13,000 for salvage services in getting a steamer off a sand bar should be reduced 50 per cent., though the steamer was worth \$300,000, the value of the tugs employed being only \$18,000, all the services being rendered under the direction and control of the master of the steamer, the real services which put her afloat being, in the main, rendered by herself, operated by the master and crew, it appearing probable, the good weather continuing, that without the services of the tugs the master would have successfully floated her through the use of his own crew and appliances, no risk being incurred by the salvors, and the tugs being exposed to no danger, the skill shown in rendering the services being of the ordinary kind, the labor being the ordinary employment of the tugs and persons engaged, the time employed being less than a day, and it appearing that extraordinary awards were given by the decree to members of the crews of the tugs, such as \$300 to cooks and firemen, who performed no services out of their usual routine, and whose wages were \$1 a day.

3. SAME—ALLOWANCE TO CREWS.

Where salvage services which occupied less than a day are of the lowest order, and the crews of the tugs perform only services in the ordinary course of employment, the award to them should not be more than two months' pay.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

On September 24, 1897, at 7:20 a. m., the British steamship Torr Head, bound on a voyage from New Orleans to Belfast, drawing about 25 feet of water astern, grounded on the Frying Pan Shoals off the coast of North Carolina, near the mouth of Cape Fear river, between five and six miles inside of the light-ship there stationed, and about a mile east-northeast from the black buoy. She had been swept out of her course about 40 miles by an abnormal setting of the Gulf Stream to the south and west, caused by a hurricane that had passed over the locality a day or two before. Frying Pan Shoals are described in the United States Coast Pilot as especially dangerous to navigation "on account of the great distance they make out from the shore," and "on account of their distance from the land, and the strong tidal currents which set across them in strong winds." They are said to consist "generally of sand,

shifting to some extent with every gale." At the time of this mishap the weather was fine, the barometer high, and the sea smooth. The weather remained fine, with light breezes, the whole of the 24th and 25th. The ship grounded without any noticeable shock. About three years before this, the ship *Valedo*, 310 feet long, drawing 21.6, grounded in the same way, and at about the same spot, and got off without assistance and without injury by turning herself around with her anchors. When the *Torr Head* grounded, soundings were immediately taken around the ship, and 30 feet of water was found over the stern, shoaling gradually to 25 feet amidships, 22.6 at the break of the forecastle, and 24 over the stem. The character of the bottom was examined, and found to be soft sand. There was deep water both ahead and astern of the ship. Attempt was made to back her off by filling the after water tanks, and shifting cargo from forward aft, so as to put the vessel by the stern, and by going astern with the engine; but this did not succeed. While these operations were going on, the steam tug *Jacob Brandow*, about 9:30 a. m., came alongside, and offered assistance, which was refused. About 11:30 a. m. the assistance of that tug was engaged, with the understanding that the amount of compensation to be paid was to be settled by arbitration; and the tug took a stern line to help pull the ship off. The captain of the *Torr Head* understood that he was employing them for a towage service. About 12:30 p. m. the tug *Blanche* arrived, with a salvage crew in a lifeboat, but the services of these salvors were refused, and the tug *Blanche* was engaged on the same terms as the *Brandow* to take a line and tow astern. About 3:30 p. m., while the *Brandow* and the *Blanche* were towing astern, a small steam tender, called the *Isabel*, came out, and offered her assistance, and she was engaged to run out the starboard anchor, but her captain considered his vessel too small for that service, and she was told to take a line, and tow astern with the other tugs. This towing astern by the three tugs continued until 5 p. m. with little or no result. The captain of the *Torr Head* then ordered the tugs to stop towing, and to go forward, and run the steamship's starboard anchor out, broad off on the starboard bow, which the tugs *Brandow* and *Blanche* proceeded to do, and about 6:30 p. m. got out the anchor and about 40 fathoms of chain. The three tugs were then set to towing on the starboard bow, and strain was put on the anchor by the ship's steam windlass. The result was that in an hour's time the ship was moved about 70 feet, and was turned almost entirely around; i. e. about 124 degrees, or from N. 56 E., to S. This brought the starboard anchor close under the forefoot of the ship. The captain of the *Torr Head* then, about 7:30 p. m., asked the tugs *Blanche* and *Brandow* to run the starboard anchor out straight ahead, in order that he might heave it tight, so as to keep the ship from moving further on shore, and so that he might jettison some molasses. This the tugs refused to do, and then quit work, saying they would come back the next tide. The captain says they gave as a reason for this refusal that the ship was all right, and in no danger. He testifies that he begged, and almost beseeched, them to run this anchor. They gave as their reason for this refusal that they thought it was an obstruction to the vessel in the position she was in. When the tugs quit work and left, the anchors were dropped under the forefoot of the vessel, and the crew was sent to supper. The tug *Isabel* lay near the ship. The tug *Blanche* went off a mile or two, and anchored. The tug *Jacob Brandow* went off towards Wilmington, with the lifeboat in tow, to take the occupants ashore. At 8:45 p. m., after supper, the crew began to jettison cargo,—staves and molasses,—which jettison continued until 10 p. m. At this time the tug *Blanche* came back, and offered the services of a pilot, which were refused. Soundings were made at dead low water, at 9:30 p. m., around the ship, and deep water was found ahead, and 21 feet amidships. About 11 p. m. the tug *Blanche* came back again, and, after some difficulty, and protests that she was not strong enough, was persuaded to run the anchor straight out ahead, with 30 fathoms of chain. In this work the *Isabel* helped her. The ship then heaved tight on this chain, and commenced to pump out her tanks to lighten the ship, and continued to jettison cargo. About 1 a. m. on the morning of the 25th the tug *Brandow* came back, and all the tugs were ordered straight

ahead to tow, the ship meanwhile working her engines, and putting a strain on the anchor chain. About 3:30 a. m. it was found that the ship was moving, and a heavy strain was put on the anchor chain. About 4 a. m. the anchor hove home, and the ship's head began to fall off to port. The tugs were then ordered to tow on the starboard bow. At 4:15 a. m. the ship began to move ahead. At 4:25 she was all afloat, and at 4:30 a. m. the ropes were cast off, and the ship proceeded on her way to Belfast, the captain saying to the tugs he would give them full credit for all they had done. While she was aground, she "lay easily," as one of the libelants admits.

It is claimed in the libels that she was in danger of being hogged, because she was aground amidships; but the testimony is that she was water-borne bow and stern all the time, and was never at any time in any such danger. It is further claimed that she was pounding. One of the witnesses for libelants says she pounded on the morning of the 25th, before she was hauled off, but that he was not aboard, and could not say how hard she pounded. Those who were aboard of her say she moved slightly and easily in her bed in the sand. When the Torr Head reached Belfast, she was docked, and the only injury she suffered from this grounding was the denting of five of her plates, which were taken out, rerolled, and put back in position. The small damage done, as thus indicated, to a ship of her enormous weight and length, shows the insignificance of the pounding. The cargo jettisoned was 10 tons of staves and 650 barrels of molasses, weighing about 200 tons. The Torr Head is 453 feet long, of 5,910 gross and 3,967 net tonnage. She is a twin-screw steel ship, launched in March, 1894, and cost, new, £80,000, and had been three years in service. Figuring her annual depreciation at 7 per cent., which is the lowest allowed, as the master testifies, it would make her value at that time about £63,200, or, in American money, \$305,888. This is the only evidence in the record as to the value of this ship. The tug Jacob Brandow is a wooden vessel, built in 1874, and was therefore 23 years old at that time. She is 78 feet long, 17 feet beam, 8 feet depth, net tonnage 32.69 tons, with one boiler 14 feet long, 96 inches in diameter (allowance of steam 80 pounds per square inch), and one condensing engine of 22½ inches diameter of cylinder and 2 feet piston stroke. The evidence of her value is that libelants bought her for \$5,200 more than two years before this time. She had on this occasion a crew of six men,—master, mate, engineer, fireman, cook, and deck hand. The tug *Blanche* is an iron vessel, built in 1878, and was therefore nineteen years old. She is 83 feet long, 17.9 feet beam, 10 feet depth, net tonnage 47.12 tons, with one boiler 11½ feet long and 107 inches in diameter (allowance, 75 pounds of steam to the square inch), and one condensing engine of 20 inches diameter of cylinder and 22 inches stroke of piston. The evidence of her value is that libelants had bought her three years prior to that date for \$11,000. She had a crew of six, the same as the *Jacob Brandow*. The tug *Isabel* is a small, wooden vessel built at Buffalo, on Lake Erie, in 1891, and was therefore six years old at that time. Her certificate of inspection does not give her dimensions, but states that she is of 13.32 net tons burden, has one boiler 9 feet long, of 75 and 88 oval inches in diameter (steam allowance, 115 pounds per square inch), and one keel condensing engine of 14 inches diameter of cylinder and 16 inches stroke of piston. There was no evidence adduced as to her value. She had a crew of five persons,—master, mate, engineer, fireman, and cook. The value of the salvaged vessel, exclusive of cargo and freight, now involved in this suit, was therefore about \$306,000, of the salvaging vessels about \$18,000, and the number of persons on the vessels engaged in assisting the *Torr Head* 17. The *Torr Head* touched at 7:20 a. m. on September 24th, and went on her voyage 4:30 a. m. September 25th, being aground about 21 hours. The tugs worked during only a portion of this time. The *Brandow* worked from 11:30 a. m. to 7:30 p. m. on the 24th, being 8 hours on that day, and from 1 a. m. to 4:30 a. m. on the 25th, being 3½ hours on that day; or a total of 11½ hours. The *Blanche* worked from 12:30 p. m. to 7:30 a. m. on the 24th, and from 11 p. m. on the 24th to 4:30 a. m. on the 25th; a total of 12½ hours. The *Isabel* worked from 3:30 p. m. to 7:30 p. m. on the 24th, and from 11 p. m. on the 24th to 4:30 a. m. on the

25th, a total of $9\frac{1}{2}$ hours. With the exception of the two occasions when the anchor was towed out, once by the Brandow and Blanche and once by the Blanche and Isabel, the work consisted of taking a line and tugging at the Torr Head. All of this work was done in fine weather and smooth sea, and without damage or particular risk of person or property. The business of these boats was to seek towage in the waters where they were working on the Torr Head, and further out, and all up and down the coast for 40 miles, and both boats and crew were engaged in their ordinary vocations during the whole time of this service. These facts appear clearly in the contest made in this court between the crews and the owners of these vessels as to the division of the award between them. None of the crews of the tugs at any time left their own vessels, or went on board the Torr Head, except that two men paddled around the Torr Head in a small dory, and took soundings. The tugs at all times were acting under the orders and directions of the master of the Torr Head, who had sole charge and direction of the services rendered. The two tugs Brandow and Blanche belong to the same owners, the Cape Fear Towing & Transportation Company. The tug Isabel is owned by John L. Grim. The owners of these tugs filed separate libels in rem for salvage against the Torr Head when she returned to the United States in November, 1897, claiming in this proceeding salvage not only on the vessel, but also on her cargo and freight. Six of the crew of these vessels—two from each—also filed a separate libel in rem, making similar claim. All three libels were consolidated.

It is conceded that no claim can be made in this present cause for salvage on either the pending freight or the cargo. The district court found that the services rendered were of the nature of salvage services, and made an award of \$13,000, to be divided equally between the crews and the owners of the three tugs. The decree of distribution shows as follows:

Amount awarded herein, thirteen thousand dollars.....	\$13,000 00
To the Cape Fear Towing & Transportation Company, owner of the salvaging tugs Blanche and Jacob Brandow, and to John L. Grim, owner of the salvaging tug Isabel, one-half of said sum, to wit, the sum of.....	\$ 6,500 00
—Two-thirds thereof to go to the Cape Fear Towing & Transportation Co., and one-third to John L. Grim. To T. Jeff Smith, William (Dock) Davis, C. B. St. George, Sam Betts, Jno. Risley, George Penny, and Elijah Burruss, members of the crews of said tugs Blanche, Jacob Brandow, and Isabel, who have claimed salvage herein, seven-seventeenths ($\frac{7}{17}$) of the remaining half, $\frac{7}{17}$ of \$6,500.00 being the sum of.....	2,676 47
To the Cape Fear Towing & Transportation Co. and John L. Grim, owners as aforesaid, the remainder of said sum of \$6,500.00, to wit, $\frac{10}{17}$ of \$6,500.00, being the sum of.....	3,823 53
—To be divided $\frac{3}{8}$ and $\frac{5}{8}$ as aforesaid.	
Total award of salvage....	\$13,000 00

The said sum of \$2,676.47 awarded to the crew, as afore stated, to be divided among them in proportion to their wages, respectively, as follows:

Name.	Rank.	Wages.	To Receive.
T. Jeff Smith	Engineer, Tug Blanche	\$2 25	\$604 57
Wm. (Dock) Davis	Fireman, Tug Blanche	1 00	308 70
C. B. St. George	Mate, Tug Jacob Brandow	1 17	361 20
Sam Betts	Deck hand, Tug Jacob Brandow	25	77 20
Jno. Risley	Engineer, Tug Isabel	2 00	617 40
George Penny	Fireman, Tug Isabel	1 00	308 70
Elijah Burruss	Cook, Tug Isabel	1 00	308 70
Total to crews.....			\$2,676 47

The claimants have appealed against the award, assigning as error: (1) "That the court erred in holding that the services herein were salvage services. (2) That the court erred in fixing the value of the services performed

by the libelants at thirteen thousand dollars, said sum being more than double the amount that should have been allowed in this cause." The owners of the tugs have taken a cross appeal, assigning as error "that the court erred in the division of the amount of salvage awarded, to wit, in only one-half of said award (to wit, one-half of thirteen thousand dollars) to your petitioners said Cape Fear Towing and Transportation Company and said John L. Grim, instead of decreeing to your petitioners the whole of said amount, except a mere nominal sum to the crews of said tugs engaged in the salvage service rendered, as the services rendered by them were merely in the nature of their employment."

E. H. Farrar, E. B. Kruttschnitt, B. F. Jonas, and Hewes T. Gurley, for appellant.

Richard De Gray, Thos. Evans, John D. Grace, J. W. Carroll, and Chas. Carroll, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The ordinary and usual employment of the tugs, for which salvage services are claimed in this case, was in the rendition of towage services in the same waters where the Torr Head was aground. Under the facts, it is fair to presume that the original employment of the tugs by the master of the Torr Head was really to render towage services, for which compensation was to be made whether they successfully aided the Torr Head in getting afloat or not. This appears from the undisputed evidence of the master, who employed the libelants, and agreed to fix their compensation by arbitration. It also appears to have been the idea of the master of the tugs, because, of their own motion, and against the wishes of the master of the Torr Head, they quit work at 7:30 p. m. on the first day of employment, and the tug Jacob Brandow entered into other employment. The services of salvors, to entitle them to compensation as such, must be successful, and, as a general rule, and necessarily, they must be continuous. In this connection it is significant to note that the assignment of error by the libelant owners of the tugs in their cross appeal, in which they claim that the crew should be awarded only a nominal sum, is to the effect that the services of the crews were merely the ordinary services rendered by them under their employment. The district court found that the services rendered by the libelants were in the nature of salvage services entitling the libelants to compensation. Looking at the services actually rendered, all were within the usual employment of the tugs and their crews. The only peculiar salvage service rendered was in the carrying out of the anchors of the Torr Head, and, considering this valuable service, in connection with the towage, the finding of the district court that the services were in the nature of salvage services, entitling the libelants to compensation, is not erroneous. We think it proper to emphasize the fact that all the services rendered and performed were under the direction and control of the master of the Torr Head, and that the

real services which put the Torr Head afloat were, in the main, rendered by the Torr Head herself, operated by her master and crew.

The real contention before us is in regard to the matter of compensation. The district court allowed \$13,000, and directed its disposition, half to the owners of the tugs and half to the crews of the respective tugs. The argument is pressed in this court that the amount awarded in a salvage case is so largely within the discretion of the district court that it is not to be disturbed, except for gross overallowance, palpable mistake, and the like. The true rule appears to be as stated in *The Connemara*, 108 U. S. 359, 2 Sup. Ct. 754, as follows:

"In *The Sybil*, 4 Wheat. 98, Chief Justice Marshall said: 'It is almost impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution.' And by the uniform course of decision in this court during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the judicial committee of the privy council of England, exercising a like jurisdiction, the amount decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake or gross overallowance. *Hobart v. Drogan*, 10 Pet. 108, 119; *The Camanche*, 8 Wall. 448, 479; *The Neptune*, 12 Moore, P. C. 346; *The Carrier Dove*, 2 Moore, P. C. (N. S.) 243, *Brown & L.* 113; *The Fusilier*, 3 Moore, P. C. (N. S.) 51, *Brown & L.* 341."

Many cases have been cited on one side to show that, compared with allowances made for salvage services in many cases of more or less similar circumstances, the amount allowed in this case was moderate and reasonable; and, on the other hand, to show that the amount allowed was very high, and out of all proportion to the services rendered. It is profitless to discuss these cases, as confusion could only come from trying to apply them in the present case. *The Hesper*, 18 Fed. 696, is, however, a case in which the circumstances are so similar that it is well to refer to it. *The Hesper*, worth \$106,500, ran aground in the sand on Galveston Island, about 20-odd miles off the port of Galveston, and remained aground for three days; one-third of her cargo was lightered by tugs, which were worth \$35,000; the weather was good; and the court found that:

"The *Hesper*, when aground as aforesaid, was in a condition of peril and distress, hardly likely to be able to get out of danger by her own efforts, even if the weather had been certain to continue favorable for many days, and certain to be wrecked if the weather should prove to be bad; that the services rendered the *Hesper* by the libelants' boats were salvage services, but of the lowest grade, involving neither risk of property, peril of life or limb, or unusual exposure, or gallantry, courage, or heroism, and the same will be fully compensated by double compensation on the basis of towage and lighterage services."

In that case the district court allowed the sum of \$8,000 salvage. This amount was cut down by the circuit court on appeal to the sum of \$4,200; that sum being double compensation for towage and lighterage. In the instant case, we find that the Torr Head was aground in a condition of peril and distress for less than one full day; that the services rendered by the libelants' boats were salvage services, but of the lowest grade, involving neither risk of property, peril of

life or limb, nor unusual exposure, nor gallantry, courage, nor heroism. The elements to be generally considered in determining the amount of salvage in a given case, taken from instructions issued by the British Board of Trade, may be stated as follows: (1) The degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the services; (6) the time and labor occupied. In the case of the *Torr Head* the value of the property saved seems to be large; the danger from which it was rescued was certain, but not determined; there was no risk incurred by the salvors; the value of the property employed was comparatively small, and it was exposed to no danger; the skill shown in rendering the services was of the ordinary kind; the time employed was short, and the labor was the ordinary employment of the tugs and persons engaged. Considering these facts, and that the amount of the salvage awarded was more than two-thirds of the value of the vessels employed in the service, and that under the decree appealed from extraordinary awards are given to the members of the crews of the libelants' vessels,—such as over \$300 to cooks and firemen who performed no services out of their usual routine, and whose wages were a dollar a day,—it would seem that the allowance of salvage is out of proportion to the services rendered, and unduly high in reference to the objects for which salvage compensation is allowed. In addition to this, we think it apparent from the record that the allowance of salvage was made largely on the theory that the libelants' tugs and their crews really performed the whole services of saving the *Torr Head* from impending peril, while the fact is, as clearly appears from the evidence, and hereinbefore referred to, the real services which put the *Torr Head* afloat were rendered by the master and crew of the *Torr Head*, using her machinery and appliances; and it seems probable,—extremely probable,—the good weather continuing, that without the services of the libelants' tugs the energetic master of the *Torr Head* would have successfully floated his vessel through the use of his own crew and appliances.

While it is now conceded that no claim can be made in the present cause for salvage on either the pending freight or cargo, it is admitted that since the appeal was taken, the libelants have sued in personam the owners of the *Torr Head* to recover salvage on both freight and cargo. As the trial judge filed no opinion in the case, we are not advised whether, in making his allowance for salvage, he considered the value of the cargo and freight. On the whole case we conclude that the allowance made against the *Torr Head* is an overallowance, that it was made on the incorrect theory that the libelants rendered all the services which saved the *Torr Head*; and that it ought to be reduced at least 50 per cent. On the cross appeal brought by the owners of the tugs it is claimed that the crews on board the libelants' tugs rendered only services within the scope of their employment, and that the amount allowed to the crews is wholly disproportioned to the services rendered. That this claim is well founded appears from

an inspection of the decree of distribution wherein cooks and firemen under pay of one dollar per day, and who rendered no services off their own tugs, and were in no wise overworked or exposed, are given nearly a year's pay as a reward, where they were occupied at regular hours in usual work, in a salvage venture over which they had no control.

Proctors argue and cite cases as though there was some fixed rule for distributing salvage compensation between vessels and their crews. Awards in all cases that have come to our notice have been based upon the particular circumstances attendant upon each case, and have varied from one-half the entire salvage awarded to one or two months' pay. In the instant case, as we have found substantially that the salvage services were of the lowest grade, and that the crews aboard of the respective tugs performed only services in the ordinary course of employment, an award of two months' pay would be ample. More than that would be judicial liberality at the expense of the unfortunate.

The decree of the district court is reversed and the cause is remanded, with instructions to award the libelants the gross sum of \$6,500 salvage compensation, and distribute the same according to the views expressed in this opinion.

THE SARATOGA.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 70.

1. MASTER AND SERVANT—ASSUMPTION OF RISK—WORK ON SHIPBOARD.

The danger of a hatch between decks, usually left open and unlighted, is assumed by one engaged to coal the vessel, and who had been so employed two or three times a week for a year on the same vessel, or vessels of the same construction, and on which the custom as to lighting and covering the hatch was the same; he having, on going towards it, after completion of his work, to make his exit by the ladder leading from it, and without availing himself of one of the lanterns furnished, fallen down it.

2. SAME—EVIDENCE.

That an open, unlighted hatch between decks, down which an employé, who had been engaged in coaling the vessel, fell when going to it, to make his exit by a ladder leading from it to the upper, was usually unlighted, is shown, in the absence of conflicting evidence, by testimony of witnesses that the kind of light there usually was exactly the same as on the evening of the accident, and that the coaling of the vessel and putting out of the lights had always been done in the same way before, and the testimony of one of the coaling gang that, when he heard some one had fallen, he started along with his lamp in his hand, "which," he said, "I always do. I take my lamp to see my way out."

3. SAME—PROXIMATE CAUSE.

The proximate cause of one of the coaling gang on a vessel falling down a hatch between decks, open and unlighted, as usual, towards which he started to make his exit by the ladder leading from it to the upper deck, is his failure to make use of one of the lanterns furnished the men to guide

themselves as well as their wheelbarrows; he knowing of the hatch and of the custom relative thereto.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York. The suit was brought to recover damages for personal injuries sustained by libellant in consequence of a fall through an open hatch. The district court held both parties in fault, and divided the damages it assessed (\$1,000) equally between them. 87 Fed. 349. The claimant has appealed. The facts sufficiently appear in the opinion.

Chas. C. Nadal, for appellant.

Edwin G. Davis, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff was one of a gang of about 20 men who were engaged in coaling the steamer while she lay at the pier, the coal being taken aboard through a port on her off-shore side. The coal was elevated from a scow or coal barge, and run through the port by means of a chute which led into the between-decks. It was shoveled into wheelbarrows, wheeled to the bunkers, and stowed therein. The forward ports, through one of which the coal came, are on each side of the vessel, from 35 to 50 feet aft of the forward hatch. The ship was 30 feet wide between decks. Immediately forward of the forward hatch the lower deck was obstructed or bulkheaded, and the machinery and bunkers closed the after end of the compartment. Just forward of the bunkers was a blind hatch (so called because there is no hatch above it on the main deck). This blind hatch was in the route followed by the wheelbarrows, and was closed; a lantern being placed on it, so that those wheeling the barrows might avoid collision with coamings or hatch cover. An iron ladder ran down the forward side of the fore hatch from the main deck to the lower hold. It was by means of such ladder that the gang of coal passers had ingress and egress to and from the between-decks, although occasionally some one would come aboard through the inshore port. The between-decks hatch had the usual 3-inch coaming. The hatchway was 13 feet square. The forward hatches both on the main and on the between-decks were off. On the main deck there was, just aft of the forward hatch, a light with a reflector which sent its rays across the top of the hatchway. No fixed lights were maintained at the hatchway below the main deck, nor any on the between-decks. When the coaling gang was sent down to work, they were provided with a number of hand lanterns,—more than 1 to every 2 men. On the evening in question there were 14 lanterns issued to, and taken by, the gang. Of these, 2 or 3 were passed out through the port, to be used by the men working on the coal scows. They were returned through the port when the work was done. The remaining lanterns were placed about the between-decks, wherever, in the opinion of the workmen, they would do most good; being shifted from time to time as the work

progressed. The way in which the work was done on the evening in question was the same as that pursued on all former occasions. The libelant had been working with this gang, coaling the steamers of claimant's line (and the interior arrangements, location of hatches, etc., are the same on all of them), for a year. As the district court found:

"The libelant had complete knowledge of these hatches, their location, and the spaces about them. It was knowledge resulting from actual use of the deck two or three times a week for a year."

What happened on the evening of the accident was this: Libelant arrived late, and went on board through the forward port on the in-shore side of the vessel, by means of some planks (apparently not a regular gangplank) which had been extended from the dock. He worked with the gang from half-past 6 to about half-past 8 or 9. The work being finished, the foreman called out, as libelant says, "Put out those lights, and all go ashore." Libelant at that moment of time had no lantern in his hand, nor was there any in his immediate charge. Usually, when work for the evening was finished, if a workman happened to have a light in his hand he extinguished it before he left; but the duty of putting out lanterns placed upon the deck devolved upon two designated men, who were allowed extra time for putting up the tools and attending to the lanterns. The foreman's order having been given, most of the lanterns were extinguished. There remained two, however,—one with the men who were closing the port; another, near the man (Vaughan) who was tying up the shovels. The libelant went to the place where he had left his coat, got the same, and went to the port by which he had come aboard. The foreman, or one of his men, was closing the entrance (there is some evidence that the temporary plank had been removed), and told him to go out the other way. Without waiting for the lantern held by those closing the port, or for the other in use where Vaughan was collecting the shovels, and without taking up any of those standing on the deck, and making an effort to relight it for his individual use, libelant turned and walked straight for the hatch ladder; and, "not knowing," as he says, "that the hatch cover was off," he fell through the opening into the hold.

The district judge held that the hatch coverings were customarily left off when the vessel was in port. The evidence in support of that proposition is, as he expresses it, "full, uncontradicted, and satisfactory." Indeed, it should take but little proof at this late day to satisfy a court of admiralty, sitting in this port, that, when a vessel is lying here between trips, one cargo discharged and the next not yet stowed, it is usual to have her between-deck hatches off, day and night, to sweeten the hold. With the knowledge of this condition of things the libelant must be held charged. Passengers, visitors, or workmen from shore, unaccustomed to the regulation of the ship's internal economy, who are invited by the owner, either expressly or by implication, to wander about in the vicinity of such hatches, may hold the owner responsible for results; but so far as the crew, and the regular gangs of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situa-

tion and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were thus advised, they took their risk. This has been held so many times that it is unnecessary to cite authorities. The principal ones will be found referred to and discussed in the exhaustive opinion of the learned district judge. He held, however, that there was no assumption of the risk of the hatchway being unlighted,—apparently on the ground of some failure of proof that it had theretofore, as a general thing, been unlighted. We do not so understand the testimony. One witness testified that the kind of light they usually had there was exactly the same as on the evening of the accident. Other witnesses testified that the coal-ing of the ship and putting out the lights had always been done in that way before. Still another witness (called by libelant), Vaughan, the man who was detailed to gather up the shovels, says that, when he heard a call that Craig was in the hold, he got his coat and started along, with his lamp in his hand, "which," says he, "I always do. I take my lamp to see my way out." If there had been any conflicting evidence, perhaps this proof would not be especially strong, but there is none. Nowhere is there any suggestion in the testimony that the claimant had ever maintained a fixed light at the between-decks hatch, or that it was ever lighted otherwise than by the lanterns in the hands of the men using it. Without deciding whether or not the claimant was negligent in failing to maintain a fixed light at the hatch, when it had given 14 hand lanterns to the score of men it set to work in the vicinity of such hatch, we are of the opinion that the proximate cause of the accident was the negligence of libelant and of his fellow workmen in failing to avail themselves of the lanterns furnished them to guide themselves as well as their wheelbarrows, and that the libelant must be held to a knowledge of the conditions under which the work was done, since it had been done in the same way repeatedly and usually during his employment. By continuing to work where the path of ingress and egress was lighted, not by any fixed light, but the casual gleams of lanterns in the hands of himself and his fellow workmen, he must be held to have taken the risk that the carelessness of one or other of them would some day bring about a catastrophe.

Much was said on the argument of the decision in *The Manhasset*, 53 Fed. 843. The case is clearly distinguishable. There is no analogy between a permanent structure like an open hatch, the exact location of which is known in advance, and a snarl in the fall of a winch, which may be at one time in one place, and at another elsewhere. The decree of the district court is reversed, and the cause remanded, with instructions to dismiss the libel.

MAHER v. TOWER HOTEL CO. et al.

(Circuit Court, N. D. Illinois, N. D. May 11, 1899.)

1. REMOVAL OF CAUSES—SEVERABLE CONTROVERSY—FORECLOSURE SUITS.

In a suit in equity in Illinois to foreclose a trust deed, the trustee is a necessary party defendant, and the controversy is not severable, as between such trustee, the owner of the equity of redemption, and subsequent incumbrancers or lienors.¹

2. SAME—TIME FOR FILING PETITION—DEMURRER.

The time allowed for filing a demurrer marks the limit of the time within which the defendant is required to "answer or plead" to the declaration or complaint under the terms of the removal act, and a defendant cannot remove a cause after his demurrer has been overruled and a rule entered against him to plead over.

3. SAME—PRACTICE—LOCAL PREJUDICE.

When application is made for removal on account of local prejudice or influence, the better practice is to allow counter affidavits to be filed, and to require it to be shown that defendant cannot in reality obtain justice in the state courts on account of such influence or prejudice.²

On Motion to Remand.

A. M. Lasley, for complainant.

E. T. Cahill, for certain defendants.

KOHLSAAT, District Judge. This cause comes on to be heard upon motion of complainant to remand to the circuit court of Cook county, Ill., from whence it is claimed this cause was improperly removed to this court. This is a foreclosure suit, the bill being filed in the state court on September 13, 1898, against the Tower Hotel Company, Timothy D. Crocker, Eliza P. O. Crocker, his wife, and others, to secure the sale of certain premises for the payment of certain notes of the Tower Hotel Company; the said Timothy D. Crocker being the present owner of the equity of redemption. On November 22, 1898, said Crocker and wife entered their appearance in that suit, and on December 10, 1898, filed a general and special demurrer therein. Subsequently, on April 3, 1899, the demurrer of defendants was overruled, and a rule entered on all defendants to plead or answer to the bill of complaint within 20 days. On April 20, 1899, defendants Crocker and wife filed in the state court a petition for removal, alleging that complainant was a citizen of Illinois, that petitioners were citizens of Ohio, that the suit was of a civil nature (being a proceeding in equity to foreclose a trust deed), that petitioners were the only defendants directly interested in the controversy, that all other defendants were only nominal parties, and that petitioners could not obtain justice on account of prejudice or local influence in the court in which the suit was brought, nor in any other state court to which they have the right to remove the cause on account of such prejudice or local influence. The petition for removal is subscribed and sworn to by the solicitor of Crocker and wife, and said

¹ For removal of causes in separable controversy cases, see note to Robbins v. Ellenbogen, 18 C. C. A. 86.

² For local prejudice as ground for removal, see note to Schwenk v. Strang, 8 C. C. A. 95.

solicitor also files his affidavit in said court stating that complainant is the widow and sole devisee of one Albert J. Maher, who was at one time an assessor or other public officer in the state of Illinois; that as such public officer said Maher became acquainted with large numbers of people in the state of Illinois, of more or less political influence; that in consequence thereof large numbers of people in said state are indebted to said Maher for political and other favors; that said influence, prejudice, and obligations now exist and extend to said widow, and that by consequence thereof prejudice and local influence now exist against petitioners; also, that affiant believes the trial judge to be prejudiced against petitioners, and also believes that said prejudice in favor of said widow extends to the other state judges to whom the cause could be removed on account of prejudice or local influence. A copy of the foregoing petition and affidavit was also filed in this court on April 25, 1899, and at the hearing of this matter a petition and affidavit of practically the same purport as above, subscribed and sworn to by said Crocker and wife, was filed herein.

The court holds that in a foreclosure proceeding the controversy is not severable, as between the owners of the equity, the trustee in the trust deed, and subsequent incumbrancers or lienors. *Hax v. Caspar*, 31 Fed. 499. A trustee in a trust deed is a necessary party to a suit to foreclose. *Walsh v. Truesdell*, 1 Ill. App. 126; *Lambert v. Hyers*, 22 Ill. App. 616.

Time within which to file a demurrer is within the terms of the statute with reference to the time within which defendant is required to "answer or plead" to the declaration or complaint. *Martin's Adm'r v. Railroad Co.*, 151 U. S. 686, 14 Sup. Ct. 533. A hearing before the state court upon a demurrer, and a ruling thereon, constitute a "trial of a case," such as to prevent removal. *Hobart v. Railroad Co.*, 81 Fed. 5.

While difference of opinion has been expressed by the different federal circuit courts with relation to the showing required when application is made for removal on account of local influence or prejudice, this court is of the opinion that the better rule is that counter affidavits be allowed, and that it be made to appear to the court that the defendant cannot in reality obtain justice in the state courts on account of such prejudice or local influence.

The reasons shown by petitioners' affidavit herein impress the court as frivolous, and, in addition thereto, there is no proper showing as to the courts, outside of Cook county, to which petitioners would have the right, under the Illinois statute, to remove the cause. The petition for removal is denied, and the cause remanded to the circuit court of Cook county, Ill.

HARTFORD & C. W. R. CO. v. MONTAGUE.

(Circuit Court, D. Connecticut. May 9, 1899.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—TIME FOR FILING

It is the settled practice in the circuit courts of the United States in the Second circuit to allow a motion to remand to be made at once on the removal of a cause from a state court, without waiting for the next term, and, unless the record is filed by the removing defendant within a reasonable time, to permit it to be filed by the plaintiff.

2. SAME—NATURE OF SUIT—STATUTORY PROCEEDING TO CONDEMN PROPERTY.

Under the statutes of Connecticut relating to the condemnation of property under the power of eminent domain, which delegate to a judge of a state court the power to first determine the right to take the property, and then to appoint a commission to fix the compensation, such a proceeding is not a suit at common law or in equity, of which a federal court would have original jurisdiction under the judiciary act of 1888, and hence is not removable under such act.

Gross, Hyde & Shipman, for complainant.

Edward D. Robbins, for defendant.

TOWNSEND, District Judge. Motion to remand. The plaintiff herein originally applied to a judge of the superior court of the state of Connecticut for the appointment of appraisers to estimate damages for the taking and occupation of certain real estate for railroad purposes, belonging to the defendant, in accordance with the provisions of section 3464 of the General Statutes of the state of Connecticut. Said judge having fixed a date for a hearing thereon, defendant seasonably removed the case into this court upon the ground that the controversy was between citizens of different states, and that the amount in dispute exceeded, exclusive of costs, the sum of \$2,000. The plaintiff now moves to remand for want of jurisdiction, alleging that such proceeding is not a suit of a civil nature at common law or in equity, of which the circuit courts of the United States are given original jurisdiction. It is claimed that, even if, prior to the act of March 3, 1887, as amended by the act of August 13, 1888, such a case could be removed into the federal courts, such right of removal was taken away by said acts, the effect of which is to provide that only such suits can be removed as might have been originally brought in the United States circuit courts. *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563.

The preliminary question was raised by counsel for defendant that the motion to remand could not be heard before the beginning of the next term of the circuit court after removal. It appears that there has been much conflict upon this question between the different circuits. *Hamilton v. Fowler*, 83 Fed. 321; *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 36 Fed. 9. It has been the settled practice in this circuit for many years to allow the removing defendant a reasonable time in which to file the record, and, upon his failure so to do, to thereafter permit the plaintiff to file the record, and in either event to allow the plaintiff to move instantaneously to remand.

The sole remaining question is whether this is a suit of which this

court would have original cognizance. The act of 1887, as amended, provides:

"Any other suit of a civil nature at law or in equity of which the circuit courts of the United States are given jurisdiction by the preceding section * * * may be removed into the circuit court," etc.

The preceding section provides as follows:

"That the circuit court of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different states."

Even if this proceeding is a suit at law, within the interpretation of the earlier removal statute by the supreme court of the United States in *Searl v. School Dist.*, 124 U. S. 200, 8 Sup. Ct. 460, it does not necessarily follow that it is a suit of which the circuit court would have had original cognizance. It is purely a statutory proceeding, whereby the legislature of the state has conferred upon a judge of one of its courts the power to make the original order authorizing the taking of property within the state by the exercise of the power of eminent domain. The act of 1887 was "mainly designed for the purposes of restricting the jurisdiction of the circuit courts of the United States." *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. 141; *Railroad Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563.

In *Patterson v. Boom Co.*, 3 Dill. 465, Fed. Cas. No. 10,829, Id., 98 U. S. 405, where the cause was removed prior to the act of 1887, the defendant landowner had appealed to the state court from an award of damages by commissioners for the taking of his land by the boom company. Mr. Justice Field there said as follows:

"The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain,—that is, the right to take private property for public uses,—appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. * * * The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law, in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

In *Upshur Co. v. Rich*, 135 U. S. 475, 10 Sup. Ct. 651, the court, referring to *Boom Co. v. Patterson*, *supra*, *Pacific Railroad Removal Cases*, 5 Sup. Ct. 1113, and *Searl v. School Dist.*, *supra*, said as fol-

"The general rule with regard to cases of this sort is that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit, within the meaning of this act of congress. In *Boom Co. v. Patterson*, the company was authorized by the state laws of Minnesota to take land for the purpose of its business, and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the district court, where it was to be entered by the clerk 'as a case upon the docket'; the landowner being designated as 'plaintiff' and the company as 'defendant.' The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and determined. Issues of fact were to be tried by a jury, unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company, subject to review by the supreme court of the state on writ of error. This mode of proceeding was followed. The boom company and the landowner both appealed from the award of the commissioners. When the case was brought before the district court, the owner, being a citizen of another state, applied for and obtained its removal to the circuit court of the United States, where it was tried before a jury, and a judgment was rendered upon their award. We held that the appeal in that case was a suit, within the meaning of the act of congress authorizing the removal of causes to the federal courts."

In *Searl v. School Dist.*, supra, especially relied on by counsel for defendant, the condemnation proceedings under the Colorado law were held to be adversary judicial proceedings, because the defendant therein was entitled to a jury to ascertain, determine, and appraise damages, presided over by a court which should pass upon the evidence offered according to the rules of law, and further to a motion for a new trial and an appeal to the supreme court, and a writ of error therefrom. And the court implies that, if there was nothing more than an appeal to the commissioners to ascertain compensation, the proceedings, even under the prior removal act, would not be a suit at law.

It seems clear that the proceedings in these cases could not have been originally begun in the circuit court of the United States. They were either originated by a board of commissioners who should be freeholders, or were brought before a county court, which had the power to exercise various functions, but not those of a judicial nature, as in *Upshur Co. v. Rich*, supra. Mr. Justice Bradley there said that the assessment made by such a court could not be called a suit, and could not thus be removed, and "the appeal from the assessment * * * was not a suit, within the meaning of the removal act, though approaching very near the line of demarkation."

The statute of Connecticut under which these proceedings were taken provides that the railroad company "may apply to any judge of the superior court for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes, and after reasonable notice * * * such judge shall appoint three appraisers who shall * * * view the premises and estimate such damages, and * * * return an appraisal of such damages in writing, under their hands, to the clerk of the superior court in the county where the estate lies, who shall record it; and when so returned and recorded, such ap-

praisal shall have the effect of a judgment, and execution may issue at the end of sixty days," etc. This is a proceeding for the taking of land and appraisal of damages, without any provision for a trial by a jury or by a court, and not based, necessarily, upon the introduction of any evidence, except that the appraisers "shall view the premises," and without any provision for an appeal by the party aggrieved.

If the application to the judge in the case at bar is analogous to those in the foregoing cases, as is claimed by counsel for defendant, and if it might have been removable under the earlier removal act, it cannot be claimed that it is a suit which could have been originally brought in the circuit court. It is only the first step in a proceeding which has not assumed the shape of a pending suit, and in which there is to be no trial of questions of fact or of law, and no jury and no appeal. The interpretation of this statute by the court of last resort of this state is of great importance in the determination of its character. In *Railroad Co. v. Long*, 69 Conn. 424, 37 Atl. 1070, Chief Justice Andrews, delivering the opinion of the court, said in reference to the provisions of this statute:

"Unlike the adjudication of the necessity and the extent of the taking, the whole process by which the compensation is ascertained is judicial. The legislature may determine what private property is needed for public purposes (that is a question of political and legislative character); but, when the taking has been ordered, then the question of compensation is judicial. The landowner is not entitled, as a matter of right, to a jury trial, because the constitution has not so required; but he is entitled to have an impartial tribunal, with the usual rights and privileges which attend judicial investigations. It is a suit at law. *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460. Under our practice, the application to the judge to appoint the appraisers is the first step in the judicial process. And, as we have indicated, it was necessary for the judge to pass upon the questions presented in the statute and alleged in the application, before he had jurisdiction to appoint the appraisers. The power to appoint implies the power to pass upon and decide the jurisdictional facts."

See, also, *Williams v. Railroad Co.*, 13 Conn. 110; *Clark v. Saybrook*, 21 Conn. 313.

The theory and practice of the Connecticut condemnation proceedings are therefore radically different from those already considered. Here the determination of the constitutional right of property of the party is the preliminary step in the proceeding, and, when the right of taking is once decided by the judge, there is no appeal therefrom. The exercise of the sovereign power of eminent domain has been delegated by the legislature to the judge of one of its courts, and to no other tribunal, and his decision thereon is final. In the cases already considered, arising under the laws of other states, the preliminary step is the assessment of damages, and thereafter the power is delegated to the court to pass upon all the rights of the parties involved. In Connecticut the only judicial question before the judge is whether the land shall be taken. The decision of this question, the court held in *Boom Co. v. Patterson*, supra, was the exercise of the sovereign right of eminent domain, and was one with which the federal court had no right to interfere. Inasmuch, therefore, as the state has reserved to the judges of its courts the final determination of the right of appropriation of property as the initial step in the

proceedings, it seems clear that this case is not one of which this court would have had original cognizance. In the absence of clear and express language, it will not be presumed that the legislature of this state intended to delegate to any other tribunal the exercise of the sovereign right of eminent domain.

These considerations seem to be decisive. But there is another forcible suggestion as to the intention of the legislature in the provision that the "clerk of the superior court in the county where the estate lies shall record the appraisal of damages." The laws regulating transfers of real estate in the state of Connecticut provide for a record of all transactions affecting the title thereto, either in the probate courts or in the office of the town clerk, or in the files of the state courts. The whole record system in the state of Connecticut depends upon the constructive notice to parties of title or incumbrances in accordance with these provisions. It could not be presumed that the legislature of the state of Connecticut, in passing this law, proposed to confer upon a clerk of a court of the United States the sole power to record proceedings of this character in his office, wherever that office might be situated. These conclusions dispense with the necessity of considering the further claim that proceedings of this character are in the nature of a proceeding in rem (*Stevens v. Battell*, 49 Conn. 162), and are therefore within the reasoning in *Re Cilley*, 58 Fed. 982. The motion to remand is allowed.

DICKEY v. DICKEY.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

No. 1,072.

1. APPEAL AND ERROR—REVIEW OF FINDINGS OF FACT.

While the findings of fact made by the court are not as conclusive as the findings of a jury, they are presumptively correct, and will not be disturbed by the appellate court, unless they are against the weight of evidence.

2. LEGACY—DEPENDENT ON VALUE OF ESTATE.

Where the amount of a legacy is dependent upon the amount of decedent's estate, at a fair valuation, at the time of his death, the value of the estate will be computed by deducting his debts, for which his estate is liable, from the fair value of the assets.

3. SAME—INTEREST.

A refusal to pay a legacy is not willful and without reasonable cause, so as to entitle legatee to interest, where he claimed a larger sum than entitled to, and, on suit, was allowed only half of the amount claimed.

4. SAME.

If legacies bear interest within the provisions of Mills' Ann. St. § 2252, allowing creditors interest for all moneys after they become due, on any bond, bill, or promissory note or other instrument in writing, they do so only after an order of the court has been made directing their payment.

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit by John M. C. Dickey against Mary S. Dickey, executrix, to recover a legacy. From decree in favor of plaintiff for part of amount claimed, he appeals. Affirmed.

Thomas H. Hardcastle, for appellant.

Henry McAllister (Henry M. Blackmer, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is a suit in equity by a legatee to recover a legacy. The material facts are: Clement C. Dickey, late of Colorado Springs, in the state of Colorado, died on March 7, 1893, leaving a will, which was duly probated, containing the following bequests:

"Second. I give and bequeath unto my brother, John Miller Crescent Dickey, of the town of Oxford, Chester county, Pennsylvania, the sum of \$20,000 cash, for his own use forever." "Fifth. In case my estate and property at the time of my decease does not amount to more than the sum of \$50,000, at a fair valuation, then, in that event, it is my will that my said brother shall receive only the sum of \$10,000 cash, instead of the \$20,000, hereinbefore mentioned."

His widow was nominated as executrix, and was made the residuary legatee. The complainant claims that he is entitled to the legacy of \$20,000, and also interest on the same. The court below decreed that he was entitled only to the sum of \$10,000, as it found the estate did not amount to more than \$50,000, at a fair valuation, at the time of the testator's death, and also denied the claim for interest. From this decree an appeal was taken to this court, and these are the only questions presented by the record.

The first question is determined by the finding that "the value of the testator's estate at the time of his death, at a fair valuation, did not exceed the sum of \$50,000." It is urged that the evidence does not support this finding. While the findings of fact made by a chancellor are not as conclusive as the finding of a jury in a common-law action, they are nevertheless presumptively correct, and will not be disturbed by the appellate court unless it can be shown that they are against the weight of the evidence. In the case at bar, a careful examination of the evidence satisfies all of us that the findings of the court below are supported by the weight of the evidence, and that the value of the estate at the time of the death of the testator did not amount to \$50,000 at a fair valuation, but fell several thousand dollars short of that sum.

It would serve no useful purpose to set out in detail the description and valuation of the assets of the estate, and the evidence relating thereto, and the amount and character of the debts which have to be deducted therefrom, to ascertain the "amount" of the "estate and property, at a fair valuation, at the time of" the testator's death. It is obvious that the testator did not mean to exclude his debts from the computation. The amount of the estate, at a fair valuation, at the time of his death, is the fair value of the estate at that time after deducting therefrom the debts then owing by the testator, and which his estate was liable to pay.

Is the appellant entitled to interest on the legacy? At common

law, interest was not allowed in any case. 2 Bl. Comm. 454; *Houghton v. Page*, 2 N. H. 42. In this country it is sanctioned by statute, and is entirely a creature of the statute, and only allowed where so authorized, except as damages in certain cases, where the refusal to pay has been willful and without any reasonable cause. *Railroad Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811; *Dexter v. Collins*, 21 Colo. 455, 42 Pac. 664. In the case at bar there has been no willful refusal to pay the legacy, as appellant claimed a larger sum than he was entitled to receive.

Do the statutes of Colorado allow interest on legacies in such a case? Section 2252 of Mills' Annotated Statutes of Colorado reads:

"Creditors shall be allowed to receive interest when there is no agreement as to rate thereof, at the rate of eight per centum per annum, for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the day of entering up said judgment until satisfaction thereof be made; also on money due on mutual settlement of accounts from the date of such settlement; on money due on account from the date when the same became due, and on money received to the use of another and detained without the owner's knowledge."

Legacies are not mentioned in the statute, and for this reason appellee insists that legacies do not bear interest. It is unnecessary to determine that question in this case; for, as shown by the bill, complainant insisted that the value of the estate exceeded \$50,000, and that he was entitled to \$20,000, while the appellee in her answer denies that the estate was of that value. The statute has never been construed by the supreme court of Colorado in relation to legacies, and, while there is some conflict among the authorities as to that proposition, it is unnecessary to determine it in this case. It is neither charged in the bill nor is there any evidence in the record showing that the court in which the proceedings for the settlement of the estate are pending has ever made an order directing the executrix to pay this legacy. Section 4797 of the Colorado Statute provides:

"Whenever it shall appear that there are sufficient assets to satisfy all legacies and all demands against the estate, the court shall order the payment of all legacies mentioned in the will of the testator, the specific legacies being first satisfied."

This, of course, refers to the court in which the estate is being administered.

Until that court makes an order for the payment of legacies, the executrix can pay the same only at her own peril. It is true that all claims against the estate must be presented within one year, still it requires a judicial determination that the assets in the hands of the executrix are sufficient to pay all demands of the creditors of her testator and to pay the legacies. The legatee can make no legal demand on the executrix until such an order is made, and there can be no default until a legal demand can be made. As interest on a legacy does not arise from a contract, but can only be awarded as damages, it follows that appellant, in the absence of such order, is entitled to no damages for the failure of the executrix to pay him the legacy. The decree of the circuit court is affirmed.

SANBORN, Circuit Judge (dissenting). I concur in the first proposition in the opinion of the majority, but I think the legatee in this case is entitled to interest from June 26, 1894, one year after the will was probated. My reasons are that the statute of Colorado provides that "creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of eight per cent. per annum for all moneys after they become due, on any bond, bill, promissory note or other instrument in writing," and this will was a written instrument, under which the legacy became due one year after its probate, and that, in the absence of such a statute and of a provision for interest at common law, it is the established rule in chancery to allow it. *Bedford v. Coke*, 1 Dick. 181; *Swinisen v. Scawen*, Id. 117; *Godfrey v. Watson*, 3 Atk. 517; *Bisp. Eq.* (5th Ed.) § 178; *Young v. Godbe*, 15 Wall. 562.

It was the duty of the executrix to convert the estate into money as far as it was necessary to discharge the legacy, and to pay it at the end of the year allowed for administration, and as she never did so, and never offered to do so, it does not seem to me to be a valid defense to the legatee's claim for interest that she neglected to obtain an order from the probate court to pay the legacy, and failed to convert the estate into money, so that she could pay it. The record shows that the estate was ample to pay this claim, and an order to pay it would have passed of course upon the application of the executrix. If she kept the legacy back for her own and others' benefit, she and they ought to pay interest during the delay out of the funds of the estate. Nor does the fact that the legatee claimed \$20,000, when only \$10,000 was due, seem to me to discharge the executrix from liability for the interest on the amount justly due. She could have stopped the running of the interest by the tender of the payment of \$10,000, but as long as she paid nothing, and tendered nothing, interest on the amount actually due under the will should, in my opinion, be allowed to the legatee.

POSTAL TEL. CABLE CO. v. CLEVELAND, C. C. & ST. L. RY. CO. et al.

(Circuit Court, N. D. Ohio, E. D. May 20, 1899.)

1. TELEGRAPHS — PROCEEDINGS TO CONDEMN RIGHT OF WAY — FEDERAL STATUTES.

Rev. St. § 5268, authorizing telegraph companies to construct their lines over and along any military or post roads of the United States, authorizes no compulsory proceedings to obtain a right of way over private property for such lines, and condemnation of such right of way can only be made by virtue of some law of the state where the property is situated.

2. SAME—STATUTES OF OHIO.

Rev. St. Ohio, § 3454 et seq., relating to telegraph companies, when construed in connection with the original acts from which they were transferred by the compilers, with some change of language, must be held to limit the right to maintain proceedings for the condemnation of rights of way for their lines to telegraph companies organized under the laws of the state. Hence a federal court cannot entertain a suit by a telegraph company of another state to condemn a right of way for its lines in Ohio.

Henry & Robert Newbegin and Loesch Bros. & Howell, for plaintiff.
Judson A. Harmon and E. A. Foote, for defendants.

RICKS, District Judge. In this action the Postal Telegraph Cable Company, a corporation and citizen of the state of New York, seeks to appropriate for its use the easement or right of way to construct, maintain, and operate its telegraph line, and the necessary fixtures and appurtenances thereto, "in accordance with law," on and over and within five feet of the outer southerly limits of the respondent railway company's right of way, from the southwesterly corporation limits of the city of Cleveland, Cuyahoga county, Ohio, to and through the counties of Cuyahoga, Lorain, Huron, Richland, Crawford, Morrow, Marion, Hardin, Logan, Shelby, and Darke, to the town of Union City, on the state line between Ohio and Indiana. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company is a corporation organized under the laws of Ohio, and is a citizen of said state. The Union Trust Company, the other defendant, is a corporation organized under the laws of Indiana, a citizen of Indiana, and is trustee under a general mortgage executed by the defendant railroad company to secure the first mortgage bonds of said company to the amount of \$50,000, and which mortgage is a lien upon the right of way sought to be appropriated. There is the necessary allegation of the jurisdictional value of the matter in dispute, and also an allegation that the complainant has filed with the postmaster general of the United States its written acceptance, pursuant to section 5268 of the Revised Statutes of the United States, of all the restrictions and obligations required by law, and thereby secured the right to construct, maintain, and operate its lines of telegraph upon all post roads in the United States, but so as not to interfere with the ordinary travel on such post roads. The right of way of the railroad company is about 100 feet in width, and said railroad is a post road, under the laws of the United States. The Western Union Telegraph Company, a rival corporation, by virtue of a contract with the railroad company occupies the northerly line of said right of way of the railroad company between the city of Cleveland and Union City, the terminal points of the line sought to be appropriated; and the plaintiff alleges that the contract between the Western Union Telegraph Company and the railroad company assured to said the Western Union Telegraph Company, so far as it legally might, the exclusive use of said right of way for telegraph purposes, contrary to the laws of the United States and of the state of Ohio, and that the railroad company refuses to agree with the plaintiff upon a sum to be paid by way of just compensation for the easement sought to be acquired by this proceeding.

The defendant the Cleveland, Cincinnati, Chicago & St. Louis Railway Company moves the court to dismiss this proceeding and the petition on the following grounds, to wit:

"(1) The same are not authorized by any law of the United States. (2) The same are not authorized by any law of the state of Ohio. (3) This court has no jurisdiction of this proceeding. (4) The petitioner has no right to appropriate this defendant's property, or any part thereof, or any rights therein, by judicial proceedings or otherwise. (5) For defect of parties defendant."

Judge Dillon, in his work on *Municipal Corporations* (section 482), says that "the tribunal by which the amount of compensation to the landowner is to be determined must be prescribed by positive law"; and the supreme court of Ohio, in the case of *Harbeck v. City of Toledo*, 11 Ohio St. 219, have held that proceedings under the Ohio laws for the appropriation of private property by corporations must be in strict accordance with such laws. It might be claimed that the legislature of the state of Ohio intended to confer exclusive jurisdiction in condemnation proceedings on the probate courts of the state. The first section of chapter 8, tit. 2, Rev. St. Ohio (being section 6414), provides that "appropriations of private property by corporations must be made according to the provisions of this chapter." Section 6416 of that chapter provides that the petition must be filed with the probate judge, and the whole chapter seems to confine the proceedings to the probate court. But, when the procedure under the laws of a state differs from that of the federal courts, the state laws must give way to the practice of the federal courts. *Kohl v. U. S.*, 91 U. S. 367. If this proceeding is a suit at common law, jurisdiction is vested in the circuit courts of the United States, for the proper allegations as to citizenship and amount involved are made in the bill. *Boom Co. v. Patterson*, 98 U. S. 403; *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. That it is a suit admits of no question. *Kohl v. U. S.*, 91 U. S. 367; *Weston v. City Council of Charleston*, 2 Pet. 464.

If the federal courts have jurisdiction in such cases when removed from the state courts, there is no good reason why they have not original jurisdiction, as well. We come, therefore, to the question whether the appropriation sought to be made is authorized by any law of the United States. If the Postal Telegraph Cable Company were a corporation organized under the laws of the United States, for purposes in which the government had a direct interest, it might be claimed that such power was granted. The act of July 24, 1866, made no provision for compensation or payment for property to be taken; hence the procedure cannot be sustained by virtue of that act. The supreme court, in *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, distinctly say:

"It gives no foreign corporation the right to enter upon private property, without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges. * * * No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

And in the case of *Postal Telegraph Cable Co. v. Southern Ry. Co.*, 89 Fed. 190, the court say:

"Rev. St. § 5263, authorizing telegraph companies to construct their lines over and along any military or post roads of the United States, does not give such companies the right to build their lines over the right of way of a rail-

road, or other private property, without the consent of the owner, or the condemnation of the right of way over such property in accordance with the laws of the state where situated."

And this was the holding of Judge Taft in the case of *W. U. Tel. Co. v. Ann Arbor R. Co.*, 33 C. C. A. 113, 90 Fed. 379.

Is this action, then, authorized by any law of the state of Ohio? The only claim of grant from the state of Ohio is founded on the language of Rev. St. § 3454 et seq. Section 3454 reads as follows:

"A magnetic telegraph company heretofore or hereafter created may construct telegraph lines from point to point along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

And section 3456, providing for the appropriation of land, begins with the words, "Any such company"; and section 3459 begins with the words, "The right of such company to use lands held by a railroad company," etc. The defendant claims that this language does not, in terms, purport to grant the right to foreign corporations, and that, taking it as it reads, with the rule of strict construction recognized by all courts, and the fact that the petitioner is a corporation of the state of New York, the language, though general, must be held to apply only to Ohio corporations, and that express terms or unavoidable implication would be required to confer this extraordinary right on a foreign corporation. The above sections are a revised form of the acts of May 1, 1852 (50 Ohio Laws, p. 274, § 47), and of March 31, 1865 (62 Ohio Laws, p. 72), the title and terms of which plainly limit the rights conferred to Ohio corporations. The title, of course, was omitted in the revision, and the phrases of limitation discarded as unnecessary; and it is therefore asserted that the Revised Statutes must be held to have no broader scope and meaning than the original act, and afford no foundation for the claim that they give the petitioner the right it here seeks to assert. An examination of the original acts which were the basis of the Revised Statutes will be necessary to a correct conclusion on this point. Section 47 of the act of May 1, 1852, corresponding to section 3454 of the Revised Statutes, reads:

"The corporation hereby created is authorized to construct said telegraph line or lines from point to point," etc.

Section 6 of the act of March 31, 1865, corresponding to section 3455 of the Revised Statutes, reads:

"Any magnetic telegraph company incorporated under the laws of this state may construct," etc.

Section 1 of the act of March 31, 1865, corresponding to section 3456 of the Revised Statutes, reads:

"That any magnetic telegraph company heretofore incorporated, or that may hereafter be incorporated under any law of this state, is authorized to enter upon any land, whether held by an individual or by a corporation," etc.

Paragraph 2 of section 1 of the act of March 31, 1865, corresponding to section 3457 of the Revised Statutes, reads:

"No magnetic telegraph company incorporated under any law of this state shall be authorized, without the consent of the owner in writing," etc.

It will be seen that a substantial change in the language of the law has been made by the commission of revision. This revision was made under the act of March 27, 1875 (72 Ohio Laws, p. 87). The supreme court of Ohio, in *Allen v. Russell*, 39 Ohio St. 336, in discussing this revision, say:

"Where one or more sections of a statute are repealed, and re-enacted in a different form, the fair inference is, in general, that a change in the meaning was intended, though even in such a case the intention may have been to correct a mistake or remove an obscurity in the original act, without changing its meaning. But where all the general statutes of a state, or all on a particular subject, are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation, should be applied to the enactment in its revised and consolidated form, although the language may have been changed. *Gardener v. Woodyear*, 1 Ohio, 170, 176; *Swazey's Lessee v. Blackman*, 8 Ohio, 5, 20; *Ash v. Ash*, 9 Ohio St. 383, 387; *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364, 368; *Williams v. State*, 35 Ohio St. 175; *State v. Jackson*, 36 Ohio St. 281, 286; *State v. Shelby Co. Com'rs*, 36 Ohio St. 326; *State v. Vanderbilt*, 37 Ohio St. 590, 640; *Bish. Writ. Laws*, § 98. Of course, if it is clear from the words that a change in substance was intended, the statute must be enforced in accordance with its changed form. *Id.* The commissioners appointed under the act of 1875 (72 Ohio Laws, p. 87) were required to revise and consolidate the laws of a general nature, and make report to the general assembly. They determined that the best way to perform that duty was to arrange all the general laws under proper heads, and report the same to the general assembly in the form of a bill. Their power to change was very limited. It was confined to 'making alterations to reconcile contradictions, supply omissions, and amend imperfections in the original acts, so as to reduce the general statutes into as concise and comprehensive a form as is consistent with the clear expression of the will of the general assembly.' Their power to change did not extend to matters of substance, like the right to a homestead. The commissioners were vested with no legislative power. They could recommend, and that was all, and the bill which they prepared obtained its vitality solely from its adoption by the general assembly. Changes were undoubtedly made in the bill by the general assembly, but they were not numerous. That the rule which I have stated as applicable to revisions should be applied to the Revised Statutes can admit of no doubt."

I do not think it is clear, from the words of the revision, that a change in substance was intended, and therefore am of opinion that these sections must receive the same construction they would receive if yet standing in the original act of March 31, 1865. The plaintiff company not being a corporation organized under the laws of this state, the first and second grounds of defendant's motion are sustained, and the bill will be dismissed.

BOSTON SAFE-DEPOSIT & TRUST CO. v. SALEM WATER CO. (SHARP, Intervener).

(Circuit Court, N. D. Ohio, E. D. May 13, 1899.)

CONTRACT BY CITY FOR FIRE PROTECTION—RIGHT OF INDIVIDUAL TO ENFORCE—PRIVITY.

A contract between a city and a water company, by which the company agreed to construct, maintain, and operate a system of waterworks in the city, and, among other things, to maintain at all times a sufficient pressure in the mains for fire purposes, does not create a privity of contract between

the company and a citizen or resident of the city which entitles the latter to maintain an action against the company to recover for a loss by fire, on the ground that, if the required water pressure had been maintained, the fire would have been extinguished and the property saved.

Hoyt, Dustin & Kelley, for complainant.

Carey, Boyle & Mullins, for intervener.

RICKS, District Judge. In December, 1892, at the suit of the Boston Safe-Deposit & Trust Company, trustee of the mortgage securing bonds of the Salem Water Company, a receiver was appointed for the water company. Thereafter Alonzo Sharp, as administrator of one Thomas Sharp, filed an intervening petition in this action against said receiver, alleging, among other things, that the Salem Water Company and its receiver derived their right to maintain and operate the water plant in the city of Salem from a certain contract, entered into on the 19th day of March, 1887, between the village of Salem and certain assignors of said water company, by the terms of which contract said water company was authorized to establish, maintain, and operate waterworks in said village, and was obligated to furnish "an abundant supply of water for fire, domestic, manufacturing, street, sewerage, and other proper purposes for a period of 20 years," and to "construct and maintain a standpipe as part of said system of waterworks, and to supply or attach to the same an electrical, pneumatic, or hydraulic valve, and to so connect the said valve with the said pump station of said works or system that said valve could be closed at any moment and the entire force of the pumps be confined to the mains, and to so construct and maintain said waterworks that the said the Salem Water Company would be able to furnish a plentiful supply of water to said Salem and its inhabitants for personal, domestic, and manufacturing purposes, and also for the extinguishing of fires and conflagrations, and other proper purposes," and also to construct and maintain the same so as to be sufficient at all times to provide a certain pressure of water throughout the system. The intervener further states in his petition that on the 22d day of April, 1894, certain buildings, machinery, tools, etc., of which his decedent, Thomas Sharp, was the owner, were destroyed by fire, the said fire not being caused by any negligence on the part of his decedent, but that the damage caused by said fire would not have exceeded \$300 had the receiver complied with the terms of said contract with the village of Salem, in which he was operating the waterworks, and that the receiver had failed in many respects to comply with his said contract, and by reason of his failure the intervener had been damaged in the sum of \$30,000. To this intervening petition the receiver filed a demurrer and exceptions, upon which the case was heard.

Hoyt, Dustin & Kelley, for receiver, maintained that there was no privity of contract between the intervener's decedent and either the Salem Water Company or its receiver, and that, in the absence of a duty resting either upon the common law or upon a contract, the Salem Water Company or its receiver owed no obligation to the intervener's decedent to comply with its contract with the village

of Salem; that this action is not founded upon any common-law duty, and does not, therefore, sound in tort, is quite evident; that it is not based upon a contractual relation between the parties has been, with one exception, uniformly held in every jurisdiction within the United States where the question has arisen. *Davis v. Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126; *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Britton v. Waterworks Co.*, 81 Wis. 48, 51 N. W. 84; *Hayes v. City of Oshkosh*, 33 Wis. 314; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; *Eaton v. Waterworks Co.*, 37 Neb. 546, 56 N. W. 201; *Beck v. Water Co. (Pa. Sup.)* 11 Atl. 300; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Water Co.*, 119 Mo. 304, 24 S. W. 784; *Fitch v. Water Co. (Ind. Sup.)* 37 N. E. 982; *Foster v. Water Co.*, 3 Lea, 42; *Ferris v. Water Co.*, 16 Nev. 44; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. 673; *Mott v. Manufacturing Co.*, 48 Kan. 12, 28 Pac. 989; *Bush v. Water Co. (Idaho)* 43 Pac. 69; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *House v. Waterworks Co. (Tex. Sup.)* 31 S. W. 179; *Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R. 620.

The general doctrine held by the foregoing cases is that, where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, there is no such privity of contract between a citizen or resident of such city and the water company as will authorize such resident or citizen to maintain an action against said water company for the injury or destruction of his property by fire caused by the failure of the water company to fulfill its contract; and this is held even where the ordinance granting the water company its franchise provides that the water company shall pay all damages that may accrue to any citizen of the city by reason of a failure on the part of such water company to supply a sufficient amount of water to put out fires. See *Mott v. Manufacturing Co.*, and other cases cited *supra*. The only case in all the books where the water company has been held liable for failure to furnish sufficient water for the extinguishment of fires is the case of *Paducah Lumber Co. v. Paducah Water-Supply Co.*, 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249, in which case it was unnecessary for the court to have held this doctrine, as there was a private contract between the water company and the consumer for the furnishing of fire pressure. This Kentucky case has been repeatedly criticised by the courts of the various states in which this question has been decided. See *Mott v. Manufacturing Co.*, *Britton v. Waterworks Co.*, *Fitch v. Water Co.*, *Howsmon v. Water Co.*, *House v. Waterworks Co.*, *Waterworks Co. v. Brownless*, and *Eaton v. Waterworks Co.*, cited *supra*. The following cases are cited to show the general grounds upon which privity of contract may be asserted by a person not a party thereto: *Simson v. Brown*, 68 N. Y. 355; *Burton v. Larkin*, 36 Kan. 249, 13 Pac. 398; *Wright v. Terry*, 23 Fla. 169, 2 South. 6; *House v. Waterworks Co. (Tex. Sup.)* 31 S. W. 180; *Anderson v. Fitzgerald*, 21 Fed. 294; *Second Nat. Bank of St. Louis v. Grand Lodge of Missouri A. F. & A. M.*, 98 U. S. 123; *Vrooman v. Turner*,

69 N. Y. 280; *Bank v. Rice*, 107 Mass. 37; *Safe Co. v. Ward*, 46 N. J. Law, 19.

That a city owning its own waterworks cannot be held liable for failure to furnish sufficient water supply to extinguish fires is undisputed. 2 Dill. Mun. Corp. § 975; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Fowler v. Waterworks Co.*, 83 Ga. 222, 9 S. E. 673; *Wainwright v. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Tainter v. City of Worcester*, 123 Mass. 311; *Vanhorn v. City of Des Moines*, 63 Iowa, 447, 19 N. W. 293; *Hayes v. City of Oshkosh*, 33 Wis. 314; *Stone v. Water Co.*, 4 Pa. Dist. R. 431; *House v. Waterworks Co.* (Tex. Sup.) 31 S. W. 179, 185. If the city itself cannot be held liable for damage resulting from failure to furnish a fire pressure to its citizens, and if there is no privity of contract between the water company operating under a franchise from the city and the citizens or residents of such city, it is clear, upon principle as well as authority, that no legal obligation exists on the part of such water company and in favor of the individual citizen to maintain a sufficient pressure at the city water mains to extinguish fires which may occur upon the premises of such individual citizen.

On the 24th day of December, 1892, Calvin A. Judson was appointed receiver of the Salem Water Company. He afterwards resigned, and Hermon A. Kelley was appointed his successor on the 19th of January, 1897. On March 19, 1887, a certain contract was entered into, by and between the common council of the village of Salem and Messrs. Turner, Clark & Rawson, of Boston, whereby the latter agreed to build and construct waterworks and standpipes, having improved engines and pumping facilities, and to furnish the city of Salem with water privileges of the character described in the petition. Afterwards, on the 22d day of April, 1894, the buildings, machinery, tools, patterns, and all property of every description on the premises described in the intervening petition, and owned by Thomas Sharp, were destroyed by fire. The intervener declares and alleges that the fire could have been extinguished if proper machinery had been furnished by the company, and if the obligations on their part in the contract between themselves and the city had been faithfully observed. There was no contract between the intervening petitioner and the company, or the city, that in case of fire he should be reimbursed for any loss he might sustain. If there were such a contract that could be enforced, there would be some foundation for the petitioner's claim in this case; but I think, under the facts stated, there is no privity of contract, and the demurrer filed by the receiver must, therefore, be sustained, and the intervening petition dismissed. This case has been very fully briefed by the receiver, and, while it is not necessary to review the authorities, they seem overwhelming upon the propositions above stated.

TAYLOR v. FISK et al

(Circuit Court, N. D. Illinois, S. D. May 12, 1899.)

1. **SUIT TO QUIET TITLE—EQUITY JURISDICTION—INSTRUMENT VOID ON ITS FACE.**
Under the general chancery practice, and in the absence of a statute enlarging the remedy, a court of equity cannot entertain a bill to quiet title where the instrument sought to be relieved against is void on its face.
2. **SAME—PARTIES—SUIT TO CONSTRUER DEED.**
A suit to determine the validity of a limitation over in a deed after the death of one grantee cannot be maintained by such grantee during his lifetime, for want of necessary parties to render such determination effective, where the persons who will be the beneficiaries under the limitation cannot be ascertained until it takes effect.

On Demurrers to Bill.

Fred Spotter and R. M. Barnes, for complainant.

Page, Wead & Ross and Charles H. Fisk, for defendants.

KOHLSAAT, District Judge. This is a bill in the nature of a bill to quiet title, but the basis of the relief sought is in reality the construction of the deed set forth in the bill of complaint. The bill of complaint is founded upon a deed from one Fisk and wife to one Sarah M. Johnson, which deed is in the nature of a trust instrument and attempts to accomplish the ends usually obtained by will. A life estate is by the deed granted to said Sarah M. Johnson, with certain powers of alienation. At her death the real estate remaining was to "go to and belong to" the children of Joseph H. Johnson (husband of Sarah M.) living at the decease of Sarah M. Johnson, or to the children living at such time of deceased children of Joseph H. Johnson. If at the death of Sarah M. Johnson there should be living no children or grandchildren of Joseph H. Johnson, the real estate unconveyed at her death should "descend, go, and belong to" the wife of Fisk, if living, and, if not living, then to her then living children or grandchildren per stirpes. If at the death of Sarah M. Johnson there should be living any children of Joseph H. Johnson "upon whom the estate hereinbefore mentioned shall have been cast," and such children should die leaving no descendants, in that event the said real estate should "descend, go, and belong" to the wife of Fisk, if living, and, if not living, then to her then living children or grandchildren per stirpes. After stating the foregoing deed, the bill alleges that both Joseph H. and Sarah M. Johnson are dead; that complainant is the only descendant of said Joseph H. Johnson, and is in peaceable possession of all the said real estate remaining at the death of said Sarah M. Johnson unconveyed; that said wife of Fisk and certain named children and grandchildren are claiming a vested remainder in said real estate; that complainant is unable to sell the same upon the market because of the claims of said Mrs. Fisk, her children, and grandchildren; that all limitations, remainders, and reversions after the death of complainant provided for in said deed are void, as being in violation of the rule against perpetuities; that all such provisions contained in said deed are clouds upon the

title of complainant to said real estate; and that complainant, by virtue of said deed, is the owner in fee simple absolute of said real estate. The prayer of the bill asks that all provisions of said deed relating to the title after the same shall have been cast upon the children or grandchildren of Joseph H. Johnson be declared null and void, that the cloud upon complainant's title "caused by the provisions and terms of said deed" be removed, and that the defendants (including the wife of Fisk, her children, and grandchildren) be forever barred from claiming any title or interest in said real estate, under or by virtue of the said deed, or otherwise. To this bill a general and special demurrer is filed, and this decision comes up on argument of said demurrer.

Complainant's counsel argue that complainant took a fee-simple title to the real estate in question, by virtue of the granting words in the deed, which could not be limited by subsequent provisions in the same instrument, and that, even if she did not take this absolute fee-simple title, yet the title she took was a fee limited only by a condition subsequent, which is void as being in violation of the rule against perpetuities, and therefore the fee becomes absolute under the rule of law that, "if future interests in any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of future estates been omitted from the instrument." Gray, Perp. 247. While the authorities seem to justify this contention of complainant, yet she has shown no ground upon which jurisdiction can be taken to enter the decree asked for. Under the general chancery practice a bill would not lie to quiet title where the instrument sought to be relieved against was void on its face. The decisions cited by complainant's counsel are based on state statutes extending this equitable right, and the question remains: Does the Illinois statute grant this right? If it does, this court will take jurisdiction; otherwise not. No authority has been cited to the effect that the general chancery rule has been extended in this state beyond the additional right to bring a bill to quiet title where the lands in controversy "are improved or occupied, or unimproved or unoccupied." As stated at the outset, the essence of the relief asked is that the court will by decree construe the deed in question as to the legal effect of its provisions. If the provisions thereof sought to be avoided are void, they are so as a legal proposition, and therefore the instrument is void upon its face. Under general chancery practice, a court of equity will not take jurisdiction for the purpose of construing a deed or other instrument, except, upon proper cause shown, at the instance of executors or trustees. *Cross v. De Valle*, 1 Wall. 7.

If the court were disposed to entertain such a bill as that herein, the proper parties would have to be ascertained as of the time of the death of complainant. They could not now be determined. The court therefore holds that it has not jurisdiction to grant the relief asked, and the bill is dismissed for want of jurisdiction.

STATE OF MINNESOTA v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,133.

TAXATION—LIEN OF TAXES ON PERSONAL PROPERTY—MINNESOTA STATUTE.

Under Gen. St. Minn. 1894, § 1623, which provides that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer," the lien so created is paramount to any other lien upon the property, prior or subsequent, in favor of private parties.

Appeal from the Circuit Court of the United States for the District of Minnesota.

On July 13, 1897, the Central Trust Company, the appellee, which is a corporation of the state of New York, filed its bill in the circuit court of the United States for the district of Minnesota against the Duluth Gas & Water Company, a Minnesota corporation, hereafter termed the "Water Company," to foreclose a mortgage executed by the latter company on November 1, 1888, and recorded with the register of deeds for St. Louis county, Minn., on February 23, 1889, whereby the mortgagor company conveyed to said Central Trust Company all and singular the property, real, personal, and mixed, then owned and controlled by it, or that it might thereafter acquire, including its franchises, incomes, rents, works, contracts, buildings, machinery, mains, pipes, lines, poles, and property of every kind, in trust, to secure the payment of an issue of bonds to the amount of \$5,000,000, of which sum bonds to the amount of \$1,513,000 were subsequently issued. A decree of foreclosure was entered in said cause in the usual form on October 13, 1897, the amount found due under the mortgage being \$1,586,059.19. The decree provided that the mortgaged property, in default of payment of said sum within five days, should be sold after six weeks' notice of the sale. On December 29, 1897, the circuit court was advised by affidavits duly filed therein by the complainant that three judgments had been obtained against the Water Company in the district court for St. Louis county, state of Minnesota, where the mortgaged property was located, amounting in the aggregate to \$37,088.30, which judgments were for taxes upon personal property that had been assessed against the Water Company for the years 1894, 1895, and 1896; that executions had been issued on said judgments; and that a levy had been made thereunder by the sheriff of St. Louis county on December 18, 1897, upon all the gas and water mains of the Water Company in the city of Duluth, the same being property which was included in the aforesaid mortgage. On the presentation of such affidavits, the circuit court enjoined the sheriff of St. Louis county from proceeding with the levies, and required him to release the same. It gave the state of Minnesota, however, leave to present its demand for unpaid taxes to the master who had been appointed to make the foreclosure sale, and empowered the master to hear and report upon the merits of said claim before there should be any distribution of the proceeds of the sale of the mortgaged property. On February 5, 1898, the master publicly sold the mortgaged property, pursuant to the decree of foreclosure, for the sum of \$700,000, the sale being made subject to a prior mortgage lien to the amount of \$295,000. This sale was afterwards reported and confirmed. In pursuance of the order empowering the master to hear and decide concerning the merits of the state's claim for unpaid personal taxes, which were alleged to be due from the Water Company, a hearing was had before the master, who reported with respect to said claim that although the aforesaid judgments for personal taxes had been recovered by the state against the Water Company, for the years 1894, 1895, and 1896, to the amount before stated, and that although personal taxes had been assessed against the Water Company for the year 1897 to the amount of \$23,569, yet "that the state of Minnesota has, under the laws of the state and the rules and practice of this court, no lien upon the personal property of the Duluth Gas & Water Company, covered by and included in the mortgage or deed of trust in

this action foreclosed, paramount to the lien of the bondholders under said mortgage or deed of trust. And the said claim on the part of the state to have said personal taxes of said Duluth Gas & Water Company paid out of the funds * * * derived from said foreclosure sale of said mortgaged property, made under said judgment and decree of this court, is * * * disallowed." The state excepted to this report; but, upon the hearing of the exceptions, they were overruled, and the report was confirmed. The appeal by the state is from the aforesaid order.

J. B. Richards, for appellant.

Jed L. Washburn (Samuel Untemeyer, Charles L. Lewis, and William D. Bailey, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The laws of the state of Minnesota (Gen. St. 1894, § 1518) declare that:

"The personal property of gas and water companies shall be listed and assessed in the town or district where the principal works are located. Gas and water mains and pipes laid in roads, streets or alleys shall be held to be personal property."

Section 1623 of the same volume of the General Statutes provides that:

"The taxes assessed upon real property shall be a lien thereon from and including the first day of May in the year in which they are levied until the same are paid, but as between grantor and grantee such lien shall not attach until the first day of January of the next year thereafter. The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer."

And section 1562 of the same volume provides, in substance, that the county auditor shall deliver the tax lists of the several districts into which a county is divided to the county treasurer on or before the first Monday in January in each year, and that such lists when received by the treasurer shall be sufficient authority to receive and collect the taxes specified therein. It thus appears that the lien for personal taxes which is provided for by section 1623, *supra*, takes effect on the first Monday in January succeeding the completion of the tax lists, that being the date on which the tax lists are usually delivered to the county treasurer. The method of assessing taxes in the state of Minnesota corresponds generally with the laws which prevail in other states, with which all are familiar, and need not be stated with particularity. Real property is listed every even-numbered year, and assessed with reference to its value on the 1st day of May preceding the assessment. Personal property is listed and assessed annually with reference to its value on the 1st day of May. *Vide* Gen. St. Minn. 1894, § 1514. All property is required to be assessed at its full and true value in money. The assessment is made during the months of May and June, and taxpayers are required to make a correct statement of their taxable property to the assessor, and, in case of a failure by the assessor to obtain such a statement, it is made his duty to ascertain

the amount of property liable to taxation, and to assess it at what he believes to be its true value. Vide Id. §§ 1536, 1541, 1542, 1546. When the assessment is completed by the assessor, it is returned to the county auditor, and the assessment is thereafter equalized and corrected by a board of equalization. The corrected tax list is subsequently delivered by the auditor to the county treasurer, as prescribed by Id. § 1562. Taxes on personal property are deemed delinquent on the 1st day of March next after they become due, and thereupon a penalty of 10 per cent. is attached. After taxes have been returned as delinquent, the county auditor is empowered to file a revised list of such delinquent taxes with the clerk of the district court of the county wherein the taxes were assessed, and after due notice of such proceedings said court is empowered to enter a judgment against the delinquent taxpayer for the amount of the tax assessed against him, together with the penalty and costs. Vide Id. §§ 1567-1569.

It is contended in behalf of the appellee, and so the lower court appears to have held, that the lien created by the mortgage in favor of the Central Trust Company, from the time when that instrument was recorded, to wit, February 23, 1889, was and is paramount, so far as the personal property conveyed by the mortgage is concerned, to any lien thereon which the state can assert under a subsequent assessment of such personal property for taxation, and in accordance with that view it was held that the personal taxes due to the state of Minnesota from the Water Company for the years 1894, 1895, 1896, and 1897 could not be paid out of the proceeds of the foreclosure sale, the amount received at such sale being insufficient to discharge the mortgage indebtedness. It cannot be successfully denied that there are some adjudications which support the appellee's contention to the full extent last stated, one of such cases, and the only one which is directly in point, being *Binkert v. Railway Co.*, 98 Ill. 205. In that case a tax had been assessed, pursuant to the laws of the state of Illinois, on the capital stock of a railway company, and an attempt was made some years after the assessment to enforce the collection thereof. By the laws of the state taxes on personalty were made a lien upon the personal property of the person assessed from and after the time when the tax books were delivered to the collector. It was held by a divided court that the tax thus imposed on the capital stock of the railway company, the same being a personal tax, was inferior to the lien of a mortgage which was executed and recorded before the tax book containing the tax was delivered to the collector. The reasons given for the ruling were, in brief, that the lien given by the statute for the taxes in question had no reference to the property which was originally assessed, but was a lien on such personal property as the taxpayer owned at the time of the delivery of the tax book to the collector; that the lien could not take effect before the time which was fixed by the statute; and that the tax book had no greater effect as a lien when delivered to the collector than an execution issued on a judgment recovered in a suit between private individuals. No reference, however, was

made in the opinion to a prior decision by the same court (*Dunlap v. Gallatin Co.*, 15 Ill. 7, 9), wherein it was declared, in substance, with reference, it is true, to a tax on realty, that a tax levied by the state is not an ordinary debt, but that, being levied for the support of the government, it takes precedence of all other demands against the owner. In the state of Iowa taxes assessed on personal property are made a lien on real estate owned by the taxpayer, and in that state it was first held (*Trust Co. v. Young*, 81 Iowa, 732, 39 N. W. 116, and 46 N. W. 1103) that the lien for such a personal tax upon realty of the taxpayer was superior to the lien of a mortgage thereon which was executed before the personal tax became a lien, although the statute of the state was silent as to the relative merits of such liens. This decision was based mainly on the ground that, if the superiority of the tax lien was not upheld, the state would be relegated to the position of an ordinary junior lienholder, and would be compelled to redeem from prior liens to collect its taxes, and in many cases would be defeated in the collection of the same by reason of the existence of prior liens in favor of individuals. In a later case (*Bibbins v. Clark*, 90 Iowa, 230, 57 N. W. 884, and 59 N. W. 290) a majority of the then members of the supreme court of that state reached a different conclusion, holding with respect to a lien on realty for personal taxes that it is inferior to the lien of a mortgage executed before the tax was assessed or became a lien. To the same effect is a decision by the supreme court of South Dakota (*Miller v. Anderson*, 1 S. D. 539, 47 N. W. 957), and a decision by the court of appeals of Colorado (*Gifford v. Callaway*, 8 Colo. App. 359, 46 Pac. 626). In the case of *Macknet v. City of Newark*, 42 N. J. Law, 38, where a city charter made an assessment for taxes a lien on all lands of the taxpayer within the city, it was held that the lien for so much of the tax as was assessed on personal property was subject to the lien of a prior mortgage on the property of the taxpayer. The question whether the lien declared by the last clause of section 1623, *supra*, takes precedence of prior liens held by private persons on personalty of which the taxpayer is the owner when the tax lists are delivered to the county treasurer, or whether it is inferior to such liens, has never been considered by the supreme court of the state of Minnesota, and, in the absence of an adjudication by that court, we feel at liberty to express an independent judgment.

It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but is an obligation which by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority. And in some well-considered cases the same priority has been accorded to a tax, although the statute imposing it failed to provide in so many words that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private con-

tracts. *Butler v. Bailly*, 2 Bay, 244, 249; *Gledney v. Deavors*, 8 Ga. 479, 481, 482; *Dunlap v. Gallatin Co.*, 15 Ill. 7, 9; *Parker v. Baxter*, 2 Gray, 185; *George v. Railway Co.*, 44 Fed. 117, 119; *Central Trust Co. v. New York City & N. R. Co.*, 110 N. Y. 250, 257, 18 N. E. 92; *Greeley v. Bank*, 98 Mo. 458, 460, 11 S. W. 980; *Eastman v. Thayer*, 60 N. H. 408, 418; *Jarvis v. Peck*, 19 Wis. 74; *Bank v. Billings*, 4 Pet. 514, 562. These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the state for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. In view of that necessity it has been a common practice to provide summary remedies for enforcing such demands, which have been upheld by the courts whenever assailed, although it is quite probable that some of the remedies so provided could not have been sustained as affording due process of law, if the proceedings had related to the collection of purely private debts. *Murray's Lessee v. Improvement Co.*, 18 How. 272, 277, 280; *Hersee v. Porter*, 100 N. Y. 403, 409, 411, 3 N. E. 338; *Sears v. Cottrell*, 5 Mich. 251. In the case in hand it is not necessary to infer the existence of a lien for the taxes in controversy, because of the character of the indebtedness, as has been done in some cases, since the state statute has, in unmistakable language, given a lien therefor upon all the personal property of the taxpayer owned by him when the tax lists are received by the county treasurer. Moreover, it cannot be successfully asserted that, in view of the prior mortgage covering the property upon which the sheriff proposed to levy, it was not the personal property of the Water Company when the tax lists were received by the county treasurer, within the meaning of the statute, since, according to the modern view, a mortgagee has a mere lien on the property covered by his mortgage, and is not regarded as the owner thereof. *Trust Co. v. Young*, 81 Iowa, 732, 739, 39 N. W. 116, and 46 N. W. 1103. The sole question at issue, then, is whether the lien of the state should be regarded as inferior to that of the mortgagee because the legislature did not expressly declare that it should be paramount. In behalf of the appellee it is conceded, apparently, that if the taxes in question had been levied upon real property the lien would prevail over a prior incumbrance thereon, without any express legislative declaration to that effect, and so it has been held on several occasions. *Parker v. Baxter*, 2 Gray, 185; *Eastman v. Thayer*, 60 N. H. 408, and cases heretofore cited. This rule with respect to the lien for real taxes is said to be due, however, to the fact that such taxes are assessed originally against the very thing to which the lien applies, whereas personal taxes are assessed against the person, and that when, as in the case at bar, the statute gives a lien for personal taxes on personal property of the taxpayer owned at a certain time, it is not a lien upon the same property on account of which the assessment was levied, and is therefore a lien of less dignity. With reference to this distinction

between personal and real taxes, it is only necessary to say that, while it is doubtless true that in some cases personal property owned by the taxpayer when he is assessed for taxation is not identical with that which he owns when the lien attaches, yet we can perceive no reason why this fact should have any effect upon the paramount character of the lien imposed for personal taxes. The state has an undoubted power to create a lien for a personal tax on other property of the tax debtor than that which was assessed for the tax, and to make the same superior to all other liens. It will also be found, we think, that taxpayers generally retain the bulk of their personal property from the time when they are assessed for taxation until the tax becomes a lien, so that in the majority of cases the statute with which we are now dealing will impose a lien on the bulk of the same property on account of which the tax was assessed. But whether it will or will not have such effect must be deemed immaterial in considering the paramount nature of the lien.

It is manifest from a glance at the situation that if the view which prevailed in the lower court is approved, and the lien for the taxes in controversy is reduced to the grade of a lien created by private contract, no more serious obstacle could be interposed in the way of the collection of personal taxes in the state from whence this appeal comes. A large percentage of personal property in nearly every community is usually subject to liens which, in one form or another, have been created by the owners thereof, and, if these shall be held to be of the same dignity as the lien given by a public statute for taxes, the state and the political subdivisions thereof will doubtless lose a considerable portion of the revenues which would otherwise be derived from taxes assessed on personal property. In the present case personal property of great value was covered by a mortgage for a period of 10 years, on account of which the state will lose personal taxes, assessed during a period of 4 years, to the amount of about \$60,000, if the contention of the appellee shall prevail. Besides, a construction of the statute which will make a tax lien subordinate to a private lien will afford a ready means of enabling those who are so disposed to avoid the payment of personal taxes altogether, and thereby afford additional ground for the complaint so frequently heard, because so much of the taxable wealth of the country escapes taxation. No state, so far as we are aware, has ever made provision for redeeming property on which it imposes taxes from prior liens in favor of individuals, in order to secure its own revenue therefrom; nor is it either expedient or desirable that laws of that nature should be enacted, and that the state, like an individual, should be compelled to indulge in a race of diligence to secure its taxes. If it is deemed best for any reason to make a lien for taxes which are imposed on personal property subordinate to private liens, then we perceive no reason why it would not be equally wise to exempt all mortgaged personal property from taxation. To counterbalance the evil results which would doubtless flow from such a construction of the statute as was approved by the trial court, the appellee suggests that much public inconvenience will

be occasioned by a contrary construction of the statute upholding the paramount character of a tax lien, since a large amount of personal property will be incumbered by a lien for taxes, which will prevent the free alienation of such property, and prove a great hindrance to business transactions. It is possible, of course, that some persons may be deterred from purchasing personal property through fear of an outstanding tax lien; but this fact will in itself prove a strong incentive to taxpayers to pay their taxes, and to do so with reasonable diligence. Upon the whole, we are satisfied that the public inconvenience resulting from this source will not be serious, and that in any event it is not of sufficient importance to sustain the appellee's contention.

In view of what has already been said, we are of opinion that it cannot be inferred that the lien for personal taxes declared by section 1623, *supra*, was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary, considering the character of the obligation and the dignity usually accorded to such liens, in public estimation, and above all, considering the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself. In a very analogous case (*Morey v. City of Duluth*, 77 N. W. 829) the supreme court of Minnesota has recently acted strictly in accordance with the latter view, holding that a clause in a city charter authorizing an assessment to be made on lands for street improvements, and making the assessment a lien, but which did not declare the same to be paramount to prior incumbrances, must necessarily be regarded as superior to such incumbrances. It is also worthy of notice that in the mortgage under which the appellee claims it was careful to insert a provision binding the Water Company to pay and discharge each year "all taxes and assessments of every kind which may be lawfully levied and assessed upon all or any part of the franchises and property hereby conveyed, so as to keep the said property free and clear from any incumbrance by reason thereof." From this provision found in the mortgage it may be fairly inferred that the mortgage was taken with the understanding, on the part of the mortgagee, that the taxes thereafter assessed on the mortgaged property, whether real or personal, would be paramount to the claims of the bondholders. It results from these views that the order and decree of the circuit court from which the appeal was taken were erroneous. It is accordingly ordered that the same be reversed, and that the case be remanded to the circuit court, with directions to vacate the erroneous order, and in lieu thereof to enter an order directing the payment, out of the proceeds of the foreclosure sale, of the taxes imposed in favor of the state of Minnesota for the years 1894, 1895, and 1896. Inasmuch as the amount of the taxes assessed for the year 1897, which

claim has not as yet been reduced to judgment, is in dispute, and litigation appears to be pending in the state courts relative to the amount of the taxes for that year, the order with reference thereto will be that, when the amount of said taxes for the year 1897 is definitely fixed and determined by the proceedings pending in the state court, the amount of such taxes be also paid out of the proceeds of the foreclosure sale, and that in the meantime funds adequate for that purpose be retained in the registry of the court.

CURTIS et al. v. LAKIN et al.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,106, December Term, 1898.

1. LACHES—PARTNERSHIP ACCOUNTING—ENFORCEMENT OF TRUST.

The plaintiffs and the defendant L. entered into a partnership for the purpose of locating, developing, and operating mines. While prospecting under the agreement, L. located two mining claims in his own name, contrary to the agreement; and on July 27, 1894, conveyed a part interest to third persons; and on March 6, 1896, the entire interest in the claims was transferred to the defendant corporation, organized for that purpose, in exchange for stock. The complainants were first advised of the sale of part interest in the claims in 1895, but never communicated with L., for the purpose of obtaining an accounting or ascertaining his intentions. On November 13, 1897, about one year after plaintiffs were informed of the conveyance to the corporation, and two years after the first conveyance, and after the claims had increased in value to an amount exceeding \$200,000, and expenditures had been made in developing them, they filed a bill against L. and the corporation, asking for a dissolution of the partnership and an accounting, and that the defendant corporation be decreed a trustee for the benefit of plaintiffs. *Held*, that the plaintiffs had been guilty of laches barring the suit.

2. SAME—EXCUSE.

The delay of plaintiffs in commencing suit against their co-partner for dissolution and an accounting, and to declare a third person purchasing partnership property from him a trustee, is not excused by the fact that the partnership agreement had been misplaced, and was not found until shortly before the suit was commenced.

3. SAME—ENFORCEMENT OF EXPRESS TRUST.

Where a trustee of an express trust openly repudiates it, and asserts a title in himself to the trust estate, with the knowledge of the beneficiary, the same diligence should be exercised by the person injured in asserting his rights as is required of one asserting a constructive trust, or attempting to rescind a contract on the ground of fraud or mistake.

4. SAME—ENFORCEMENT OF PROPERTY RIGHTS.

One claiming an interest in mining property that is subject to great and sudden fluctuations in value, or the value of which is uncertain, cannot remain silent and inactive, awaiting developments, while those in possession are expending money in its development, and a court of equity will deny him relief, where he has failed to bring suit within a comparatively short period.

5. SAME—INTERESTS OF INNOCENT PURCHASERS.

Partners instituting suit to compel a co-partner to account for the proceeds of partnership property transferred to a corporation in exchange for stock, and to compel the corporation to transfer to them the stock, where it does not appear that the corporation had notice of their claim, and the

stock may have passed into the hands of innocent purchasers, must proceed with reasonable diligence, and, where they have waited a year before commencing suit, relief will be denied.

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Utah.

The bill in this case was filed by M. J. Curtis and A. D. Bowley, the appellants, against Josiah S. Lakin and the Sacramento Gold Mining Company, the appellees, on November 13, 1897, and was subsequently amended on March 8, 1898. In the original and amended bill the following facts were alleged, in substance: On February 1, 1892, Josiah S. Lakin, A. D. Bowley, and M. J. Curtis associated themselves together "for the purpose of locating, developing, and operating mines in the states of California, Nevada, and such other states and territories or mining districts that may come to their notice." By the agreement, which was signed on said date at Sacramento, in the state of California, each of said parties agreed to "deposit into one general fund the amount of \$500, to be drawn upon for the purpose of paying any and all expenses that shall accrue in locating, developing, and operating such mines as may come into the hands of said Lakin, Bowley, and Curtis." They further agreed that, in addition to the general traveling expenses that might be allowed, there should also be allowed not less than one hundred dollars per month for the time occupied by either of the parties to the agreement in locating, developing, and operating mines, or in other business connected therewith, which sum was to be paid out of the general fund. While prospecting under said agreement, Lakin, on March 14, 1892, located two mining claims in Tooele county, Utah, called the "Sacramento" and "Excelsior" claims, which were located, as it was alleged, by Lakin in his own name, contrary to the intent and purpose of the aforesaid agreement. After making these locations, Lakin returned to California in June, 1892, and traveled through that state and the state of Nevada, prospecting for mining claims, which was done at an expense of several hundred dollars, the expenses being paid out of "assets furnished by said partnership." He did not return to Utah until March, 1894, and prior to his return he consulted with Curtis and Bowley, the complainants, about filing notices, as an act of congress provided might be done, in lieu of doing the usual assessment work on said Sacramento and Excelsior claims. Before returning to Utah, Lakin called upon the complainants, and also advised with them as to the expediency of selling the aforesaid claims for the sum of \$7,500, saying, in substance, that a party in Utah had offered that sum for the claims. The complainants advised against such sale; nevertheless Lakin returned to Utah, and on July 27, 1894, sold an undivided one-sixth interest therein for \$5,000. On the same day, July 27, 1894, he contracted to sell an additional one-third interest in the claims for \$10,000, which latter sale was subsequently consummated, and the money was received by Lakin. The complainants did not hear of the sales aforesaid until the year 1895, when they were informed of the fact, and at the same time heard that the sales had been made by Lakin to obtain funds to develop the property, and that he was developing it. Subsequent to July 27, 1894, the claims were so developed, by Lakin and others to whom he had sold altogether a one-half interest therein, as to make them self-supporting, but when they became self-supporting was not stated. The amount of expenses incurred in developing the claims did not exceed \$30,000, of which sum Lakin contributed not more than one-half. The development consisted in part in the construction of a mill of the value of \$15,000. Lakin never made any demand on the appellants to furnish money for the development and operation of said claims, although the complainants have always been ready to respond to any such demands; neither has he rendered any statement of his expenditures, or made any report of his transactions, with respect thereto. On March 6, 1896, the persons to whom Lakin had sold an undivided one-half interest in said claims associated themselves with Lakin, and formed a corporation known as the "Sacramento Gold Mining Company" (one of the appellees), to which corporation the Sacramento and Excelsior claims, together with some others, were conveyed in exchange for its capital stock. Said corporation issued 1,000,000 shares of stock, of the par value of \$5 each, and Lakin and

his wife together received one-half of the stock, or, in the aggregate, 500,000 shares, in exchange for a one-half interest in the Sacramento and Excelsior claims. Lakin became the president of said company when it was organized, and also a director therein. The complainants had no knowledge of the action of said Lakin in forming said company "until about one year before the bringing of this suit." When they acquired such knowledge, the alleged partnership agreement of February 1, 1892, had been misplaced, and could not be found, and for that reason the complainants believed that they could not successfully maintain a suit to recover their alleged interest in the claims. The agreement was found, however, in the summer of 1897. The value of the Sacramento and Excelsior claims now exceeds \$200,000, and ores have been extracted therefrom of a value exceeding \$50,000. In view of the allegations contained in the bill, which have been stated, in substance, the complainants prayed for the dissolution of the alleged partnership; for an accounting, both as against Lakin and the Sacramento Gold Mining Company, with respect to all transactions concerning the aforesaid claims: that the Sacramento Gold Mining Company be deemed to have accepted a conveyance of a one-half interest in the Sacramento and Excelsior claims with knowledge of the complainants' equities; and that it be decreed to hold 333,333 shares of its capital stock in trust for the complainants, and that it be compelled to issue to them the usual certificates for that amount of stock. The circuit court sustained a demurrer to the bill, and eventually ordered that it be dismissed.

James M. Denny, for appellants.

Hiram E. Booth (E. O. Lee and Morris L. Ritchie, on brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill of complaint is disingenuous, in that it fails to state certain facts with that degree of fullness and accuracy which a court of chancery has a right to expect in a case of this character and magnitude, and in that it fails to give information concerning the plaintiffs' conduct in certain respects and on certain occasions, which obviously might have been given had the pleader been disposed to make a frank disclosure of all the material facts and circumstances touching the transactions out of which the controversy arises, and on which the plaintiffs' right to equitable relief depends. For example, the bill does not state the amount of money or property which the plaintiffs advanced to create the general fund which was to be used for the benefit of the alleged partnership, the allegation in that respect being simply that they "contributed to the assets of said co-partnership by furnishing Lakin with money and supplies to travel," etc. It fails to show whether the plaintiffs ever made any complaint to Lakin, in person, because he located the Sacramento and Excelsior claims in his own name, or whether they ever demanded a conveyance to themselves of their alleged interest therein. It fails to allege at what time during the year 1895 the plaintiffs ascertained that Lakin had sold an undivided one-half interest in said claims for the sum of \$15,000, or from what source the plaintiffs derived such information; and what is of more importance, perhaps, the bill does not show that the plaintiffs ever communicated with Lakin after being advised of the sale, or that they attempted to do so, for the purpose of obtaining an account of his stewardship, or of ascertaining what he proposed to do with the mining claims in fu-

ture, although the sale appears to have been contrary to their wishes, and was made as early as July 27, 1894. The bill does not disclose that the plaintiffs have communicated with their alleged partner in any form, or he with them, at any time since March, 1894, when he left Sacramento for the purpose of going to Utah; while it appears that they waited for about one year before bringing this action, after they were advised that the mining claims in controversy had been conveyed by Lakin and his associates to a corporation, and were therefore aware that the stock of the corporation was liable to be placed upon the market, and pass into the hands of innocent purchasers at any moment. It is not even averred that the stock issued to Lakin which the plaintiffs seek to recover is still in his hands, or that any efforts were made prior to the filing of the bill to prevent him from disposing of the same for value to third persons. Besides, the excuse which is given in the bill for waiting a year or more after the mining claims were conveyed to the corporation, before bringing a suit or taking any other steps to preserve their right to the property, is unsatisfactory, and therefore insufficient. It is somewhat remarkable, to say the least, that an agreement, upon which the plaintiffs' right to a large interest in a mine, supposed to be of great value, depended, should have been misplaced, and not found for a year, and that intelligent business men should have supposed that the loss of the agreement would necessarily prevent them from establishing their right to an interest in the Utah claims, and that no effort was made in the meantime to obtain from their alleged co-partner other recognition of their interest in the property. In short, the allegations of the bill, in the respect last mentioned, are so vague and unsatisfactory, and the failure of the plaintiffs to disclose whether they have ever held personal communication with the defendant Lakin since 1894, and demanded from him an account or an explanation of his conduct and purpose, is so significant, that we are forced to infer that, for at least two years prior to the filing of the bill, the plaintiffs were well aware that Lakin intended to assert a right to dispose of the Utah claims as his own, without accountability to any one. The facts stated in the complaint, no less than those which might have been stated, but are left undisclosed, leave little room for doubt that Lakin's intentions with respect to the Utah mines, and his assertion of an absolute title thereto, have been well known to the plaintiffs at least since 1895, when they learned that he had sold a half interest therein for \$15,000, and had appropriated the proceeds. Men of average intelligence and business sagacity would not ordinarily permit mining property in which they had a large interest, and which they believed to be valuable, to be sold and otherwise dealt with by a third person as his own, without remonstrance on their part, and without seeking for an explanation, unless they were well aware that he asserted a legal right to so deal with it, and that any remonstrance on their part or attempt to obtain a recognition of their rights would be vain and useless, unless it took the form of a suit to enforce their alleged rights. We think, therefore, that the conclusion is well warranted by the allegations of the bill that for more than two years before it was filed the plaintiffs remained silent

and inactive, knowing that Lakin claimed the Utah mines as his own, yet intending to assert a title thereto in case they proved to be productive and valuable, but to deny all interest therein and all liability for obligations which Lakin might incur in attempts to develop them, provided they proved to be barren and valueless. This seems to be the only reasonable explanation of the plaintiffs' silence and inaction for a period of two years or more, in view of facts that were then well known to them, when their actions are judged by the tests which are usually applied to determine the motives which prompt human conduct.

It results as a matter of law, from the views which we have thus far expressed with reference to the allegations of the bill, that it was filed too late to obtain redress, for the alleged grievances, in a court of chancery. It may be conceded, for present purposes, that the agreement of February 1, 1892, between the plaintiffs and Lakin, created a co-partnership, and that the Utah claims were located thereunder, and that the title thereto, when taken by Lakin in his own name, was held by him in trust for the benefit of himself and his co-partners. Nevertheless, when the plaintiffs were advised, by Lakin's conduct with respect to the claims, that he intended to repudiate the trust and treat them as his own, they were bound to assert their rights with reasonable diligence. The rule that lapse of time will never bar the enforcement of an express trust is applicable to those cases where there has been no repudiation of the trust, or where the beneficiaries have no reasonable ground to believe that the trust has been or will be denied. *Wood v. Carpenter*, 101 U. S. 135, 141; *Oliver v. Piatt*, 3 How. 333, 411; *Hunt v. Patchin*, 35 Fed. 816, 819, 820; *Miles v. Thorne*, 99 Am. Dec. 390, 391. When a trustee of an express trust openly repudiates it, and asserts a title in himself to the trust estate, and the fact of such repudiation becomes known to the beneficiary, we are aware of no reason why the same degree of diligence should not be exercised by the injured party in making complaint and in asserting his rights which courts of chancery always require to be exercised when a litigant seeks to fasten upon another a constructive trust or to rescind a contract upon the ground of fraud or mistake. The reasons requiring the exercise of diligence in the latter class of cases have been stated many times with great clearness and force, and they are no less applicable to the former class of cases than to the latter. *Naddo v. Bardon*, 4 U. S. App. 642, 681, 2 C. C. A. 335, and 51 Fed. 493; *Godden v. Kimmell*, 99 U. S. 201; *Wood v. Carpenter*, 101 U. S. 135, 139; *Lemoine v. Dunklin Co.*, 10 U. S. App. 237, 239, 2 C. C. A. 343, and 51 Fed. 487; *Gallier v. Cadwell*, 145 U. S. 368, 373, 12 Sup. Ct. 873; *Kinne v. Webb*, 12 U. S. App. 137, 144, 4 C. C. A. 170, and 54 Fed. 34; *Scheffel v. Hays*, 19 U. S. App. 220, 225, 226, 7 C. C. A. 308, and 58 Fed. 457; *Wetzel v. Transfer Co.*, 27 U. S. App. 594, 12 C. C. A. 490, and 65 Fed. 23; *Id.*, 169 U. S. 237, 241, 18 Sup. Ct. 307.

Special reasons existed in the case in hand which required the plaintiffs to be prompt in the assertion of their rights when they became aware that Lakin claimed the Utah property as his own. In the first place, the property consisted of mining claims, which were

subject to great and sudden fluctuations in value, and the rule is that one claiming an interest in property of that nature must take steps to establish his title with all convenient speed, if he has reasonable grounds to believe that such asserted interest will be denied by those in possession of the property who are at the time engaged in developing it. In cases of the latter kind, courts of equity will refuse to grant relief if the complainant has failed to bring suit for a comparatively short period after the denial of his rights became known to him, unless a good excuse is offered for such delay; and they will more readily hold that the cause of action is barred by laches if it appears that the failure to sue was occasioned, in whole or in part, by a desire on the part of the complainant to ascertain how development work in progress on the property would affect its value. Where delay is occasioned by motives of the latter sort,—that is, by waiting to see whether developments undertaken by those in possession will be successful or otherwise,—a litigant is justly chargeable with bad faith, which courts of chancery always aim to discourage. *Oil Co. v. Marbury*, 91 U. S. 587, 592, 593; *Johnston v. Mining Co.*, 148 U. S. 370, 371, 13 Sup. Ct. 585; *Clarke v. Hart*, 6 H. L. Cas. 633, 656; *Bush v. Sherman*, 80 Ill. 175.

In the second place, the conveyance of the Utah claims to a corporation, and the issuance of a large quantity of stock representing their value, was an act which made it the duty of the plaintiffs to be prompt in asserting their rights, to protect third parties from loss and damage which they might possibly sustain by purchasing the stock. According to the averments of the bill, the defendant corporation, when it accepted a conveyance of the Sacramento and Excelsior claims, had no notice of the plaintiffs' alleged interest therein, except such as was imputable to it from the fact that Lakin became the president of the corporation and one of its directors. It is not averred that the persons to whom Lakin sold a one-half interest in the claims in the year 1894, and who subsequently conveyed their interest to the corporation and joined in its formation, were advised of the plaintiffs' alleged interest at the date of either of said transactions, and, in the absence of such knowledge, it is obvious that they, as well as all other persons who may have acquired stock in the corporation by purchase from any of the original promoters, are entitled to full protection against the claims which are now asserted by the plaintiffs, and that they ought not to be subjected to the costs of litigation in defense of their rights. In addition to an accounting, the relief sought, as against the corporation, is that it be compelled to issue fully one-third of its capital stock to the plaintiffs, all of which stock was issued on the organization of the company at least one year before this suit was instituted, and the bill does not show that it is possible to afford such relief without injury to numerous third parties into whose hands the stock in question, or a large portion of it, may have passed during the period which elapsed before the bill was filed.

For the reasons stated, we are of opinion that the plaintiffs have been guilty of such negligence in the assertion of their rights,

in the light of known facts which should have inspired earlier action, that their bill ought not to be entertained by a court of equity. The decree below is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). This is a bill brought by the appellants against their co-partner Lakin for a dissolution of the partnership and for an accounting. It is not material here that they sought other relief against other parties, for the demurrer cannot be sustained if they are entitled to any relief against any party. The question is therefore whether or not, by a delay of two years after they discovered the faithlessness of their co-partner, they are estopped by laches from obtaining an accounting or any other relief from him. The appellee Lakin held the partnership property in his own name, in trust for his partners and himself. No time runs against an express trust, until it is openly repudiated, and notice of the repudiation is brought home to the cestuis que trustent. *Speidel v. Henrici*, 120 U. S. 377, 386, 7 Sup. Ct. 610; *Swift v. Smith*, 25 C. C. A. 154, 159, 79 Fed. 709, 714, and 49 U. S. App. 188. It is conceded in the opinion of the majority that notice of the repudiation of this trust was not received by the appellants until two years before this suit was commenced. The statutes of Utah, as construed by its supreme court, expressly permit cestuis que trustent to maintain an action for an enforcement of the trust, against a trustee who has repudiated it, for four years after the repudiation becomes known to them, when the trust was created by a written agreement, as in the case at bar. *Rev. St. Utah* 1898, §§ 2876, 2883; *Thomas v. Glendinning*, 13 Utah, 47, 53, 56, 44 Pac. 652, 654, and cases there cited.

In support of the view that this suit is barred by laches in two years after the partner Lakin repudiated his trust, although the statutes of Utah permit such a suit for four years thereafter, the cases for the rescission of contracts for fraud or mistake are cited in the opinion of the majority. It appears to me, however, that the reason which requires the early application of laches to such cases has no application to the suit of partners against their co-partner for an accounting of proceeds of firm property, and that, the reason ceasing, the rule ceases. That reason is that a contract induced by fraud or mistake is voidable, not void, and it appears to be valid. The parties to it and others may change their position, and incur liability to loss in reliance upon its validity. Hence he who would avoid it must make his attack at once upon his discovery of the fraud or mistake, or he will be estopped by his silence from denying its legality. *Rugan v. Sabin*, 3 C. C. A. 578, 580, 53 Fed. 415, 418, and 10 U. S. App. 519, 530, and cases there cited. But the partner who holds the property of his firm in trust, and who disposes of it and appropriates its proceeds to his own use, cannot be deceived or misled by the silence or delay of his partners. He is aware of his relation to them. He knows his liability to them, and it seems to me that there is no sound reason why he should be relieved from responding to it, within the time fixed for its enforcement, by the statute of limitations of the state in which he is sued.

In *Naddo v. Bardon*, 2 C. C. A. 335, 340, 51 Fed. 493, 498, and 4 U. S. App. 642, 685, Mr. Justice Brewer, in delivering the opinion of this court, said: "It is doubtless true that, where an express trust is once shown to exist, it is presumed to continue, and therefore no lapse of time will defeat an action to enforce rights under it. But when that trust is repudiated, and knowledge of the repudiation is brought home to the cestuis que trustent, the case is brought within the ordinary rules of limitation and laches." The doctrine of laches is applied by courts of equity, in analogy to the statute of limitations at law, to promote, and not to defeat, justice. Under the statutes of Utah cited, the appellants were allowed at least four years, after they learned that their partner had repudiated his trust, in which to institute a suit against him for a dissolution of their partnership and an accounting, and, in my opinion, their delay of two years ought not to be fatal to it. *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 135, 63 Fed. 192, 199, and 27 U. S. App. 346; *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 85 Fed. 55, 62, and 56 U. S. App. 363, 383.

PINE MOUNTAIN IRON & COAL CO. et al. v. BAILEY et al.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,103.

1. AGENT — REPRESENTING ADVERSE INTERESTS — NOTICE TO AS AFFECTING PRINCIPAL.

The fact that an agent also acts as agent for the party adversely interested in the transaction does not prevent his principal from being bound by notice to or knowledge acquired by such agent where the principal consents to such adverse agency.

2. SAME—ACQUIRING ADVERSE INTERESTS—NOTICE TO AS AFFECTING PRINCIPAL.

Where one negotiating the sale of a mortgage for a trust company is also the agent of the proposed purchaser for the purpose of investing his money and examining his titles, and pending the negotiations the agent becomes the owner of the mortgage, without the knowledge of the principal, the agency ceases, so that on the subsequent purchase of the mortgage by the principal he is not bound by notice to or knowledge of the agent as to defects in the mortgage or its title, and is a bona fide purchaser for value.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This is an appeal from a decree which dismissed a bill to remove an alleged cloud from the title of the appellants to certain real estate in the state of Minnesota. The alleged cloud consisted of a perfect record title to the property in the appellee Charles Irving Bailey which had arisen in this way: On August 29, 1892, the appellee John D. Blake, who was the owner of the property, made a mortgage upon it to the Metropolitan Trust Company, a corporation, to secure the payment of his promissory note to it for \$17,290. This mortgage was recorded on October 27, 1892, and according to the record constituted a first lien upon the property in controversy. P. M. Woodman had been for many years, and was, a general agent of the appellee Charles M. Bailey to procure first mortgages for him, and to examine the title, or to cause the title of the property covered by such mortgages to be examined, on his behalf; and at the same time he was the trust or trading officer of the Metropolitan

Trust Company. On account of certain agreements which Blake had made with the appellants, the Pine Mountain Iron & Coal Company and the Germania Safety-Vault & Trust Company, they claim—and for the purpose of the decision of this case their claim will be conceded to be well founded without investigation—that this mortgage was void as against them. Their agreements, however, were not of record, and the record disclosed no notice of their claim. Upon the record their title appeared to be subject to the mortgage, and to be founded upon a deed to Blake, which was not recorded until after the record of the mortgage had been made. Before the trust company paid to Blake the money which it loaned to him on this mortgage, however, the appellants notified Woodman, as the trust officer of that company, of their claim that the mortgage was void. In this state of the facts, Woodman wrote Charles M. Bailey on January 6, 1893, and asked him, if he would like “an ‘A 1’ 7 per cent. mortgage, \$17,290, on at least \$60,000 worth of property; mortgage made by a good man, too. We have taken it in, and I think I can get it for you if you wish.” On January 9, 1893, Bailey replied that he was short of funds, but that if it was a good mortgage he thought he could send a check for it some time that month. He inquired about the property it covered, whether Woodman could get $7\frac{1}{2}$ per cent. or 8 per cent. interest, and when the note was payable. On January 13, 1893, Woodman wrote to Bailey: “This \$17,290 mortgage of which I wrote you is on good city property, and is already made. Our company took it in, and it is exceptionally good, we think, in the matter of security; and I know the maker, and have known him for many years, and believe him to be perfectly good. The mortgage is dated August 29, 1892, and runs for three years at 7 per cent. We could not make it better than 7 per cent., as we get a very small commission.” On January 17, 1893, Bailey wrote Woodman that he did not care for the mortgage, but that, if they would allow him one month’s interest, and could make anything by sending it to him, he would send a check some time that month. On January 20, 1893, Woodman replied that he could not allow him the January interest, but would give him half of their commission of \$122.90, and asked him to send a check for the mortgage on or before February 1, 1893. Some time in January, 1893, while this negotiation was in progress, and before the sale to Bailey was made, or its terms agreed upon, Woodman had bought the mortgage and note of the trust company, in order to raise money for it. The trust company had assigned them to him. He had borrowed of a bank in Minneapolis, upon his individual note, the necessary money to pay for them, and had pledged them to the bank as collateral security for his note. In other words, Woodman had become the owner of the note and mortgage, and the trust company had parted with its title to and interest in them, before Woodman sold them to Bailey. In this condition of the title, Bailey sent his check to Woodman for the note and mortgage on January 27, 1893, Woodman assigned them back to the trust company, that company then assigned them directly to Bailey, and this latter assignment was recorded. The previous assignment to Woodman was not recorded, and Woodman never notified Bailey, and Bailey did not learn until years afterwards, that Woodman had ever owned the note and mortgage, or that the appellants had ever claimed that it was not valid. In 1894 he foreclosed the mortgage, and in November, 1895, he conveyed the property which it covered to his son, Charles Irving Bailey, by a quitclaim deed, which recites a consideration of \$25,000. The record of this case discloses no evidence that the grantee in that deed was aware of any defect in the title, or of the claim of the appellants, before he paid the consideration for it; and there was no notice of any such claim upon the record of the title. In this state of the facts the court below dismissed the bill on the ground that the Baileys were bona fide purchasers for value, without notice of any defect in the mortgage or title.

A. E. Richards and Arthur M. Keith (John B. Baskin, A. G. Ronald, R. G. Evans, Charles T. Thompson, and Edwin K. Fairchild, on the brief), for appellants.

John Van Derlip (George P. Wilson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

This case presents many interesting questions, but the answer to one of them necessarily determines its decision. It is admitted that the decree below should be affirmed unless the facts which we have recited charged Charles M. Bailey, under the law, with notice of the claim of the appellants that the mortgage was invalid on or before January 27, 1893, when he purchased and paid for it. The proof is conclusive that he had no actual notice of this claim, and that the record title of the property mortgaged gave him no constructive notice of it; but the counsel for the appellants insist that the notice which Woodman had received while acting as an officer of the trust company was, under the law, notice to Bailey, because Woodman was Bailey's general agent to invest his money, and to examine his titles, and notice to the agent is notice to the principal. Notice to and the knowledge of the agent or attorney acquired in prior transactions, and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and the knowledge of his principal. *Railway Co. v. Belliwith*, 28 C. C. A. 358, 83 Fed. 437, 440. For the purpose of this discussion we concede, without considering the issue, that knowledge of the appellants' claim had been acquired by Woodman in October, 1892, and was present in his mind when he sold the note and mortgage to Bailey. He entered upon the negotiation of that sale as the trust officer of the Metropolitan Trust Company, duly authorized to sell the mortgage for it, and also as the agent of Bailey to purchase mortgages, and to examine titles for him. Bailey, however, knew that he was an officer of the trust company, and that he was acting for that company in his attempt to sell this mortgage to him, and we concede, for the purposes of this case, that his consent that Woodman should act as agent for both these parties would estop him from escaping on that ground from the general rule that notice to the agent is notice to the principal. A principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him, and yet consents that he may act as his agent, is estopped from denying the notice and knowledge which the agent has during the negotiation. *Astor v. Wells*, 4 Wheat. 466; *Fitzsimmons v. Express Co.*, 40 Ga. 330, 336; *Alexander v. University*, 57 Ind. 466, 476; *Leekins v. Nordyke & Marmon Co.*, 66 Iowa, 471, 475, 24 N. W. 1; *Mining Co. v. Senter*, 26 Mich. 73, 77. But before the negotiation was closed, before Bailey bought or agreed to buy the mortgage, Woodman had become the sole owner of them, the trust company had parted with its title to them, and Bailey was kept in ignorance of this fact. Woodman had borrowed the money of the bank on his individual note to purchase the mortgage, and had paid this money over to the trust company. The note and mortgage had been assigned to him, and he had pledged them to the bank as collateral security for the payment of his note. It is doubtless true that the motive which induced him to take this action was to raise money for the company. But his purpose is not material here. The facts remain that before Bailey bought or agreed to buy the note and mortgage Woodman had be-

come their owner; and when the agreement of sale was finally made, and when it was performed, he was the vendor, and Bailey was the purchaser, and Bailey was not informed of these facts. Now, the interest of vendor and purchaser are diametrically opposed. To the former the highest, and to the latter the lowest, price is the greatest good. To permit the seller to act as the agent of the buyer inaugurates so dangerous a conflict between self-interest and duty that the law has wisely removed the temptation by forbidding the relation. No man can be a vendor or the agent of a vendor and the purchaser or the agent of the purchaser at the same time, unless he first obtains the consent of the party with whom he deals, after a complete disclosure of all the facts which condition his relation. The law absolutely prohibits the vendor from being at the same time the agent of a purchaser, unless the latter consents to the relation after he knows that his agent is the seller. *Warren v. Burt*, 7 C. C. A. 105, 107, 58 Fed. 101, 103, and 12 U. S. App. 591, 595; *McKinley v. Williams*, 20 C. C. A. 312, 74 Fed. 94, and 36 U. S. App. 749, 752. Every general agency is necessarily limited by this rule of law, and must be construed in its light. As long as the agent is conducting negotiations for his principal with third parties, he may act on his behalf; but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases, and the powers and liabilities of that relation no longer exist. *Voltz v. Blackmar*, 64 N. Y. 440, 446.

In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal. *Surety Co. v. Pauly*, 170 U. S. 133, 156, 18 Sup. Ct. 552; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758; *Waite v. City of Santa Cruz*, 89 Fed. 619, 630; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33, 37; *Winchester v. Railroad Co.*, 4 Md. 231, 241; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. 699, 702; *Thomson-Houston Electric Co. v. Capital Electric Co.*, 56 Fed. 849, 853; *Bank v. Cunningham*, 24 Pick. 270, 276; *Mechem*, Ag. § 723. The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conducting on his own behalf, and the counter presumption that he will conceal them arises. As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails. The case at bar falls far within the exception. The time when notice of the appellants' claim that the mortgage was void became material, the time when that notice would naturally have been communicated to Bailey, was when it became the duty of Woodman to examine and certify the title

for him. In the ordinary course of business that time did not arrive until Bailey agreed to take the mortgage, for it is useless and unusual to examine or certify the title for a purchaser until he has agreed to purchase if it is found to be good. Now, Bailey did not accept the terms of sale which Woodman offered him until January 27, 1893, and long before that time Woodman had become the owner of the note and mortgage, the vendor, and the party interested adversely to his former principal, in his negotiations for their sale; and he was conducting those negotiations in his own interest, and not in the interest of Bailey. He had, therefore, ceased to be Bailey's agent, and his notice and knowledge of the appellants' claim cannot be lawfully imputed to his former principal. The presumption, which arises from his adverse interest, that he did not communicate his knowledge, is shown by the record to be in accordance with the fact. He never informed Bailey of the appellants' claim that the mortgage was void. He never notified him that he was the real owner and vendor of the note and mortgage which he caused the trust company to assign to him. All these material facts he concealed from his former principal, just as the law presumes from his adverse interest he would do; and in this way Bailey bought without either actual or constructive notice of any defect or claim of defect in the mortgage. There was no error in the conclusion of the court below that the Baileys were bona fide purchasers for value, without notice of the appellants' claim, and the decree below is affirmed.

CLARKE v. NORTHWESTERN MUT. LIFE INS. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,088.

1. FORECLOSURE SALE—REDEMPTION.

Under Code Civ. Proc. Neb. § 497a (Comp. St. p. 595), providing for redemption by the owner of premises sold under foreclosure, the owner may redeem, where other than the plaintiff was purchaser, by paying the purchaser, or tendering into court before the confirmation of the sale, the amount of his bid, with 12 per cent. interest from the date of sale.

2. SAME—ANTICIPATING QUESTIONS AS TO EFFECT.

It is not the business of courts to anticipate controversies, and it will not take jurisdiction of a petition of the owner of the equity of redemption asking leave to redeem from a foreclosure sale, and the advice and instruction of the court as to the effect of redemption, and the nature of the title that will accrue to the redemptioner.

3. SAME.

Where the court entertains a petition of the owner of the equity of redemption asking leave to redeem from a foreclosure sale, it cannot pass on the question of the effect of the redemption, and the rights and title acquired by it.

Appeal from the Circuit Court of the United States for the District of Nebraska.

On the 31st of January, 1888, William E. and Mary A. Clarke made and delivered their promissory note for \$6,500 to the Northwestern Mutual Life Insurance Company, and to secure the payment of the same, made and de-

livered to the insurance company their mortgage deed on the real estate here in controversy. On the 17th of January, 1896, Artemus M. Clarke, the appellant, purchased from the mortgagors, William E. and Mary A. Clarke, the legal title to the mortgaged premises, subject to the lien of the mortgage, but did not agree to pay the same. On the 21st of August, 1896, the insurance company filed its bill in equity to foreclose the mortgage in the circuit court of the United States for the district of Nebraska, in which suit Artemus M. Clarke, the appellant, and all other persons having an interest in the mortgaged premises, were made parties. In the foreclosure suit, the Merchants' National Bank of Omaha, the Nebraska National Bank of Omaha, and the Nebraska Savings & Exchange Bank were made defendants, and filed answers setting forth the amount and nature of their respective liens on or interest in the land. On the 23d of December, 1896, the court rendered a decree in which the following were found to be the order and amount of the several liens on the land, namely: First lien, mortgage to Northwestern Mutual Life Insurance Company, \$7,129.39; second lien, mortgage to Merchants' National Bank of Omaha, \$8,062.70; third lien, judgment in favor of Nebraska Savings & Exchange Bank, \$3,246.56. And it was decreed "that unless the defendant pay the complainant the said sum of \$7,129.39, and interest thereon from the date hereof at the rate of seven per cent. per annum, together with the costs of this suit, within twenty days from the date hereof, said mortgaged premises be sold at public vendue, in the manner provided by law, to the highest and best bidder for cash, and, after confirmation of said sale by the court, the proceeds thereof applied—First, to the payment of the costs of this suit and expenses of sale; second, to the payment of the amount hereinbefore found due the complainant, and interest as aforesaid; third, to the payment of the amount hereinbefore found due the defendant Merchants' National Bank; fourth, to the payment of the amount hereinbefore found due the defendant William K. Potter, receiver of the Nebraska Savings & Exchange Bank,—and that the balance of the proceeds, if any, be brought into court to abide the further order of the court." The order of sale was stayed for nine months, after the expiration of which time, and on the 1st day of December, 1897, the mortgaged premises were sold under the decree, and purchased by the Merchants' National Bank of Omaha for \$10,150. On the 30th of December, 1897, the appellant filed in the court below a petition for leave to redeem the mortgaged premises. After setting forth the purchase of the mortgagor's equity of redemption, the petition proceeds: "Your petitioner further says that as the owner of said real estate in said deed described, and which is the same real estate as that in controversy in this suit, your petitioner is ready, willing, and able, and now offers, to redeem said real estate from the lien of the decree herein, except that your petitioner is in doubt, and, although he has taken legal advice on the question, he is still in doubt, as to the amount to be paid, the effect of payment, and the nature of the title that will accrue to your petitioner as a result of said payment to redeem said property from the lien of said decree, and therefore your petitioner asks the advice and instruction of the court in that behalf. Nevertheless, your petitioner avers, upon information and belief, that the alleged purchaser at said sale has made no payment on its bid, and that your petitioner is entitled to redeem said premises from the liens of the parties hereto by paying the amount of the complainant's claim, with interest and costs. Wherefore your petitioner prays for an order adjudging and decreeing your petitioner to be the proper person, and entitled, to redeem said real estate from the lien of said decree, and determining the exact amount to be paid by your petitioner in order to redeem the same, and adjudging and decreeing that by so redeeming the same your petitioner will take title thereto free and clear from any right, interest, lien, claim, or demand whatsoever of the complainant, or of any of the defendants hereto, by reason or by virtue of any of the mortgage deeds, judgment liens, or other interests whatsoever of any of the parties to this suit, and that, upon so redeeming the same, the cloud cast upon the title to said real estate by the respective claims of the several parties to this suit may be removed, and that your petitioner may have such other and further relief in the premises as may be just and equitable." Upon consideration of this petition, the court entered the following decree: "It is therefore considered, adjudged, and decreed by

the court that the said defendant, Artemus M. Clarke, be, and he is hereby, permitted to redeem said premises from said sale by paying to the complainant herein, Northwestern Mutual Life Insurance Company, the amount found due it, in said decree, with interest, and all the costs of said suit, and by paying to the said Merchants' National Bank twelve per cent. interest upon the amount of its bid, from the date of said sale to the time of such payment. and that, upon redeeming said premises as aforesaid, the said Artemus M. Clarke take the same subject to the several liens of the several parties to this suit, except the complainant, and that, unless the said Artemus M. Clarke redeem said premises as aforesaid within five days from this date, then that said sale be and stand ratified, confirmed, and made absolute, and that a deed to the premises so sold be made in the usual form, and delivered to said purchaser, according to the course and practice of this court, and the laws of the state of Nebraska in such case made and provided." From this decree Artemus M. Clarke, the petitioner, appealed to this court. The assignments of error are that the court erred in not decreeing that the appellant was entitled—"First, to redeem the premises from the sale by paying to the Merchants' National Bank, the purchaser, the amount of its bid, with twelve per cent. interest thereon from the date of the sale to the date of redemption; and, second, upon making such payment, that the appellant take the same title to said premises that the Merchants' National Bank would have taken if redemption had not been made, and the premises had been conveyed to the bank as purchaser at the foreclosure sale."

James H. McIntosh, for appellant.

George E. Prichett, for appellee Merchants' Nat. Bank.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). If the appellant desired to redeem the premises in question, he should have paid the purchaser (who was not the plaintiff in the action) at the foreclosure sale, or into court before the confirmation of the sale, the amount of its bid, with 12 per cent. interest thereon from the date of the sale to the date of redemption. Code Civ. Proc. Neb. § 497a (Comp. St. p. 595); *Swearingen v. Roberts*, 12 Neb. 333, 11 N. W. 325. Instead of doing this, the appellant, without redeeming, or paying any sum to effect a redemption, or becoming bound to do so, filed a fishing petition, by which he sought to find out, before he made the redemption or parted with any money or incurred any liability, what rights he would acquire by making it. It seems highly probable that, unless he has the assurance in advance that his construction of the statute will prevail, he will not redeem. It is not the business of courts to anticipate controversies or try moot cases. The appellant had no right to delay the confirmation of the sale and the redemption, and keep the purchaser out of its title to the premises, or the money it paid for them, until it should be determined what he would get if he made the redemption, and whether it would be profitable to make it. The case is not one for a bill of interpleader; and the petitioner is not a trustee, and sustains no trust relation that entitles him to ask the advice and direction of a court of equity as to what he shall do in the premises. The lower court should have dismissed his petition. But it took jurisdiction of the same, and in so doing erred in fixing the amount which the appellant was required to pay to effect the redemption, by not following the rule prescribed by the supreme court of the state of Nebraska in *Swearingen v. Roberts*, *supra*, and in undertaking to determine the effect of the redemption upon the

rights of the mortgagees and lienholders, whose mortgages and liens were prior in point of time to the acquisition by the appellant of the mortgagors' equity of redemption in the premises. We decide nothing more than that, in determining the amount necessary to effect redemption, the rule prescribed by the Nebraska statute, as construed by the supreme court of that state, should be followed, and that the effect of the redemption, and the rights acquired by making it, must be left to be determined when a case shall properly arise presenting those questions. As the appellant may have been misled by the action of the lower court in the premises, the order of this court will be that the decree of the circuit court be reversed, and the cause remanded, with directions to that court to enter an order immediately upon the receipt of the mandate of this court giving the appellant the right to redeem, as he may be advised, within 10 days after the entry of such order. Ordered accordingly.

RUTLEDGE v. WALDO et al.

(Circuit Court, S. D. New York. May 12, 1899.)

MATTERS OF DEFENSE TO REVIVOR—BURDEN OF PROOF.

In defense to a bill of revivor to carry into effect a decree in a suit which has abated by the death of the original complainant, the defendants may show that the decree was rendered without jurisdiction over their persons, but the burden rests on them, in such case, to prove that the attorneys who appeared for and assumed to represent them in the case acted without authority.

In Equity.

R. H. Worthington, for complainant.

Preble Tucker, for defendants.

WALLACE, Circuit Judge. This is a bill of revivor to carry into effect a decree against the defendants in a suit which has abated by the death of the original complainant. While it is no doubt true that generally the sole questions before the court in such a bill are the competency of the parties and the correctness of the frame of the bill to revive, I have no doubt that the defense introduced to the present bill, that the original decree was obtained without jurisdiction of the persons of the defendants, is good if established by the proofs, because, in that event, the original decree would be void, and no subsequent proceedings could be founded upon it. I am of opinion that the defense is not established by the proofs. The burden of proof is upon these defendants to establish that the appearance in their behalf by the attorneys who assumed to represent them in the original action was unauthorized. *Hill v. Mendenhall*, 21 Wall. 454; *Osborn v. President, etc.*, 9 Wheat. 738. These attorneys were the law firm of Tucker, Hardy & Wainwright. The defendant Mrs. Tucker was the wife of one of them, and the defendant Miss Waldo was the sister of Mrs. Tucker. These attorneys had represented the defendants in other litigations of the same character, pending about the same time, when they appeared for them in the original action. It cannot for

a moment be believed that Mr. Hardy would have taken charge of the action, and the steps in it he did, without the instructions of Mr. Tucker; nor can it readily be believed that Mr. Tucker would have given these instructions unless he had understood himself to be authorized to do so, as otherwise he would have been deliberately lending himself to a deception calculated to jeopardize the rights of the complainant. The lapse of time since the occurrences afford a charitable explanation of Mr. Tucker's present testimony, as well as that of Miss Waldo, and suggests that they have forgotten the facts rather than intentionally misstated them. The relations between Mr. Tucker and the defendants render it extremely improbable that they were not informed of the commencement of the action, or that Mr. Tucker's intervention in their behalf was without their sanction. The case is one where conduct is of far more probative force than asseverations or denials by witnesses.

A decree is ordered for the complainant, with costs.

DIMICK et al. v. SHAW.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,136.

1. EQUITY JURISDICTION—ENJOINING CONTINUING TRESPASS.

A court of equity has jurisdiction of a suit to enjoin a trespasser from working a mine upon, and removing mineral from, land the title to which has been finally adjudicated in complainant's favor.

2. APPEAL—REVIEW OF INTERLOCUTORY ORDER GRANTING INJUNCTIONS.

A circuit court of appeals will not disturb an interlocutory order granting an injunction where the questions of law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain, and great if the relief is denied, while the loss of the opposing party will be comparatively small if it is granted.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from an interlocutory order granting a temporary injunction restraining appellants from in any manner working the property known as the "Independent Mine," and from extracting or removing ores therefrom, or removing or selling any ores, until the final determination of the cause. The bill charges that the appellee is the owner of a certain large tract known as the "Baca Grant No. Four," his title thereto having lately been determined by the supreme court of the United States in the cause of Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632; that defendants, while said cause was pending in the supreme court, went into possession of the lands in controversy under verbal permission of appellee's manager for the purpose of prospecting only, until the final determination of the cause then pending in the supreme court; that after the final determination of that cause, and the decision of the court that appellee was the owner of the tract, appellants were notified to quit the premises, but refused, and since then have commenced mining operations on a large scale in excess of the permission granted to them, to prospect, and continue their mining operations and trespasses; that they are insolvent, and, unless enjoined by a court of equity, will commit an irreparable injury to appellee's property. Appellants filed an answer setting up, among other things, the same defenses which had been expressly adjudicated by the supreme court in the case of Shaw v. Kellogg, supra, and also that appellants' manager

had verbally given them permission to prospect on the lands for minerals, and, in case of a final decision in favor of the appellee in that case, to make some fair and just arrangement with them; that they had discovered a valuable gold vein on the property, and, with the knowledge and consent of appellee, had expended large sums of money in developing the mine which is known as the "Independent Mine," but that now appellee refuses to give them any lease, or make any fair arrangement with them. A general replication was filed, and upon a hearing a temporary injunction granted.

Charles D. Hayt, Thomas Macon, and John R. Smith, for appellants.

Joel F. Vaile (Edward O. Wolcott and Elroy N. Clark, on the brief); for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The answer challenging the appellee's title, and setting up an adverse superior title, is merely an effort to retry the question settled by the judgment of the supreme court in the case of *Shaw v. Kellogg*, *supra*. It requires no citation of authorities to sustain the proposition of appellee's counsel that a person going upon property by permission of a party while a suit in relation to the title of that property is pending cannot, after that suit has been determined in favor of his licensor, litigate the title over again on the same lines. The only question raised by appellants which it is necessary to notice on this appeal is that appellee has a complete and adequate remedy at law, and that by this proceeding appellants are deprived of their constitutional right to a trial by jury. This precise question, on facts identical in legal effect with the facts of this case, has been three times decided by this court. In *Preteca v. Land Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, and 50 Fed. 674, this court held that a court of equity had jurisdiction of a cause in which the averments in the bill were substantially the same as the averments of the bill in this case. In that case we said:

"A court of equity may take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication upon purely legal rights, and confer purely legal relief; and so a court has jurisdiction to restrain waste and trespass to land where the facts are of such a nature that the law cannot afford adequate relief. 1 Pom. Eq. Jur. §§ 243, 245, 252, 271, 274, and cases there cited. The bill avers that the complainant's title has been finally adjudicated in its favor by a court of competent jurisdiction in suits brought against persons in like situations with the defendants. The averments of the bill make the case one of equitable cognizance. Against irresponsible parties taking mineral out of the land and removing the same, and cutting and removing timber, actions of ejectment would have been wholly inadequate for the protection of the complainant's rights. It may be true that the complainant had a remedy at law, but 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce v. Grundy*, 3 Pet. 215; *Oelrichs v. Spain*, 15 Wall. 211, 228."

In *Coal Co. v. McCaleb*, 32 U. S. App. 330, 15 C. C. A. 270, and 68 Fed. 86, the court below had refused to grant an injunction against trespassers who had entered upon complainant's lands, and were mining and shipping coal, but this court reversed that decree, and held that equity had jurisdiction, and that complainant was entitled to an

injunction. Judge Thayer, who delivered the opinion of the court in that case, said:

"It is now well settled by many adjudications, beginning with the case of *Mitchell v. Dors*, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character standing upon lands, are readily enjoined, because, as has sometimes been said, such acts tend to destroy the estate, and to occasion irreparable loss and damage. *Courthope v. Mapplesden*, 10 Ves. 290; *Scully v. Rose*, 61 Md. 408; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565; *Jerome v. Ross*, 7 Johns. Ch. 315; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892; *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367; *Iron Co. v. Reymert*, 45 N. Y. 703; 2 Beach, *Inj.* (1895) § 1155; *High, Inj.* (1st Ed.) § 469."

In *Emigration Co. v. Gallegos*, 61 U. S. App. 13, 32 C. C. A. 470, and 89 Fed. 769, this court held that a continuing trespass by a large number of persons, and constant and wrongful diversion of water through lands, which is continually depreciating their value, will give a court of equity jurisdiction, even without showing the insolvency of the defendants. In that case Judge Sanborn, speaking for the court, said:

"A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective. 2 Beach, *Inj.* §§ 1129, 1146; *Tallman v. Railroad Co.*, 121 N. Y. 119, 123, 23 N. E. 1134; *Uline v. Railroad Co.*, 101 N. Y. 98, 122, 4 N. E. 536; *Galway v. Railroad Co.*, 128 N. Y. 132, 145, 28 N. E. 479; *Evans v. Ross* (Cal.) 8 Pac. 88."

In addition to what has been said, it is now the settled rule of this court and the other circuit courts of appeal which have had occasion to pass upon the subject that on appeals from interlocutory orders granting an injunction whenever the questions of law or facts to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted, and is protected by a good bond, the appellate courts will not disturb the order of the court below. *City of Newton v. Levis*, 49 U. S. App. 266, 25 C. C. A. 161, and 79 Fed. 715; *Allison v. Corson*, 60 U. S. App. 387, 32 C. C. A. 12, and 88 Fed. 581; *Dooley v. Hadden*, 38 U. S. App. 651, 20 C. C. A. 494, and 74 Fed. 429; *Jensen v. Norton*, 29 U. S. App. 121, 12 C. C. A. 608, and 64 Fed. 662.

Other questions have been presented by counsel in their argument, but, as this appeal is merely from an interlocutory order, they should not be determined until the proofs are all in. Upon the showing made by the appellee he was entitled to the injunction, and the order granting it is affirmed.

HUGULEY MFG. CO. et al. v. GALETON COTTON MILLS et al.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1899.)

No. 798.

1. MORTGAGES—REVERSAL OF DECREE OF FORECLOSURE—RIGHTS OF MORTGAGEE IN POSSESSION AS PURCHASER.

A mortgagee having a valid mortgage which is foreclosed in a court of competent jurisdiction, and who becomes the purchaser under the decree, and is given possession of the property, cannot be treated as a trespasser wrongfully in possession on a subsequent reversal of the decree, but is entitled on an accounting to the benefit of the equitable rules governing mortgagees in possession, and to have the rental value of the property during his possession applied on a deficiency remaining due him after its resale.

2. SAME—EFFECT OF STATE STATUTE.

The right and obligation of a mortgagee in possession to apply rents and profits upon the mortgage debt is a doctrine of equity, and is not affected by a state statute providing that a mortgage is only security for a debt, and passes no title, as mortgages were always so regarded by courts of equity.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

W. R. Hammond and John M. Chilton, for appellant.

B. F. Abbott and P. H. Brewster, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. On January 1, 1884, the Alabama & Georgia Manufacturing Company executed a mortgage or deed of trust to J. J. Robinson and two others to secure \$65,000 of bonds issued by it that day. Subsequently the property embraced in the mortgage was sold under a decree of a state court subject to the mortgage. Under this sale the Huguley Manufacturing Company became the purchaser and owner of the property, subject to the incumbrance of the mortgage for \$65,000. It was placed in possession of the property. A bill was filed in the circuit court of the United States for the Northern district of Georgia to foreclose the mortgage, a decree of foreclosure rendered, and on appeal to this court the decree was reversed. 13 U. S. App. 359, 6 C. C. A. 79, and 56 Fed. 690. The decree of foreclosure being vacated by reversal, the circuit court granted a petition on the part of the Huguley Manufacturing Company to restore it to the possession of the property, upon condition, however, that it pay into court \$10,000, which had been paid by the purchasers under the now vacated foreclosure sale. This condition the Huguley Manufacturing Company did not comply with, but resisted. It took another appeal to this court, and the decree of the circuit court was affirmed. 30 U. S. App. 683, 19 C. C. A. 152, and 72 Fed. 708.

At the first foreclosure sale the property was purchased for the bondholders, who organized a corporation under the name of the Galeton Cotton Mills. This corporation was placed in possession of the

property under the first decree of foreclosure, and held the same pending the appeal, and after the reversal of the decree, and upon the second foreclosure became purchasers again, and have remained continuously in possession, operating the mills on the property. The Galeton Cotton Mills were in possession of the property under the first decree of foreclosure for a period of three years and eight months. The real controversy in the present litigation is about the rents of the property during this period. The net rents have been ascertained to be \$28,334. At the last foreclosure sale a balance was left due, after applying the net purchase money to the mortgage debt, of \$33,414.21. The Huguley Manufacturing Company contends that the possession of the purchasers at the foreclosure sale, the decree afterwards being reversed, was illegal and wrongful, and that in stating the account of reference the company was not to be treated as a mortgagee in possession, but that a stricter rule should be applied on the accounting, and that the rents are the property of the Huguley Manufacturing Company, and should be paid to it. The Galeton Mills, on the contrary, contends that its possession was not tortious, but legal, that it should be treated and charged only on the accounting as a mortgagee in possession, and that the net rents should not be paid to the Huguley Manufacturing Company, but should be applied to the payment of the amount left unpaid on the mortgage. These are the only substantial questions in the case. The material assignments of error relate either to the statement of the account before the master, or the application of the rents to the payment of the mortgage debt. We are relieved from stating these questions and the facts relating to them more minutely by the opinion of the learned judge who rendered the decrees appealed from in the circuit court. 89 Fed. 218-231.

1. The possession of the purchasers at the first foreclosure sale was not wrongful in the sense that such possession made them trespassers. The decree was rendered by a court having jurisdiction of the case. The mortgage foreclosed was valid. The decree was binding, and not subject to collateral attack. It was valid and effectual to place the purchasers in possession, and to protect them in possession till it was reversed. 2 Jones, Mortg. (5th Ed.) §§ 1587, 1588. It was reversed by this court, and the circuit court then granted an order of restitution, but upon condition that the Huguley Manufacturing Company would pay into court the sum of \$10,000, which had been paid by the purchasers at the date of their purchase. This court, on appeal, affirmed this condition. The Huguley Manufacturing Company did not pay the \$10,000, and so were not entitled to the possession by the terms of the order made by the circuit court and affirmed by this court. From its inception the possession in question was sanctioned by a decree of the court having jurisdiction of the parties and the property. The reversal of the decree does not make the purchasers under it trespassers. The purchasers in this case, on the facts stated, are entitled to the benefit of the equitable rules governing mortgagees in possession, and the account should be stated and the rents applied by such rules. Dutcher v. Hobby, 86 Ga. 198, 12 S. E. 356; Brobst v. Brock, 10 Wall. 519; Lane v. Holmes,

55 Minn. 379, 57 N. W. 132; Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891.

2. Under the English law, which has been substantially adopted in many of the states, a mortgage on real estate is of dual nature. In a court of law the mortgagee is regarded as the owner. He possesses the legal title, and can recover the estate in ejectment. In a court of equity the mortgage is deemed only a security for the debt described in it. *Welsh v. Phillips*, 54 Ala. 309; 3 Pom. Eq. Jur. § 1184; 1 Jones, Mortg. (4th Ed.) § 11. In Georgia, as in several of the states, the English view does not prevail. The legal title does not pass to the mortgagee. The mortgage, both at law and in equity, is always deemed a mere security for debt. This was settled in Georgia many years ago by judicial decision. *Davis v. Anderson*, 1 Ga. 176; *Vason v. Ball*, 56 Ga. 269. It is now confirmed by statute. "A mortgage in this state is only security for a debt, and passes no title." Civ. Code Ga. § 2723. In the argument of this case it was urged with much earnestness that these decisions and the statute are controlling in this case, and that their proper application to the case will give to the appellant the rents and profits of the property. It must be conceded as established by authority, as a general principle, that a mortgagee in possession, whether in person, by trustee, or receiver, is in equity accountable for the rents and profits, "and must apply them to the reduction of the mortgage debt." 2 Jones, Mortg. (5th Ed.) § 1114. This is a matter exclusively of equity jurisdiction, and is for the benefit of the mortgagor. By such application of the rents his debt is paid or reduced so as to lessen the burden of redemption. It is also nothing more than is due to the mortgagee. He is entitled to be paid. In cases where the corpus of the property is not sufficient to pay the debt, and where the mortgagor is insolvent, the mortgagee has no other means of obtaining full payment except to secure the rents. As between an insolvent mortgagor and the mortgagee who has collected rents, the property mortgaged being insufficient to pay the debt, the rents must be applied to extinguish the debt. The mortgagee would not, in equity, be permitted to retain the rents, and not apply them to the debt. In no jurisdiction would he be required to pay the rents to the mortgagor, his debtor, and leave the debt unpaid. As the mortgagor, under such circumstances, could not prevent the rents being applied to the payment of his debt, he cannot, by selling his equity of redemption to another, invest him with a right he did not have himself. The purchaser of the mortgagor's right of redemption can have no greater rights than the mortgagor. In cases like this the equitable right of the mortgagee to apply the rents to the payment of his claim seems undisputed by the general practice and principles of equity jurisprudence. This, we understand, if not conceded by the appellant, is not denied, but the contention is that these principles are not applicable to a mortgage controlled by the laws of Georgia. Is there anything in the Georgia law in conflict with these principles? Does the statute which makes a mortgage only a security for debt, intend to make it any less a security, in equity, than other mortgages on real estate? Under the English rule, a mortgage on real estate

is in equity always regarded as a mere security for debt. It is only at law that the mortgagee is regarded as the owner of the legal title. The Georgia statute changes the effect, in this regard, of a mortgage at law, but it is only a legislative recognition of the equitable rule, which views a mortgage as merely a security for debt. It is held in *Hart v. Respass*, 89 Ga. 87, 14 S. E. 910, as stated in the syllabus:

"While the mortgagee has no legal title to the rents and profits, he has an equitable claim upon the same in so far as they may be needed to discharge so much of the mortgage debt as cannot be realized out of the corpus of the property, the facts of the case indicating that the debtors are insolvent, and the creditors likely to sustain loss."

The decree of the circuit court is affirmed.

INTERSTATE COMMERCE COMMISSION v. CHICAGO, B. & Q. R. CO.
et al.

(Circuit Court, N. D. Illinois, N. D. May 9, 1899.)

No. 25,101.

1. CARRIERS—INTERSTATE COMMERCE COMMISSION—SUIT TO ENJOIN UNREASONABLE CHARGES.

A petition by the interstate commerce commission for an order of a federal court enjoining a carrier from making certain charges, which the commission has declared to be unreasonable and unjust, is authorized by the interstate commerce act, and is not subject to objection as an attempt to fix maximum rates; the question of the reasonableness of the charges complained of being one which the court is required to determine in such proceeding.

2. SAME.

The findings of the interstate commerce commission on which it bases an order requiring carriers to cease and desist from making certain charges as unreasonable and unjust, which are made prima facie evidence of the facts therein stated on the hearing of a petition by the commission asking a court to enjoin obedience to such order, will not, in view of the terms of the statute and its remedial character, be given a narrow construction on the hearing of a demurrer to the petition on the ground that such findings do not sustain the order made.

3. SAME—PROCEDURE—HEARING DE NOVO.

The court will not be limited on the hearing to a review of the evidence before the interstate commerce commission, and a hearing de novo on the merits should be granted where the findings and petition of the commission are within the letter of the act.

On Demurrer to Petition.

S. H. Bethea, U. S. Dist. Atty., for plaintiff.

Robert Dunlop, for defendant Atchison, T. & S. F. R. Co.

Robert Mather, for defendant Chicago, R. I. & P. R. Co.

Sidney F. Andrews, for defendant Illinois Cent. R. Co.

William Brown, for defendant Chicago & A. R. Co.

G. S. Bennett, for defendant Wabash R. Co.

C. M. Dawes, for defendant Chicago, B. & Q. R. Co.

Charles B. Keeler, for defendant Chicago, M. & St. P. R. Co.

Lloyd W. Barrows, for defendant Chicago & N. W. R. Co.

Frank B. Kellogg, for defendant Chicago G. W. R. Co.

KOHLSAAT, District Judge. This cause comes on to be heard upon demurrer of the defendants to the petition filed herein by the interstate commerce commission seeking an order of this court enjoining the defendants to cease and desist from making certain charges which the said commission had declared to be unreasonable and unjust.

It is contended on the part of defendants that the petition attempts, by indirection, to fix a maximum rate of transportation, and is therefore obnoxious to the rule of law laid down in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, wherein, conceding that such power might have been conferred, the court held that the commission was not vested by the statute with authority to fix rates, either maximum or minimum. The statute does, however, in express terms, empower the commission to execute and enforce the provisions of the act, by notifying the transgressor thereof to cease and desist from specific violations, and to invoke the aid of the federal courts in compelling obedience to such notice or order. It is not an anomaly in law that the commission should have the right to declare any given rate unreasonable and unjust, while it may at the same time be without jurisdiction to fix a rate. The language of section 15 of the act (24 Stat. 384) investing the commission with authority to notify the defendants to cease and desist from the violation of any given provision of the act may fairly be applied to the clause in section 1 reading, "and every unjust and unreasonable charge for such service, is prohibited and declared to be unlawful," without in any way conflicting with the rule of law laid down in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*

The defendants further contend that the decision of the court of appeals in the case of *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 755, is conclusive in this case. The court in that case expressly said that the unreasonableness of the charge was not suggested. Here it is the question at issue. Even if it were raised in that case, however, the facts before that court are not available for the purpose of this motion.

The defendants further insist that the finding of facts by the commission do not support its notice or order. The act provides that the findings of the commission shall be prima facie evidence of the matters therein stated, and that this court shall proceed to hear the matter without formal pleadings and proceedings applicable to ordinary suits in equity; so that, certainly for the purposes of a demurrer, no narrow construction should be applied by the court in such a case. The commission does find, among other facts, that the flat rate to Chicago includes compensation for a portion of said two-dollar charge, that the two-dollar charge is made in part for services which should be included in the flat Chicago rate, that the flat Chicago rate is a reasonable charge for all the services which should be included in the transportation of freight to Chicago, and that the two-dollar charge is unreasonable and unjust. Any one of these is sufficient to sustain the petition herein, as against this demurrer.

While the findings of the commission contained in its report, which is made a part of the petition herein, may not appeal to the judgment of the court upon the merits as disclosed by the report, and while the apparent benefit to result from the enforcement of the order of the commission would seem to be almost unappreciable, yet, in view of the remedial character of the act, the provision thereof that no petition shall be dismissed because of absence of direct damage to complainants, and the further fact that this proceeding is within the letter of the act, I am of the opinion that the petition is sufficient to give this court jurisdiction in the premises for a trial de novo upon the merits. The demurrer is overruled.

MEARS v. LOCKHART.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,131.

1. APPEALS IN EQUITY—RECORD—FAILURE TO FILE PROOFS.

The evidence taken in an equity cause in a federal court must be made a part of the record and certified on appeal, otherwise it will be disregarded; and, unless the record contains some evidence to sustain the finding, the decree will be reversed.

2. EQUITY PRACTICE—MANNER OF TAKING PROOFS.

Testimony can only be taken orally before the court on the hearing of an equity cause "upon due notice given, as prescribed by previous order," in accordance with equity rule 67. It cannot be so taken on an ex parte order.

Appeal from the Circuit Court of the United States for the District of North Dakota.

E. Ashley Mears (W. H. Standish, on brief), for appellant.

John E. Greene (John F. Cowan, on brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Appellee filed his bill to remove a cloud from real estate, charging that appellant claimed some interest or estate in it adverse to appellee. An answer was filed, which, although very loosely drawn, and containing a great deal of irrelevant matter, set up some kind of an equitable title to the land in controversy. Exceptions were filed to the answer, which failed to allege as fully as is required by the rules of pleading prevailing in the federal courts in equity what claim he had; nor did he file the evidence of his claim, or copies of them, as exhibits to the answer. The exceptions were not brought to a hearing. Appellee filed a replication to the answer. On December 6, 1897, counsel for appellee entered an order on the rule book setting the cause for hearing on December 14th. No notice, other than the entry of this order in the rule book, was given to the appellant, which was "for final hearing upon the bill, answer, and testimony, to be at that time taken orally before the court." On that day there was a hearing, and a decree in favor of the appellee. The decree recites:

"This cause came on for hearing at this time before the court, pursuant to the order setting the same down for hearing, plaintiff appearing by John F. Cowan, Esq., his attorney, and no appearance being made on behalf of defendants; and after hearing evidence and proofs adduced on behalf of plaintiff, and arguments of counsel, it is ordered * * *."

The record fails to show any of the evidence, except the contract or agreement under which appellant claims his equitable interest in the land, and which, in connection with the answer, show that he has an equitable interest therein; but there is nothing whatever in the record showing upon what evidence the court below rendered a decree in favor of the appellee. On appeal from a decree in equity the record must show some evidence to sustain the findings, otherwise the decree will be reversed. In the case at bar the record shows that appellant has an equity in the lands, and there is no evidence whatever showing that appellee has a better title, or any title which should prevail in a court of equity over that of the appellant under his contract.

The record shows that there was oral testimony introduced, presumably in pursuance of the order taken on December 6th, but there is no warrant of law for oral testimony to be taken at the hearing of a cause in equity on an *ex parte* order made by counsel. Section 862, Rev. St. U. S., provides that:

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court except as herein specially provided."

The supreme court, in pursuance of this statute, has adopted rules for the taking of testimony. The sixty-seventh equity rule provides the manner in which testimony may be taken. That rule does not permit testimony to be taken orally at the final hearing, except "upon due notice given as prescribed by previous order." When oral testimony is presented, it must be taken down and made part of the record, and upon appeal certified to this court; otherwise, it must be disregarded. *Blease v. Garlington*, 92 U. S. 1. In the case cited the whole subject is considered, and the proper practice settled. There being no evidence in the record to sustain the decree, it must be reversed, and the cause remanded, with leave to the parties to amend their pleadings as they may be advised, and to take proofs. Ordered accordingly.

CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA, R. & C. R. CO.
et al.

OWEN et al. v. JONES.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1899.)

No. 784.

1. RAILROADS—MORTGAGE ON FUTURE-ACQUIRED PROPERTY—GENERAL LAWS.

There being in force a general law for the incorporation of railroads which authorizes the mortgage of future-acquired property, the fact that the original or amended charter of a railroad company does not authorize a mortgage of after-acquired property will not affect the right to execute

such mortgage, as power in that respect is given under the general law, and the lien of such a mortgage will take precedence of the liens of subsequent judgments on such after-acquired property.

2. **SAME—INCOME AFTER DEFAULT IN MORTGAGE—LOCAL LAWS AND DECISIONS.**

Neither the local laws of Georgia nor the decisions of the supreme court of that state limit the security of a mortgagee to the corpus, to the exclusion of the income after default.

3. **SAME—RENTS AND PROFITS—RECEIVER.**

That a mortgage does not expressly include the income on the property mortgaged is not material, as the mortgagee can only be interested in the income on default, on which event, if the maker is insolvent and the security inadequate, he is entitled to the appointment of a receiver to preserve, not only the corpus, but the rents and profits, for the satisfaction of the debt.

4. **SAME—INSOLVENCY—INADEQUACY OF SECURITY—RECEIVER.**

Where a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt, and it may be put in the hands of a receiver.

5. **SAME—MORTGAGES—RECEIVERS.**

Under a railroad mortgage which expressly authorized a mortgagor to receive the income until default had been made for three months, whereupon the trustee could take possession of the road and operate the property until sale, or apply for a receiver, upon electing to ask for appointment of a receiver the right to the rents and profits inured to the mortgagee, subject to such terms as the court might impose, at the date of entry by the receiver.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

L. A. Dean and C. P. Goree, for appellants.

Alex. C. King, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The Chattanooga, Rome & Columbus Railroad Company, by a different name, was chartered by an act of the legislature of the state of Georgia approved August 30, 1881. The company was given power to issue bonds in such amount as it desired, and to mortgage all of its railroad, right of way, rolling stock, and franchise for the purpose of securing its bonds. Laws Ga. 1880-81, p. 246, § 13. By an amendment approved December 22, 1886, it was provided that the company should have power and authority to issue income bonds, and to secure the same by a mortgage of its property and franchise, or by pledging the income of its railroad, either or both, as the company should deem proper. Laws 1886, p. 137, § 2. The company was authorized to construct a railroad from Chattanooga, Tenn., to Carrollton, Ga.,—a distance, by the route proposed, of about 140 miles. It began the construction of its road, placed a mortgage on that part of its property lying between Rome and Cedartown to secure an issue of bonds amounting to \$150,000, but up to September 1, 1887, had only completed 20 miles of its railroad. On September 1, 1887, it executed the deed of trust foreclosed in this proceeding. This deed conveyed to the trustee all of the railroad constructed and to be constructed extending from Chattanooga, Tenn., to Carrollton, Ga., with all the rights of way,

depot grounds, yards, terminal property and rights, and all such real and personal property as might be germane to and necessary for the construction, operation, and maintenance of its line of railroad, whether then owned and possessed by the mortgagor or thereafter to be acquired,—specifying exhaustively the materials necessary to be used in the construction, maintenance, and operation of the railroad, whether then owned and possessed by the mortgagor or thereafter to be acquired by it; also all the rights, powers, privileges, and franchises of, or belonging to, or thereafter to be acquired by, the mortgagor. This deed of trust was subject to the former mortgage as to so much of the property as that mortgage embraced. It was given to secure an issue of bonds amounting in the aggregate to the sum of \$2,240,000. It provided that, in case of default for three months in the payment of any interest coupon when due, the principal of the bond to which the coupon was annexed should immediately become due; and if such default should be made in the payment of interest, and in the payment of principal thereby or otherwise matured, upon the written request of the holder of any bond or coupon the trustee was authorized, empowered, and directed to take and hold possession of the railroad and all its property, rights, etc., and to maintain and operate the same until the day of sale thereafter to be fixed, or, in its discretion, proceed by bill in equity or other appropriate proceeding in any court of competent jurisdiction, whether of the United States or of the state of Georgia, to foreclose the mortgage, and enforce the rights, liens, and securities of the trustee and bondholders thereunder. On September 2, 1887, the defendant railroad company (mortgagor) issued income bonds, and, to secure their payment according to their terms, executed and delivered to the same trustee a mortgage, covering the same property, declared to be subsequent and subordinate in all respects to the mortgage dated September 1, 1887, pledging as security for the payments stipulated to be made by the income bonds and coupons thereto attached the net earnings of the railroad, after providing for the interest on the \$2,240,000 of first mortgage prior lien bonds. After the execution and delivery of these mortgages, the mortgagor company sold and conveyed all of its property, including the property covered by the mortgages, to the Savannah & Western Railroad Company, which last-named company came under the control of the Central Railroad & Banking Company of Georgia, all of whose property was placed in the hands of receivers in March, 1892. On September 1, 1892, default was made in the payment of interest on the bonds secured by the mortgage of September 1, 1887, and on March 1, 1893, and on September 1, 1893, default was made in the payment of interest respectively maturing on those dates. On December 15, 1893, the trustee in the deed of trust exhibited its bill, with proper averments, asking for a foreclosure of its lien, a sale of the mortgaged property, and showing that the property was inadequate security for the debt, that the mortgagor and its assigns were insolvent, and praying that, pending foreclosure proceedings, the mortgaged property be taken possession of by a receiver to be appointed by the court, with such powers and authority as may be

requisite to preserve the property until sale thereof, and to secure the earnings for the use of the bondholders. The appellee Eugene E. Jones was thereupon duly appointed receiver by an order passed February 1, 1894. He took possession of all of the railroad property, and operated it pending the progress of the foreclosure suit, under the customary orders in such cases. The decree of foreclosure and sale was passed July 12, 1894. It ascertained the amount due on the bonds at that date. It provided that the funds to be realized from the sale should be appropriated—First, to the payment of costs, including expenses and allowances indicated; second, to the payment of the principal and interest due and unpaid on the bonds secured by the mortgage of September 1, 1887; third, to the payment of the principal of the income bonds secured by the mortgage of date September 2, 1887; and, fourth, should there be any surplus remaining, after making the payments above directed, it was to be paid into the registry of the court to abide such order and decree as the court should make in respect thereto. For reasons which the record does not fully disclose, the sale was not made until some time in the early part of 1897. At the sale a reorganization committee became the purchaser. They complied with the terms of the sale, and the same was confirmed to them by a decree passed June 30, 1897. On September 25, 1897, the interveners filed their petition, showing that they were judgment creditors of the mortgagor company, whose judgments were obtained in the several state courts of Georgia prior to the filing of the bill by the Central Trust Company of New York to foreclose the mortgage. They claimed that, as such judgment creditors, they had a superior lien—First, on the proceeds of the sale of all of the road, except the 20 miles that had been constructed at the date of the mortgage; and, second, on the whole amount of the net earnings in the hands of the receiver acquired by him from his operation of the road pending the foreclosure proceedings. To this petition the receiver (appellee) demurred, on the ground that the lien of the mortgage attached to all of the proceeds of the sale of the railroad property and to the alleged income earned by the receiver, and was superior to the alleged lien of the petitioning creditors' judgments. On September 16, 1898, the circuit court passed its decree, sustaining the demurrer of the receiver, and dismissed the petition of the interveners. 89 Fed. 388. From that decree this appeal was taken.

The errors assigned are: (1) That the circuit court erred in holding that the mortgage is a valid lien upon the property acquired by the railroad company after the execution of the mortgage; (2) in holding that the mortgage creditors are entitled to the income earned by the receiver while operating the railroad; (3) in holding that the judgments are not liens on the after-acquired property and the incomes, superior to the mortgage lien. The appellants contend—First, that the defendant railroad corporation (mortgagor) had no authority, under its original or its amended charter, or the general laws of Georgia, to mortgage on September 1, 1887, any part of its railroad not then constructed, or any part of its equipment or other property which had not theretofore been

acquired and was not then held by it; and, second, that the mortgagor company had no authority, under its charter or under the general laws of Georgia, to mortgage its income.

By the act of the legislature of the state of Georgia approved September 27, 1881, a general law for the incorporation of railroads, it is provided that future-acquired property may be mortgaged by railroad corporations formed under that act. Laws Ga. 1880-81, p. 160, § 9. The supreme court of Georgia, by a decision rendered on August 20, 1894, held:

"(1) There being in force a general law for the incorporation of railroad companies, if the subsequent special charters of the two railroad companies involved in this litigation were unconstitutional, and therefore wholly void, each of said companies was, nevertheless, a corporation de facto, and, as such, could acquire and own property, and would be bound to its creditors by all acts which would have bound it had it been duly incorporated under the general law. Bonds issued by it, and deeds or mortgages made to secure the same, are enforceable to the same extent as they would be if no special charter had been granted, and the company had been organized as a corporation in the method prescribed by the general law, and such bonds, deeds, and mortgages had been thereafter executed; and any person making claim upon the assets of one of these corporations de facto, whether as its own creditor directly, or as a creditor of such creditor or of a stockholder, sustains the same relation to it in respect to such claim as would be sustained under like circumstances were it a corporation de jure. (2) A corporation created under the general law of this state for incorporating railroad companies can bind by mortgage or trust deed, executed to secure bonds issued by it to provide funds for constructing its railroad, future-acquired property, as well as property owned by it at the time of the execution of the instrument. This being so, a corporation de facto can do the like." Georgia S. & F. R. Co. v. Mercantile Trust & Deposit Co., 94 Ga. 306, 21 S. E. 701.

In the opinion in the case just cited we find this language:

"If we have succeeded in showing that these railroad companies, supposing their special charters to be void, are de facto corporations, because of the existence of the general law, it would seem that they might make any contracts authorized by that law, and become bound by such contracts to those with whom the same were made. As a practical proposition, it is well known that most, if not all, of the railroads of any length in the United States which have been built for years past have been constructed by issuing in advance bonds upon their entire lines, including the unbuilt portions, as well as those already constructed, with mortgages to secure the bonds covering the whole. If a de facto railroad company is a corporation for any purpose at all, it ought, on general principles, to have the power to mortgage 'future-acquired property'; and this seems to be the doctrine very generally recognized by the courts."

On the authority of this decision of the supreme court of Georgia, the circuit court rightly held that the appellants' first contention is not well taken.

The appellants' second contention is that the deed of trust foreclosed in these proceedings does not purport, in express terms, to cover the income of the railroad property, and that, if it did, the mortgagor company had no authority to mortgage its income. It is earnestly insisted that the questions submitted by this contention depend upon the local law as declared by the statutes of Georgia and by the decisions of the supreme court of that state. We have examined with some care all the provisions of the statute law which seem to us to bear either directly or remotely upon these questions, and, in connection therewith, the decisions of

the supreme court of Georgia to which we have been referred. We have considered with especial care and with deep interest the decision in *Green v. Railroad Co.*, 24 S. E. 814, and the later decision in *Railway Co. v. Barton*, 28 S. E. 842. The authority of the decision first just above cited is stated thus by the court:

"By invoking equitable relief, such as the appointment of a receiver and the administration of the mortgaged property by equitable means and agencies, mortgagees submit themselves to do equity relatively to any creditor of the mortgagor who may rightly intervene in the foreclosure proceedings in which such relief is sought. Mortgages upon a railway, and the income from the same, the mortgagor being left in possession, are, as to the income, whether produced before or after the appointment of a receiver in foreclosure proceedings, subject to be postponed in equity in favor of a claim for damages resulting from a tort committed by the mortgagor while and by reason of operating the railway after the execution of the mortgage. The tort now in question consisting of negligence in running a train upon the railway, whereby damages accrued, and judgment therefor against the mortgagor having been obtained before the mortgages were foreclosed or the receiver was appointed, such damages, so reduced to judgment, should be regarded as operating expenses charged by the judgment upon income as against the mortgages and all their incidents. So long as such a charge is unsatisfied, the mortgagees cannot justly and equitably divert income from its payment, and take the benefit of such diversion, whether directly or indirectly."

This decision evidently does not purport to rest upon local law. It extends a little further than had hitherto been done the class of preferential claims which have been fully recognized generally by the courts since the decision in *Fosdick v. Schall*, 99 U. S. 235. There was manifested in the circuit courts of the United States a disposition to extend the doctrine of *Fosdick v. Schall* to a degree that has challenged the attention of the supreme court, and moved it to check this tendency, as appears from its utterances in *Kneel and v. Loan Co.*, 10 Sup. Ct. 950, and subsequent cases. The fact that so many railroad corporations have issued bonds and mortgaged their property in advance of the construction of their railroads, and the acquisition of the property mortgaged, greatly beyond its market value at forced sale, had inclined courts of equity to treat the holders of railroad bonds, or the trustees in the mortgages, as the owners of the roads, rather than simply as lienholders, and to charge them as such owners, after default, with the unpaid expenses of operating the property. It has become the settled practice, where mortgagees invoke equitable relief and seek the appointment of a receiver and the administration of the mortgaged property by equitable means and agencies, to require them to permit payment of that large class of claims generally referred to as "preferential claims." The considerations which inspired the glowing argument of the distinguished jurist who wrote the opinion in the case of *Green v. Railroad Co.*, *supra*, have touched the consciences of other chancellors. No exactly definite limits can be traced to include the class of claims which have generally been heretofore allowed as preferential. The warnings of the supreme court indicate that the bounds have been extended as far as sound judicial discretion can go, and that, if further relief is needed, it can be granted only by the legislature. The decisions of the supreme

court of Georgia on which the appellants chiefly rely have been rendered since the execution of the mortgage here involved, and since the default, which by the terms of the mortgage terminated the right of the mortgagor to receive the income, and since the appointment of the receiver, who took possession of the property at the prayer of the mortgagee, to secure the earnings of the railroad to the use of the bondholders. We do not see in these decisions anything to control or qualify the settled doctrine that has obtained in the courts of the United States in such foreclosure proceedings as these. The appellants appear to regard as of the first importance the distinction between mortgages which, in express terms and with full warrant, are made to include the income of the property, and those which for want of power in the mortgagor, or a failure to exercise the power, do not expressly embrace the income. As far as we have been able to discover, such a distinction cannot rest on any provisions of the statute law of Georgia that are peculiar to that state, either in the language of those provisions or in the construction that has been placed on the language by its supreme court. The Civil Code of Georgia (section 2723) declares, "A mortgage in this state is only security for a debt, and passes no title." That rule is not peculiar to Georgia. It was the rule in equity from the beginning. In this country that rule is accepted by the courts of law. In some states, as in Georgia, it is expressed in a statutory provision; but, wherever thus found, it is only declaratory of the law already established by the dealings of the people and the decisions of the courts. This rule being established, it would seem to be immaterial whether or not the income is expressly named as included in the mortgage. When the mortgage does expressly include the income, the mortgagee can only claim his debt, principal and interest; and, while these are paid as they mature, he can have no cause of action on his mortgage for possession, or for account of rents and profits, or for any other account. He receives what is due him as it matures, and the mortgagor, or his assigns in possession, receive, and have a right to receive, the rents and profits. If default is made in the payment of interest, or of principal that has matured, the mortgagee has his right to foreclose according to the terms of the mortgage. If the corpus of the mortgaged property is ample security for the whole mortgage debt, the mortgagee has no need, even after default, to look to the income, or to an account of rents and profits, so long as the corpus is adequate security. When the mortgaged property is not of value sufficient to secure the payment of the mortgage debt, or when its sufficiency becomes substantially doubtful, and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctively as deteriorations by the cutting of timber, suffering dilapidation, etc.,—the leading illustrations from the earliest time in the adjudged cases and with text writers. In such cases courts of equity always have the power to take charge of the property by means of a receiver, and to preserve not only the corpus, but the

rents and profits for the satisfaction of the debt. *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420.

The bill in this case shows that the mortgagor company and its assigns are insolvent, are unable to pay their debts and liabilities in full, and that the value of the property covered by the mortgage of September 1, 1887, is less in amount than the amount of the bonds issued under that mortgage, and is inadequate security for their payment. The result of the sale shows that after nearly three years' delay (during which the property was improved) the court, through its commissioner, succeeded in obtaining a bid for the mortgaged property as an entirety to an amount equal to not more than one-fifth of the mortgage debt at the date of the sale. It is true that such sales are not a reasonable test of the actual value of such property. It is, however, equally true that the conditions which generally affect such property have been found to render it not practicable to make a sale thereof in any other manner to any greater or to an equal advantage to all parties concerned therein. The practical result from these prevalent conditions is that, when a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt. The larger part of the value of the property is dependent upon its continued operation as a public carrier. Its successful operation and ability to earn income are in most cases largely dependent on the railroad's connections, and its friendly relations with other carriers, and on the good will it has secured. And while the appointment of a receiver is not a matter of strict right, and such applications always call for the exercise of judicial discretion, these imminent conditions bearing upon such property, after default by the mortgagor in the payment of interest on the mortgage debt, give to an application for the appointment of a receiver great force, and the practice to grant the prayer therefor in such cases has become settled. We think it is quite equally well settled that the receiver takes and operates the property, subject to the preferential claims as stated in *Fosdick v. Schall*, and to liens prior in point of time to the date of the mortgage, for the benefit of the mortgagees, according to their priority. His possession is "that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place." This is precisely what the circuit court did in this case. It has determined that the judgments, being junior to the mortgage in the date of their rendition, if entitled to a lien at all on the corpus of the mortgaged property, such lien is not superior to that of the mortgage. And the mortgage by its terms having limited the right of the mortgagor to remain in possession and receive rents and profits, and authorized the entry of the trustee either without or by

the aid of a court of equity, the right to operate the road and receive its rents and profits, subject to such terms as the court of equity might impose, inured to the mortgagees at the date of the entry by the receiver.

We have seen that the mortgage does expressly provide that the mortgagor should receive the income until default had been made for three months in the payment of interest on the bonds, and that thereupon the trustee had the right to take possession and operate the mortgaged property until the sale to be thereafter fixed, or, at its discretion, to apply to a court of equity, as it elected to do, for the appointment of a receiver to take charge of the property, and operate the same until a sale should be made. We have seen, further, that in the issuance of its income bonds, and the mortgage given to secure the same, it provided that payment thereon should be made out of the net income of the road, after the interest on the bonds issued under the prior mortgage was duly paid. It seems clear to us that the circuit court did not err in holding that the lien of the mortgage was superior to the lien of the judgments, both as to the proceeds of the corpus of the property and as to the net income from the operation thereof while it was in the hands of the receiver. The decree of the circuit court is therefore affirmed.

YOUNG v. RAPIER.

(Circuit Court of Appeals, Fifth Circuit. May 9, 1899.)

No. 802.

1. COMMUNITY PROPERTY—RECOVERY FROM ESTATE OF FORMER HUSBAND.

There can be no recovery of specific property, as part of the community, in an action by a divorced wife against the estate of her former husband, where it does not appear that the property is in the possession of, or in any wise claimed by, defendant.

2. SAME—INCREASE OF SEPARATE PROPERTY BY USE OF COMMUNITY FUNDS.

To entitle a divorced wife to a share in the increased value of her husband's separate property caused by the expenditure of community funds, the amount of such expenditure must be shown.

3. SAME—FAILURE OF DIVORCED WIFE TO ACCEPT COMMUNITY.

Where the only evidence that a divorced wife had accepted the community was that of a futile suit to have the divorce annulled, and a suit to have her decreed the owner of an undivided one-half interest in property claimed to have been acquired during the community, commenced more than 20 years after the divorce, she will be presumed to have renounced the community, under Rev. Civ. Code La. art. 2420, providing that a divorced wife who has not accepted the community within the delays fixed is supposed to have renounced the same, unless she has within the term obtained a prolongation.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Mrs. Jennie Bronson (now the wife of Henry J. Young) was married to Alva M. Holbrook, in the city of New York, on the 25th day of June, 1864. Holbrook was domiciled in the city of New Orleans. On the 20th day of December, 1871, upon a petition filed in November of that year, a decree of divorce was pronounced in the Eighth district court for the parish of Orleans,

dissolving the bond of matrimony theretofore existing between these persons. Holbrook married, subsequently, on the 18th day of May, 1872, Mrs. Eliza J. Poitevent. Holbrook died January 1, 1876, without issue; having by last will instituted his wife, Eliza J. Poitevent, as his sole heir, and appointed her testamentary executrix. The will was duly proved, and on January 22, 1876, Mrs. Poitevent was qualified as testamentary executrix, and directed to take an inventory; and on the 26th day of January, 1892, she was placed in full possession of all property and effects of said Holbrook, deceased. On the 28th day of June, 1878, Mrs. Poitevent, the widow of Holbrook, married George Nicholson. Of this marriage, two children were born. George Nicholson died. His heirs were sent into possession of his estate. Then Mrs. Nicholson died, and her heirs, Leonard and Yorke Nicholson, minors, were sent into the possession of her estate, through Thomas G. Rapier, their tutor, the defendant here. This suit is brought by Jennie Bronson (now Mrs. Young), claiming that there was certain real estate acquired during the community which existed between her and her husband A. M. Holbrook, and describing the same, and praying to be decreed the owner of an undivided one-half interest therein. She also claims a one-third interest in the Picayune newspaper plant, or \$50,000, the value thereof, as gains during the existence of the community. The answer to the suit pleads the general denial, the dissolution of the community, that the property described in the petition was not community property of A. M. Holbrook and Jennie Bronson, and that Jennie Bronson, after the dissolution of the community of acquets and gains, had renounced any right therein that she may have acquired during the marriage. The defendant pleads that all the matters and things set up by the plaintiff have been passed upon in the state courts (setting out the suits by number and title), and that these suits had been finally decided against the plaintiff. Defendant then pleads the prescription of one, two, five, and ten years, and the staleness of the plaintiff's demand. The cause came on to be heard before Judge Boardman and a jury, and at the trial, after the plaintiff's evidence was all presented, upon motion of defendant's counsel the judge directed a verdict for the defendant, and upon that verdict is entered a judgment rejecting plaintiff's demand; and the plaintiff has sued out this writ. The first offer by the plaintiff was the judgment of the Eighth district court for the parish of Orleans, showing the judgment of divorce, which was dated December 20, 1871. The second offer is a certificate of marriage of the plaintiff with her present husband, Henry J. Young, dated September 20, 1884. The third offer was the proceedings in the supreme court of Louisiana in the suit of Jennie Bronson, praying for a decree annulling the judgment of divorce, which resulted in a judgment against her. In this connection is offered the printed report of the opinion and decree of the supreme court upon the petition of plaintiff, as found in 25 La. Ann. 51; also, opinion and decree in 32 La. Ann. 13. The next offers (4 to 7, inclusive) are copies of acts of sales of several properties to Alva M. Holbrook. They refer to property that was acquired by Holbrook many years prior to his marriage with Jennie Bronson. The properties described in the offers 8 and 9 relate to property acquired by Holbrook during his marriage with Jennie Bronson. The offer 10 (the record of the succession of Alva M. Holbrook) shows the last will and testament of Holbrook, the judgment of the court recognizing his widow as his universal legatee, and the judgment of the court sending her into the possession of the estate. The offer 11 is the record of the proceedings in the matter of the Succession of Eliza J. Nicholson. The inventory in this estate shows the property possessed by Mrs. Nicholson at her death, and succinctly states the history of the title of such real estate as is therein described. In this inventory are mentioned two pieces of property which were acquired by Mrs. Nicholson of her husband A. M. Holbrook, but at the same time it shows that Holbrook acquired these properties long anterior to the marriage with Jennie Bronson. The plaintiff testified in her own behalf, among other things, as follows: "As to the amount of property possessed by A. M. Holbrook at the time of our marriage and domicile in New Orleans, and its value, I have no means of knowing, nor of what it consisted, except that we had real estate and personal property. On the 28th of November, 1871, as far as it is possible for me to state, the property, real and personal, had largely increased,

as during the existence of our marriage he had acquired the interest of the various partners associated with him. This particularly applies to the real estate in the First district of the city of New Orleans, No. 66 Camp street, with improvements, and No. 19 Bank alley, also including buildings, also a two-thirds interest in the plant, good will, and business of a paper known as the New Orleans Picayune, published daily in the city of New Orleans, state of Louisiana, the value of which I am unable to state. I am unable to state the value of this property on March 10, 1873, but am certain it had not depreciated in value." The plaintiff having rested, the following bill of exceptions was taken: "Be it remembered that on this, the 11th day of January, 1899, this cause having been duly called for trial, counsel for both parties being present and expressing their readiness for trial, a jury was duly called, impaneled, and sworn to try the issues as presented by the pleadings; that thereupon the plaintiff offered in evidence, to support the allegations of her petition, the written and printed documents as hereinafter set forth and numbered, and of the tenor and in the words and figures as therein appear, and as herein made part, and hereto annexed. And same having been so offered, introduced, filed, and noted in evidence to the jury, and constituting the entire evidence presented in the cause, counsel for defendant thereupon, in open court, arose, and verbally requested the court to direct a verdict to be rendered by the jury, then and there, in favor of the defendant, upon the ground that said evidence did not make out a case for plaintiff; and thereupon the court, upon and under said motion, instructed the jury, in accord with said motion of counsel for the defendant, to render a verdict in the cause in favor of the defendant, which was then and there obeyed by the said jury, through its foreman, and the verdict was so written, rendered, signed, and recorded, and final judgment entered thereon, as appears by the record herein. To which said motion of counsel for the defendant, and to said order then and there given thereon, counsel for plaintiff, in presence of the jury, and before verdict, excepted, contending that, under all the evidence so presented, the plaintiff was entitled to a verdict as prayed for, and tendered this, his bill of exceptions, for the signature of the court, praying that it might be made part of the record herein, which is accordingly signed by the court." From the judgment rendered, plaintiff below sues out this writ, assigning errors as follows: "First. In the instructions of the court to the jury on motion of defendant, after all evidence for plaintiff had been offered, and its directing the jury, without any special reason being assigned, to find for the defendant; same being in words following, viz.: 'Gentlemen of the Jury: During your absence [considering the motion to direct a verdict] the court has concluded that the plaintiff has not made out a case sufficiently to authorize a verdict in her favor, even though what she alleges be true, and I am going to direct you to return a verdict for the defendant.' Second. In directing an entry of judgment dismissing plaintiff's cause, based upon the verdict rendered under instructions as aforesaid. Third. In that, the evidence being sufficient to warrant a verdict for plaintiff under the issues presented, the court erred in not submitting same to the jury, and directing a verdict for plaintiff, as prayed for. Fourth. In this: That all the evidence produced and adduced on the trial being presented by record and copies, pursuant to the ruling of this court, plaintiff was entitled to a judgment as prayed for. Fifth. In this: That the answer of defendant admits (a) the marriage from which the cause of action arose; (b) its dissolution by judgment of court. Sixth. In this: That the evidence produced and offered shows (a) the property acquired by the husband and wife during the existence of the community; (b) the acceptance by the wife of said community on its dissolution; (c) the transmission of the entire property of said community to the defendant, with full notice; (d) the refusal of the husband, as well as of his successors, to account for or pay over to her the moiety of said community due her."

W. S. Benedict, for plaintiff in error.

John Clegg and Lamar C. Quintero, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

Having stated the case, the opinion of the court was delivered by PARDEE, Circuit Judge.

The only bill of exceptions found in the transcript is irregular and insufficient. It recites that "the plaintiff offered in evidence, to support the allegations of her petition, written and printed documents as hereinafter set forth and numbered, and of the tenor and in the words and figures as therein appear, and as herein made part, and hereto annexed," while there are no documents thereafter set forth and numbered, and thereafter appearing, or as thereafter made part, or thereto annexed. In the transcript, preceding the bill of exceptions, is inserted, although making no part of the record proper, an alleged note of evidence, identified by no one; and, following the same, appear alleged copies of certain records and documents, no one of them identified in any respect. If a motion had been made to affirm the judgment of the circuit court because there was no sufficient bill of exceptions showing the ruling of the court complained of, we would have been inclined to take that course in disposing of the case.

A careful reading of the petition leads to the opinion that the suit is one to recover an undivided half interest in certain real estate described in the petition, and one third undivided interest in the Picayune plant; the same being claimed as belonging to the plaintiff, as the widow in the community of the late A. M. Holbrook. The theory of the case advanced by the learned counsel for the plaintiff in error is that the suit is one to recover an estate, to wit, the one undivided half of the community existing between the plaintiff and the late Alva M. Holbrook during their marriage. It is on this theory that the pleas of prescription interposed are sought to be avoided. It is very doubtful whether the suit, in any aspect, is on the right side of the docket. It seems to be a suit for the ascertainment of a community interest, where the plaintiff can only recover after a settlement and accounting. Taking the case, however, as presented, we are of opinion that the ruling of the trial judge directing the verdict in favor of the defendant was proper, because of insufficient evidence to warrant a verdict in favor of the plaintiff for any specific property or any specific sum. Neither of the two pieces of real estate which appear to have been acquired by A. M. Holbrook during his marriage with Jennie Bronson is shown to be now in the possession of, or to be in any wise claimed by, the defendant. There is no evidence in the record showing or tending to show that Eliza J. Poitevent, widow and testamentary executrix and universal legatee of Alva M. Holbrook, ever came into the possession of either piece of said real estate. The plaintiff was certainly not entitled to recover from the present defendant an undivided half interest, or any interest, in either one of these pieces of property. The evidence in the record shows that the Picayune plant was acquired by A. M. Holbrook prior to his marriage with Jennie Bronson. This being the case, for the community interest existing between A. M. Holbrook and Jennie Bronson the latter could only claim the increased value of the same growing out of the expenditures of community assets, and on this subject the record is silent. The plaintiff herself testifies:

"As to the amount of property possessed by A. M. Holbrook at the time of our marriage, and its value, I have no means of knowing, nor of what it consisted, except that we had real estate and personal property."

Of course, all the real and personal property owned by A. M. Holbrook at the time of his marriage with Jennie Bronson formed no part of the community.

Aside from the failure to prove any interest sufficient to warrant a verdict, a conclusive reason why the plaintiff in error could not recover is the fact that, within the delay given by the law after the dissolution of the marriage, she did not accept the community, nor obtain a prolongation of the time for deliberation from the judge, and she is therefore conclusively presumed to have renounced the community.

Article 2411 of the Revised Civil Code of Louisiana provides as follows:

"The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal or extradotal."

Article 2420 of the same Code also provides as follows:

"The wife, separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same; unless, being still within the term, she has obtained a prolongation from the judge, after the husband was heard, or after he was duly summoned."

These articles of the Code have been construed by the supreme court of the state in precisely similar cases. In *Herman v. Theurer*, 11 La. Ann. 70, it was held:

"Where the community is dissolved by the death of the husband, the surviving wife is presumed to have the intention to accept the community, and her right to renounce is subject to the same rules as govern the beneficiary heir. But, a different rule prevails where a divorce has been pronounced. Unless the wife accepts the community within the delay allowed by law, or obtains from the judge a prolongation of that delay, she is supposed to have renounced the community. Civ. Code, art. 2389."

In *Succession of Ewing v. Altmeyer*, 15 La. Ann. 416, it was held:

"Where a marriage has been dissolved by a judgment of divorce, if either party brings suit to recover his or her share of the community property, it must be shown that he or she accepted the community within the legal delays after its dissolution by the sentence of divorce; otherwise, the pretensions are without foundation in law."

In *Weller v. Von Hoven*, 42 La. Ann. 602, 603, 7 South. 702, the question was further considered, and the court say:

"The exception is founded on article 2420, Rev. Civ. Code: 'The wife, separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same; unless, being still within the term, she has obtained a prolongation from the judge after the husband was heard, or after he was duly summoned.' It is shown, and is undisputed, that plaintiff did not accept within the term prescribed, and obtained no prolongation thereof from the judge. The above article is taken from article 1463 of the French Code, and its meaning and effect are conclusively settled by both our own and the French jurisprudence. It is universally held to mean that the failure of the wife separated from bed and board to accept the community,

either expressly or tacitly, within the prescribed delay, operates a conclusive renunciation thereof, which is irrevocable, and which bars any subsequent acceptance or assertion of community rights."

In the instant case the record shows conclusively that the marriage between Alva M. Holbrook and Jennie Bronson was dissolved on the 15th day of December, 1871. There is no evidence to show, nor tending to show, that Jennie Bronson, the divorced wife, accepted the community at any time thereafter until the institution of this suit. The suit instituted in the state court (32 La. Ann. 13), and proved, was to obtain the nullity of the judgment decreeing a divorce and for alimony. That case seems to have been disposed of by the supreme court of the state of Louisiana in January, 1880, and adversely to the plaintiff in error, since which time, until the institution of this suit, no action appears to have been taken, accepting or renouncing the community. The judgment of the circuit court is affirmed.

KOHN et al. v. DRAVIS.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1899.)

No. 1,130.

1. CHATTEL MORTGAGE—EXECUTION OF POWER OF SALE.

A mortgagee who avails himself of the power of sale contained in the mortgage must strictly pursue its terms, and, when sufficient of the property has been thus sold to satisfy the debt secured and costs, there is an implied agreement that the remainder unsold shall be returned to the mortgagor.

2. SAME—COSTS OF SALE BY MORTGAGEE—ACTION FOR CONVERSION.

In an action for conversion, by a mortgagor of a stock of goods against the mortgagee, where it appeared that defendant sold a part of the stock in the manner authorized by the mortgage, he is entitled to allowance for the costs of such sale, notwithstanding an unauthorized sale of the remainder.

3. SAME—CONVERSION OR UNAUTHORIZED SALE BY MORTGAGEE—MEASURE OF DAMAGES.

The measure of a mortgagor's damages for conversion of the mortgaged property by the mortgagee, or its sale in violation of the terms of the mortgage, is the market value, at the time of such conversion or sale, of the portion that would have remained, after sufficient had been sold in the manner provided by the mortgage, to satisfy the mortgage debt and costs.

4. SAME.

Where a mortgage on a stock of goods authorized the mortgagee to sell at retail, at not less than cost price, until a sufficient amount was realized to pay the mortgage debt and costs of sale, but the mortgagee, after selling a portion of the goods at retail as provided, sold the remainder at auction, the mortgagor may, at his election, adopt as the basis for the assessment of his damages the market value of the goods which would have remained after satisfaction of the mortgage debt, had the mortgagee proceeded with the sale at retail, or the market value of all the goods not sold at retail, less the amount remaining due on the mortgage debt after the application thereon of the net proceeds of the portion so sold.

5. PARTIES—RIGHT TO BRING IN NEW PARTIES—IOWA STATUTE.

Under Code Iowa 1897, § 3466, which provides that, when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to

be brought in, a mortgagee of personal property, sued by the mortgagor for its conversion, has the right to have subsequent mortgagees brought in.

6. CONVERSION—ACTION BY MORTGAGOR—EFFECT OF SUBSEQUENT MORTGAGES.

The fact that a mortgagor of personal property has given subsequent mortgages on the same property, which are unsatisfied, is a defense pro tanto to an action brought by him against the first mortgagee for conversion of the mortgaged property.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

On January 4, 1893, Theodore H. Dravis, the defendant in error, was a merchant in business at Sibley, in the state of Iowa. He had a stock of merchandise, whose cost price was \$8,000. He mortgaged these goods to Kohn Bros., the plaintiffs in error, to secure the payment of \$3,816 which he owed them. The mortgage contained a stipulation that "the mortgagee has permission to take immediate possession of such merchandise, and sell the same at retail only, but not at a price less than cost, and sufficient of such goods as will pay the debt hereby secured, with costs." The mortgagees took possession of the goods, and sold such a part of them as cost \$3,500. They then sold the remainder at auction, and Dravis brought this action. In his petition he set forth the foregoing facts, and alleged that Kohn Bros., by accepting the mortgage, became the trustees of an express trust, that by selling at auction they had violated this trust, and prayed for a judgment for \$8,234.90, the damages which he claimed he had sustained by their auction sale. Kohn Bros. answered that the defendant in error owed them \$3,816 on January 4, 1893, that he gave them the mortgage to secure them the payment of this debt, and that they took possession of the stock of merchandise under it; but they denied all the other allegations of the petition. On the day before the case came on for trial in the court below, they filed an amendment to their answer, in which they averred that on January 4, 5, and 7, 1893, Dravis gave five subsequent mortgages, to five mortgagees, whom they named, on this same stock of merchandise, to secure the payment of debts which amounted to \$5,122.88, that the aggregate amount of these several mortgages was greater than the value of the goods, that the subsequent mortgages were unpaid, that the mortgagees were entitled to enforce any claim which existed against the plaintiffs in error on account of their sale of the mortgaged property in their order of priority, and that the mortgagor had no interest in the property or its conversion. They prayed that the subsequent mortgagees might be made parties to the action, and might be required to state their respective claims under their mortgages. On the first day of the trial of the case, they made a motion in accordance with this prayer; but the court denied it, and struck from the files the amendment to their answer. On the trial the court refused to permit them to prove the market value of the goods, and instructed the jury to return a verdict against them for the cost price of the stock of merchandise, less the \$3,816 and interest which was due to them on the original debt of Dravis and the costs of the sale. This instruction resulted in a judgment against the plaintiffs in error for \$4,666.44, which this writ of error challenges.

Deloss C. Schull (William H. Farnsworth, James M. Flower, Frank J. Smith, and Harrison Musgrave, on brief), for plaintiffs in error.

George W. Argo and D. J. Murphy, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts, delivered the opinion of the court.

The mortgage authorized the plaintiffs in error to sell the merchandise at retail only, and at not less than cost, until they realized the amount due them and the cost of this sale. This limitation of the amount and the method of the sale raised the implied agreement

that, when the limit of the sale had been reached, the unsold remainder of the goods should be returned to the mortgagor. Those who avail themselves of the power of sale in a mortgage must strictly pursue its terms. By accepting the mortgage, and the benefit of the power it contained, these mortgagees agreed that they would sell the stock of goods in accordance with its terms until they realized their claim, and that they would return the unsold remnant to the mortgagor. They violated this contract. After they had sold at retail such a part of these goods as cost \$3,500, they sold the remainder at auction. What is the proper measure of the mortgagor's damages for this breach of the agreement? The court below held that it was the cost price of the entire stock mortgaged, less the amount due on the debt of the mortgagor and the costs of the sale, and this ruling is assigned as error.

If the plaintiffs in error had bought these goods at the cost price, or if they had agreed to pay the cost price for them, that price would have been the measure of the mortgagor's damages for the violation of that contract. *Wicker v. Hoppock*, 6 Wall. 94, 99, 100. But they made no such agreement. The extent of their contract was that they would sell from their stock at retail and at cost until they obtained proceeds enough to pay the costs of such a sale and the debt of the mortgagor to them, and that they would return the remainder of the goods to him. What, then, would the mortgagor have received if they had fulfilled their agreement? Evidently, the unsold remnant of the stock, after a sufficient amount had been sold from it to pay his debt and the costs of the sale,—nothing more, and nothing less. What, then, was the real and entire effect of the breach of the agreement upon the rights of the mortgagor? It was that the mortgagees sold at auction, and thus converted to their own use, the unsold remnant of the mortgaged stock which they had agreed to return to him. They had the right to apply all the stock, except this remainder, to the payment of the debt and costs, by the terms of the mortgage; and, if the mortgagor received the benefit of this entire remnant, he could not suffer any loss by the method which the mortgagees adopted in disposing of their part of the property. If *Kohn Bros.* had agreed to buy this remnant at its cost price; if they had agreed to pay its cost price, at any time or in any way; if they had even contracted to sell it at its cost price,—they might have been liable to the mortgagor for that amount. But the limit of their undertaking here was that they would return this remainder of the goods to the mortgagor, and this was the only stipulation of the contract which was violated to his prejudice. They failed to return this remnant, and they converted it to their own use; but the measure of their liability could not exceed its market value at the time of its conversion, because the mortgagor could not have obtained more than that amount for it if it had been returned to him. The difference between that which the injured party would have received if the contract had been performed, and that which he did receive, is the true standard for the measure of damages for a breach of a contract, because that measure gives the sufferer that full and exact compensation for his injury which it is the aim of the law to bestow.

Kingman & Co. v. Western Mfg. Co., 34 C. C. A. 489, 92 Fed. 486. The mortgagor in the case at bar would have received the remnant of his stock of goods, after a sufficient amount had been sold from it at retail and at cost to pay his debt and the costs of the sale, if the contract had been performed. By the breach of the agreement he lost nothing but this remnant, and the mortgagees converted this to their own use by their sale of it at public auction. The measure of damages for the conversion of personal property or for the sale of mortgaged personal property in violation of the terms of the mortgage is the market value of the property at the time of the conversion or sale. *Gravel v. Clough*, 81 Iowa, 272, 276, 46 N. W. 1092; *Coad v. Cattle Co.*, 32 Neb. 761, 49 N. W. 757; *Wygall v. Bigelow*, 42 Kan. 477, 22 Pac. 612; *Cushing v. Seymour*, 30 Minn. 301, 306, 15 N. W. 249; *Coe v. Cassidy*, 72 N. Y. 133, 138; *Denny v. Faulkner*, 22 Kan. 75, 83; *Thew v. Miller*, 73 Iowa, 743, 747, 37 N. W. 771. The result is that the court below fell into an error in measuring the mortgagor's damages by the cost price of the stock, less his debt to the mortgagees, and in refusing to permit the latter to prove the market value of the remnant of the stock which they agreed to return; and the case must be tried again.

In view of the second trial, we remark that we have considered the question of damages in the belief that an estimate of them on the basis of the market value of the remnant which would have remained if the mortgagees had proceeded with the sale at retail until they had realized their claim and costs will yield a larger amount to the mortgagor than the amount of the proceeds of the actual sale at retail, and the market value of the goods which they did not actually sell in this way, less the costs of the sale at retail and the amount of the mortgagor's debt and interest. Since the mortgagees did not complete the sale at retail, we have no doubt that the mortgagor may choose either of these bases for the assessment of his damages which he thinks will be the more advantageous to him. *Botsford v. Murphy*, 47 Mich. 536, 537, 11 N. W. 375, 376.

This case presents another question. The plaintiffs in error filed an amendment to their answer the day before the trial, in which they pleaded that within a few days after their mortgage was made, and long before the auction sale of the property, the mortgagor made five mortgages upon this stock of goods to secure debts which amounted to more than \$5,000, that these debts were unpaid, and that the property was not worth as much as the aggregate amount of the mortgages upon it. On the next day they moved the court to make the subsequent mortgagees parties to the action, but the court denied the motion and struck out the amendment. It is unnecessary to consider here whether or not this amendment and motion were made in time, because there will be ample opportunity before the next trial of the case to present them upon their merits. There is no doubt that one of the subsequent mortgagees, whose debt is unpaid, can maintain an action against the plaintiffs in error for the conversion of the property and the destruction of his lien, and can recover any damages which he has

sustained thereby. If the mortgagor may also obtain a judgment against these mortgagees for the entire difference between the value of the mortgaged property and his debt to the plaintiffs in error, they are in danger of a double liability for the same wrong. Section 3466 of the Code of Iowa of 1897 provides:

"The court may determine any controversy before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy between the parties before the court cannot be made without the presence of the other parties, it must order them to be brought in."

The defendant in error bases his right to recover in this case on the ground that Kohn Bros. were the trustees of an express trust, and he was the beneficiary. He alleges in his petition that—

"By accepting said mortgage, and taking possession of the goods and property described therein, the said defendants became, were, and are trustees of an express trust, and that the plaintiff is the beneficiary; * * * that the defendants have violated their trust, and, by selling said goods for less than the cost price thereof, the plaintiff has been greatly damaged, in the sum of \$8,234.90."

An answer that, under assignments or mortgages, third parties claim and appear to be the only beneficiaries of this trust, clearly shows the existence of a controversy that cannot be determined between the parties to this action. No adjudication of the question thus presented between Kohn Bros. and Dravis would protect the former against the claims of the subsequent mortgagees for the same damages which Dravis is seeking to recover. In *Kennedy v. Moore*, 91 Iowa, 39, 43, 58 N. W. 1066, the assignee of a note and mortgage brought a suit to collect the note and to foreclose the mortgage. The defendant answered that the mortgagee claimed to own them, and moved, under the statute we have cited, that he be made a party. The supreme court of Iowa held that, since the mortgagee claimed an interest in the note and mortgage, the motion should have been granted. In *Evans v. Harvester Works*, 63 Iowa, 204, 18 N. W. 881, a sheriff seized exempt mortgaged personal property on an attachment against the mortgagor, and the attaching creditor gave a bond of indemnity. The mortgagor brought an action on the bond, and the creditor pleaded the mortgage as a defense. The court held that the mortgage did not deprive the mortgagor of his cause of action and said:

"The difficulty in the case at bar, if there is any, arises from the fact that the mortgagee, if deprived of his security by the defendants, has a right of action. The defendants should not, of course, be subjected to a double liability. If the mortgagee has been deprived of his security, he should properly be joined with the mortgagor as co-plaintiff. It is the mortgagee's right to demand that he be brought in."

And the court cited the section of the statutes which we have quoted.

While the subsequent mortgagees cannot be said to be indispensable parties to this action, we are of the opinion that under this statute the plaintiffs in error are entitled to have them brought in, unless their joinder will oust the jurisdiction of the court as to the parties before it, or unless they are incapable of being made

parties, by reason of their absence from the jurisdiction of the court, or otherwise. *Donovan v. Campion*, 29 C. C. A. 30, 31, 85 Fed. 71, 72, 56 U. S. App. 388, 390. In reaching this conclusion, we have not overlooked the contention of the defendant in error that the causes of action which the subsequent mortgagees once had against Kohn Bros. have been barred by the statute of limitations, but we cannot undertake to consider or determine that question in the absence of pleading and proof upon the subject. Of course, if those claims are barred, the subsequent mortgagees have no interest in the controversy, and they should not be made parties to this action, but the question whether or not their claims have fallen within the statute of limitations must be left for the court below to determine.

Finally, we are at a loss to find any sound reason why the existence of subsequent liens upon converted mortgaged property is not a good defense pro tanto to the claim of the mortgagor. He is entitled to recover no more than he has lost. If he had no beneficial interest in the property at the time of its conversion, he has really lost nothing thereby, and he ought not to recover anything. If he had assigned to another his interest in the mortgaged property before it was converted, that fact would have been a complete defense to his action. If he had assigned one-half or one-third of his interest in it, that fact would have reduced the amount of his recovery one-half or one-third; and if he has placed liens upon it by means of mortgages which gave their holders the right to take and sell the property, and to apply its proceeds to the payment of their claims, it is not perceived why that fact should not have a similar effect. One who has mortgaged his property for its value may have the right to redeem it, or a naked legal title to it, but he has no substantial valuable interest in it. If it is converted or destroyed, the direct loss falls, not upon him, but upon the mortgagees, and they have their action against the wrongdoer for their damages. If the mortgagor loses at all, it is only indirectly, when he is compelled to pay the mortgage debts, and is deprived of the mortgaged property which he might have used for that purpose. If, however, he never pays the debts, he loses nothing, and consequently he should recover nothing. In an action by a mortgagor against a mortgagee for the conversion of the mortgaged property, or for a sale of it in violation of the terms of the mortgage, he can recover only the value of his interest or equity in it; and that is the market value of the property, less the aggregate sum of the liens upon it at the time of the conversion. *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. 550; *Roberts v. Kain*, 6 Rob. (N. Y.) 354, 358; *Cobbey*, Chat. Mortg. § 1036. The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

ATCHISON, T. & S. F. RY. CO. v. HARDY.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

No. 1,125.

RAILROADS—INJURY OF BOY ON TRACK—AGE AS AFFECTING CONTRIBUTORY NEGLIGENCE.

Where the attention of a boy of 14, who was crossing diagonally over the tracks of a railroad near a station, was attracted by a live engine standing on a side track near where he crossed, which was ringing its bell and blowing off steam, in consequence of which he failed to see a train approaching from an opposite direction, which struck and injured him, his age was an important consideration in determining whether he was guilty of contributory negligence; and how far his youth should operate as an excuse for his action was a proper question for the jury.

In Error to the Circuit Court of the United States for the District of Colorado.

Henry A. Dubbs (Charles E. Gast, on the brief), for plaintiff in error.

E. C. Glenn (W. B. Gobin, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. Alva Hardy, the defendant in error, suffered the loss of his right foot and a part of his right leg by being run over in the town of Rocky Ford, in the state of Colorado, by a train of the Atchison, Topeka & Santa Fé Railway Company, the plaintiff in error, on the morning of July 16, 1897. On this account he brought the present suit by Richard T. Hardy and Annie E. Hardy, his parents, acting as his next friends, and recovered a judgment against the railway company for \$1,000. The accident occurred near the place where the main street of the town of Rocky Ford crosses the defendant company's railroad track, which is a point about 50 feet from the company's station or depot; and the plaintiff charged that the train which ran over him was moving at an unlawful rate of speed,—some 35 miles per hour,—in violation of a city ordinance, and that it was not a regular train, but a special. The case hinges on the plea of contributory negligence; the contention on the part of the railway company being that the boy was on its track outside of the limits of Main street, where he had no right to be, that he went on its track without looking to see if a train was approaching, and that he was hurt by his own carelessness. On this ground it is insisted that the trial judge should have directed a verdict in its favor, and not submitted the case to the arbitrament of a jury. The trial court instructed the jury, in substance, that the sole question for them to consider respecting the charge of negligence against the railway company was whether the train was moving at a dangerous or negligent rate of speed, considering the locality, and that in no other respect did the evidence tend to show that the company had been negligent or guilty of a violation of any duty. On the other hand, it charged with respect to the boy's conduct that, if he had been a person of mature years, he would,

as a matter of law, be chargeable with contributory negligence—First, because the evidence showed that he went on the defendant's track without looking to see if a train was coming; and, second, because he was apparently on the railroad track at a place outside of the traveled street, where he had no right to be. The learned judge of the trial court was of the opinion, however, that he had no right to withdraw the case from the consideration of the jury on the ground last indicated, because the plaintiff was not of full age, and that the jury had a right to say whether, in view of his minority, his conduct was excusable, and whether he should recover. We quote an excerpt from the charge which explains fully the views of the trial judge:

"So it is clear upon the testimony that, from the time he left the store and came to the track, he could have seen the train, if he had looked for it. He did not look for it. If he were a man, the law would charge upon him the duty of looking. No man can go upon a railroad track, when he can see an approaching train, and afterwards claim that he is not in fault, there being a train approaching which he might have seen by looking. But he is a boy; that is to say, he is somewhat of a boy,—it is said, fourteen years old a few months before the accident. Counsel for the defendant demand that I shall say to you that, because he was fourteen years old,—just past that age,—therefore he must be charged with the responsibility of a man. I doubt whether that can be so; that is to say, I do not doubt it can be so if you say so. If, after looking at him and observing him, you say he has the intelligence and prudence of a man, then he cannot recover in this action, because he went upon the track without looking. More than that, he got off the street, and got to a place which was east of the street, a place in which he had no right to be. Probably, also, he was walking with his back to the approaching train, in an easterly direction, and between the rails. Upon this ground, also, if he were a man, he could not recover. The law would forbid that he should recover, because he put himself blindly in a position of danger. But he is something of a boy, and he was attracted by the other train. Like a boy, he was looking at that train. If he were a man, he could not look at it; he was bound to look out for himself. Being a boy, and the kind of a boy he is, will you say that he ought to have looked out for himself? That is the question, gentlemen,—whether, on account of his boyhood, his being under age, you relieve him from this responsibility. If he were a little older, a little more mature, we should probably still say that he could not recover in this action, because he did not exhibit care for his personal safety. Now, gentlemen, I cannot explain the matter to you more than that. The young man was negligent,—there is no doubt of that; and whether he shall be excused for his negligence, and be allowed to recover from this company because of that, is a question for your consideration, as to his being under age and of immature mind."

If there is error in the record of which the railway company is entitled to complain, it inheres in the portion of the charge last quoted. There is no other error of which it may complain, as all other questions in the case were decided in its favor. To understand the allusions to the testimony contained in the above excerpt from the charge, it should be stated that there was testimony before the jury which tended to show that shortly before the accident the boy had been sent by his father, on an errand, to a store on the south side of the railroad track, with directions to rejoin him at a point some distance north of the track, and to the east of Main street, which street, as it seems, ran north and south; that on his return from this errand he walked north on Main street until near the railroad crossing; and that he then walked oblique-

ly across the street from the west to the east side thereof, intending to go diagonally across a block on the north side of the track, and east of Main street, and join his father by the shortest route. A local train was standing on the side track at the crossing, headed west, the engine being about on the east line of Main street. It was ringing its bell and blowing off steam, and the boy was required to pass just in front of this engine, or around it; and as he did so, and came on the main track, he was struck by the train which occasioned the injury. This latter train came from the west, and the evidence tended to show that it was moving at a high rate of speed. The boy testified that he was looking at the engine on the side track, and that he had also looked west up the main track before reaching the crossing, and had not seen any train coming from the west. The portion of the charge heretofore quoted is criticised on the ground that it did not afford the correct test by which to determine whether the boy's conduct was excusable because of his youth, the test mentioned in one paragraph being whether he had "the intelligence and prudence of a man." It is also said that the boy was guilty of such gross negligence that his youth and inexperience were no excuse for his conduct, and that the court should have so declared. Concerning the first of these criticisms, it only need be said that, immediately after directing the jury to consider whether the boy had "the intelligence and prudence of a man," the court remarked that, if he were "a little older and a little more mature," it would probably say that he could not recover; thereby clearly indicating to the jury that the test which they were to apply was not solely whether he had the intelligence and prudence of a full-grown man, but whether he acted as boys of his age and experience would ordinarily act under similar circumstances. This was the correct rule, and it was the rule which the court obviously intended to state, and did state, in effect, because such is the thought that is conveyed to our minds by a casual reading of the charge. We must assume that the jury understood it as we are forced to understand it, and for that reason it cannot be adjudged to have been misleading.

The other objection to the charge, in our opinion, is not tenable. Here was a boy 14 years of age going upon a railroad track in front of a live engine standing on a side track, which would naturally attract the close attention of boys of that age, and for the time being divert their thoughts from all other subjects. The average boy of 14, under such conditions, would be more interested in the engine than a man, and for that reason would not exercise the same care as an adult to ascertain if a train was approaching on the adjoining track, and it ought not to be required of him that he should do so. Care commensurate with his age, experience, and environment is all that the law should exact. In the case of *Manufacturing Co. v. Erickson*, 12 U. S. App. 260, 5 C. C. A. 341, and 55 Fed. 943, this court held that a boy 15 years old, who for some time had worked at a table placing boards against a wheel provided with knives, which wheel was in rapid revolution, was as capable as an adult of appreciating the result which would

ensue from allowing his hand to come in contact with the knives, that it was not necessary to give him notice of the danger, and that his minority was no excuse for his negligent conduct in placing his hand so near to the wheel that it was badly cut. The case at bar is different in its circumstances, and therefore distinguishable, in that in the present case an object very attractive to the boy and to persons of his age was standing on the side track, which rendered him momentarily unconscious of a train approaching at a high rate of speed on the other track, and from an opposite direction. We agree with the trial court that the boy's age was an important consideration in determining whether he was guilty of contributory negligence, and that how far his age should operate as an excuse for his conduct was properly a question to be determined by the jury. The judgment below is therefore affirmed.

HALEY LIVE-STOCK CO. v. BOARD OF COM'RS OF ROUTT COUNTY.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,148.

FEDERAL COURTS—EFFECT OF STATE DECISION CONSTRUING STATUTE.

Where the sole grounds relied upon by a plaintiff in a suit in a federal court to entitle him to a recovery, as disclosed by his pleading and the opening statement of his counsel, were the invalidity, under the statutes of the state, of certain tax proceedings, and the identical proceedings had been adjudged valid by the supreme court of the state, though not in a suit between the same parties, so as to render the matter *res judicata* as between them, its decision was nevertheless binding on the federal court as a construction of the local statutes, and the direction of a verdict for defendant by the court, on the conclusion of the plaintiff's opening statement, was not error.

In Error to the Circuit Court of the United States for the District of Colorado.

William T. Hughes, for plaintiff in error.

Henry T. Sale (D. E. Parks, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This suit was brought by the Haley Live-Stock Company, the plaintiff in error, against the board of county commissioners of Routt county, in the state of Colorado, the defendant in error, to recover the sum of \$12,725.50, which the plaintiff company claimed to have paid under protest to the treasurer of Routt county to obtain the release of some 700 head of cattle that had been seized to compel the payment of certain taxes which were assessed against Ora Haley for the year 1884. The suit was brought upon the theory that the assessment was absolutely void as to Haley, and afforded no warrant in law for the seizure of the cattle. In addition to the recovery of the sum of money above stated, which was actually paid to the county of Routt to satisfy its claim for taxes, the plaintiff, in two other counts, also sought to recover the sum of \$10,500 for injuries sus-

tained by the cattle while they were under seizure, and the sum of \$500 for expenses which the plaintiff had incurred in securing their return. At the conclusion of a somewhat lengthy opening statement, which was made by the plaintiff's attorney, and before any evidence had been introduced to sustain the allegations of the complaint, the trial judge ruled, in substance, that, upon the facts which had been stated by counsel, there could be no recovery. A verdict was accordingly rendered by the jury in favor of the defendant, pursuant to a peremptory instruction to that effect. The seizure complained of had given rise to considerable litigation in the courts of Colorado, both state and federal, prior to the institution of the present suit. One of the prior suits, in which the Haley Live-Stock Company had brought an action of trespass against the officer who seized the cattle, had eventually gone to the supreme court of the United States, and had been decided by that court adversely to the plaintiff. *Vide Wilson v. Haley Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 768. Certain cases growing out of the same seizure had also found their way to the supreme court of Colorado, and had been decided by that court. *Vide Breeze v. Haley*, 10 Colo. 5, 13 Pac. 913; *Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551; *Haley v. Elliott*, 20 Colo. 379, 38 Pac. 771; *Id.*, 16 Colo. 159, 26 Pac. 559. It was in view of these decisions, doubtless, that the learned judge of the trial court disposed of the case in the summary manner above indicated; being satisfied, no doubt, that, upon the state of facts disclosed by the opening statement, there could be no recovery.

In the case of *Wilson v. Haley Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 768, no final judgment appears to have been entered, nor were the parties to that suit the same as in the case at bar. It may be conceded, therefore, that the plaintiff company is not barred of its right to sue by any of the proceedings taken in that case, and that the action of the trial court cannot be sustained upon that theory. Nevertheless, if it appears from the averments contained in the plaintiff's declaration, aided, as it may be, by the statement of its attorney of the facts which it expected to prove, that no cause of action in fact existed, then no complaint can be made of the summary character of the trial. We accordingly proceed to inquire whether the declaration and oral statement of counsel did disclose a cause of action as against the board of county commissioners of Routt county, the present defendant.

It appears from the allegations of the complaint that the seizure of the cattle which is complained of was made by S. D. Wilson, acting as county treasurer of Routt county, Colo., in the month of July, 1888, and that the seizure was made under a tax warrant, as it is termed, and that this warrant was founded on an assessment roll for the year 1884 which was made by the county assessor. This warrant is alleged to have been void for the following reasons: First, because the assessment roll on which the warrant was founded was not made and returned to the county clerk until after the first Monday in July, 1884, whereas the law (*Gen. St. Colo. 1883, § 2856*) directed its return on or before June 25th of that year;

second, because no notice was published of the meeting of the board of equalization to equalize assessments, as required by law, which could apply to the assessment roll on which the tax warrant was founded, because such assessment roll was not returned in due time to the county clerk; third, because certain interlineations were made in said assessment roll in July, 1887, by the then county treasurer, which interlineations consisted in making the dollar mark (\$) before certain figures, and in writing at the head of certain columns of the assessment roll the words, "Dolls.," "Cents"; and, fourth, because the realty embraced in said assessment roll was imperfectly described, the description being as follows: "Six $\frac{1}{4}$ sections." It should be stated, in this connection, that Haley was assessed in the aggregate, for the year 1884, the sum of \$4,248.59, the total value of his property, as shown by the assessment roll, being about \$175,100, of which amount property of the value of \$3,780 appears to have been realty and the residue personalty. This tax, by the addition of penalties and costs, had grown to be \$12,725.50 in the year 1888, when a seizure of property to collect the tax was made. We are unable to ascertain from the allegations of the complaint, supplemented by the oral statement of the plaintiff's attorney, that the validity of the tax warrant is challenged for any other reasons than those last stated.

Each of the grounds thus relied upon to impeach the assessment, and the validity of the warrant under which the alleged wrongful seizure was made, have been considered by the supreme court of Colorado, and have been pronounced insufficient for that purpose. Thus, in *Breeze v. Haley*, 10 Colo. 5, 3 Pac. 913, a case wherein Haley, the tax debtor, sought to restrain the collection of the very taxes which are involved in the present case, because of alleged defects in the assessment roll, it was held that the failure of the assessor to complete and deliver the assessment roll to the county clerk by June 25, 1884, as directed by section 2856, Gen. St. 1883, did not render the tax invalid, and the court accordingly declined to enjoin its collection. In a later case (*Haley v. Elliott*, 20 Colo. 379, 38 Pac. 771), wherein Haley seems to have sued in replevin to recover certain property which was sold under the same tax warrant that is involved in this case, all of the above-mentioned defects in the assessment roll and warrant, which are relied upon as a basis for a recovery in the case at bar, were considered at length in two opinions, one of which was delivered on a motion for a rehearing, and the conclusion was announced that none of the alleged defects or irregularities complained of either invalidated the tax or rendered the tax warrant void. The court held, in substance, that the omission of the dollar mark on the assessment roll might be corrected at any time by the county treasurer; that the defective description of the realty was likewise subject to correction at any time; and that, even though uncorrected, it did not affect the validity of the warrant. It was further said, after a review of the various provisions of the revenue laws of the state, that they had been specially framed so as to prevent such objec-

tions to the assessment, as were then and now raised, from having the effect of rendering a tax invalid and preventing its prompt collection. While it is true that the defendant cannot avail itself of these decisions to support a plea of *res judicata*, nevertheless, as these are decisions construing a statute of the state, they are binding upon this court, in so far as they place a construction upon the local statute, and determine the validity of acts done thereunder. Moreover, if they were not thus binding upon the federal courts, we should have little difficulty, we apprehend, in reaching the same result which was reached by the supreme court of the state. Inasmuch, then, as it is settled, by the decisions aforesaid, that the money which the plaintiff seeks to recover was collected under a valid tax warrant, and was thereafter paid over to the county, no ground is disclosed by the record upon which it can be recovered. The Haley Live-Stock Company, to whom Haley attempted to transfer the cattle, according to admissions contained in the present record, did not become a body corporate until some time after the alleged trespass was committed, so that at the time when the cattle were seized they were in fact Haley's property, and subject to be taken for taxes which had been assessed against him. This conclusion was reached by the supreme court of the United States, upon substantially the same state of facts that is disclosed by the present record, in the case of *Wilson v. Haley Live-Stock Co.*, 153 U. S. 39, 45, 14 Sup. Ct. 768. It results from what has been said that no error was committed of which the plaintiff below is entitled to complain, and the judgment of the circuit court is therefore affirmed.

CASE v. HALL.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,134.

1. APPEAL—DEFECTIVE VERDICT — NECESSITY OF OBJECTION IN TRIAL COURT.

An objection to the sufficiency of a verdict cannot be urged in an appellate court, where the bill of exceptions does not show that the defect was called to the attention of the trial court, and proper exception taken to its action thereon.

2. SAME—REVIEW OF INSTRUCTIONS—FAILURE TO BRING INTO RECORD.

The charge of a trial court is no part of the record, and cannot be noticed on appeal, unless brought into the record by the bill of exceptions, and without such charge before the court the refusal to give instructions requested cannot be reviewed.

3. SAME—BILL OF EXCEPTIONS—ADDING MATTERS BY STIPULATION.

Neither testimony nor instructions can be added to a bill of exceptions, after it is signed and filed, by stipulation of counsel in the appellate court.

In Error to the United States Court of Appeals in the Indian Territory.

Ben Hall, the defendant in error, brought an action of unlawful detainer against George W. Case, the plaintiff in error, in the United States court in the Indian Territory, to recover the possession of three tracts of land, the same being portions of a larger tract containing some 600 acres. The complaint al-

leged, in substance, that on March 14, 1894, Hall rented to Case a certain farm and improvements thereon, five miles south of Nowata, in the Indian Territory, containing 600 acres, more or less, and known as the "Ben Hall Place," together with the dwelling houses, outhouses, barns, etc., thereon, for the term of five years; that Case entered into possession of the premises, and complied with the terms of the contract of lease, and paid his rent as therein agreed for the years 1894 and 1895 and until the 1st day of March, 1896; that on the latter day he refused to pay any more rent, and laid claim as owner to three parcels of the 600-acre tract, one of said parcels containing 135 acres of land situated in the northwest corner of the tract, together with the dwelling house, outhouses, etc., another parcel consisting of 45 acres of land situated in the south part of the 600-acre tract, and the third parcel consisting of a two-room log house, with the grounds appurtenant thereto, which was situated on the north side of the tract. In view of the premises, the plaintiff below demanded a judgment for the immediate possession of the three parcels of land last aforesaid, which were alleged to be unlawfully withheld by the defendant. The suit appears to have been instituted on April 20, 1896. For an answer to the complaint, the defendant admitted that he had failed to pay rent as charged in the complaint, and he further admitted that he had laid claim as owner to the three parcels of land forming a part of the 600-acre tract, which were mentioned in the complaint. He alleged that these three parcels of land and the improvements thereon had been sold to him by the plaintiff, and that the plaintiff was not entitled to the possession thereof. The trial *à nisi prius* resulted in a verdict and judgment for the plaintiff below. The defendant appealed to the United States court of appeals in the Indian Territory, where the judgment *à nisi prius* was affirmed. *Case v. Hall* (Ind. T.) 46 S. W. 180. From that court the record was removed to this court by a writ of error.

W. H. Kornegay, for plaintiff in error.

Preston S. Davis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is urged in this court as one ground for reversal that the verdict which was returned in the trial court was not in the proper form, and does not adequately describe the premises which were found to have been unlawfully detained. The verdict was as follows:

"We, the jury, find the issue for the plaintiff, and assess his damage, in being kept out of possession of the premises, at \$300. And possession of entire farm in ten days from date.

Foreman: W. W. Miller."

The defendant below insists that the jury should have returned a verdict of guilty or not guilty, and should have assessed the plaintiff's damages incident to the unlawful detention, if the finding was in his favor. In support of that contention, sections 3362-3365 and 3367 of Mansfield's Digest of the Statutes of Arkansas are cited. It is unnecessary, however, to consider this contention, since the bill of exceptions which was settled and signed by the trial judge does not show that any objections were made to the verdict when it was returned. The verdict was clearly sufficient, in the light of the pleadings, to show what the jury intended, and to warrant the judgment which was subsequently entered thereon, wherein the property referred to was sufficiently described to identify it. If the verdict was not in the statutory form, the trial court's attention should have been directed to the defect when it was returned, and an exception to the court's action in refusing to have it corrected, if the court did

so refuse, should have been taken at the time, and the exception should have been properly preserved in the bill of exceptions. As the bill of exceptions contains no record of any such action having been taken by the defendant's counsel, the error complained of cannot be noticed by this court.

The other errors that have been assigned, to which our attention is directed in the briefs, each relate to the instructions which are said to have been either given or refused by the trial judge, but they cannot be noticed by this court for the following reasons: None of the instructions that are said to have been given by the trial court are contained in the bill of exceptions which was settled and signed by the trial judge, and for that reason they form no part of the record. Neither does the bill of exceptions, as settled and signed, contain a direction that the charge of the court be inserted therein.

It is well established that the charge of the trial judge is no part of the record, and cannot be noticed on appeal, unless it is made a part thereof by a bill of exceptions, properly signed and filed. *Dietz v. Lymer*, 19 U. S. App. 663, 667, 10 C. C. A. 71, and 61 Fed. 792; *Jefferson City v. Opel*, 67 Mo. 394, and cases there cited. One instruction is contained in the bill of exceptions, the same being an instruction that is said to have been refused by the trial court; but whether an error was committed in refusing it can only be determined by consulting the entire charge of the trial court. It may be that the instruction contained in the bill of exceptions which was refused was not given because embraced, in substance, in other portions of the charge, and it will be presumed in aid of the judgment that such was the fact. It appears from the record that counsel filed a stipulation in the court of appeals in the Indian Territory shortly before the hearing of the case on appeal in that court, consenting that certain so-called "instructions" which were set out in the stipulation might be referred to in that court as the instructions which were given by the trial judge. It has been held, however, that neither testimony nor other matters can be added to a bill of exceptions, after it is signed and filed, by stipulation of counsel alone. *Wessels v. Beeman*, 66 Mich. 343, 33 N. W. 510. The general rule is that neither counsel nor the court to which an appeal is taken have any power to change the record made by the trial court, and that defects or omissions therein can be cured only with the approval of the latter court. *Cluck v. State*, 40 Ind. 263. The case in hand is not one where a clerk, in certifying a record to an appellate court, has inadvertently omitted something which was in fact contained in the bill of exceptions as settled by the trial judge, but it is a case where an attempt is made in an appellate tribunal to insert something in the bill of exceptions which is really no part thereof, because it was never made a part thereof by the trial court. If counsel, by stipulation, can change the record without the sanction of the trial judge, they may thus present any moot question to an appellate court. We cannot, therefore, regard the stipulation which was filed in the United States court of appeals in the Indian Territory, after the record had been removed thereto, and the term of the trial court had expired, as being effectual to change or alter the record of

the trial court, from the standpoint from which that record must be viewed by this tribunal. As the bill of exceptions does not contain the charge of the trial judge duly certified by him, we must presume, in aid of the judgment, that the charge was correct. The judgment of the United States court of appeals in the Indian Territory, and the judgment of the United States court for the Northern district of the Indian Territory, are therefore affirmed.

TEXAS & P. RY. CO. v. HARBY et ux.

(Circuit Court of Appeals, Fifth Circuit. May 2, 1899.)

No. 791.

1. RAILROADS—DEATH OF INFANT—INSTRUCTION—CARE IN STOPPING TRAIN.

An instruction, in an action against a railroad for causing the death of an infant, after stating that servants operating a train should use "such care as an ordinarily prudent person would exercise to stop the train in order to prevent injury to the party on the track," was qualified, without coming to a period, by adding: "And in this behalf the care and caution an ordinarily prudent person would use would be to use every power within their ability and means to stop the train, in order that injury might not be inflicted on the person on the track; and if they fail to exercise this care, and to use every power and means consistent with the safety of themselves in their position on the train, and by reason of their failure to exercise such care and caution the person is injured, then they would be liable for any damage sustained or loss occasioned by reason of the injury." Held to require a degree of care higher than such as "ordinarily prudent persons would exercise."

2. INSTRUCTIONS—CURE OF ERROR.

An instruction, in an action against a railroad for causing the death of an infant, which states that it is the duty of the engineer to use every means within his ability to stop the train in order that no injury may be inflicted to one on the track, and that a failure to exercise every power and means consistent with the safety of those on the train and engine to stop the train will render them liable in damages, and which is defective as requiring too high a degree of care, is not rendered less misleading or cured by adding that, "In this respect you are charged that a reasonably prudent and cautious person would have used all the efforts in his power and within his means and ability, consistent with the safety of those on the train and engine, to stop the train," and by conversely stating the matter, saying, "If, however, the engineer, after discovering the peril of the child, used all the efforts at his command, consistent with the safety of those on the engine and the train, to stop the train, and avoid the injury," etc., as the charge clearly limits the qualification of the duty to use all means, etc., alone by the terms "consistent with the safety of those on the engine and train."

3. SAME—QUESTION FOR JURY.

Where the evidence showed that the engineer, on a descending grade, did not discover a child on the track until within a train's length of him, when he applied the air brakes, released the sand, and did everything to stop the train, short of reversing the engine, which would result in a wreck, the reiteration of language in the instruction tending to show that in the court's view he should have reversed the engine was erroneous, as it was the duty of the jury to determine from the evidence whether the care of the engineer was such as a prudent man would have used.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action brought by T. H. Harby and his wife, Maggie Harby, against the Texas & Pacific Railway Company, for damages resulting from the

death of their infant child, who was run on and killed by a train of the railway company on a bridge across the Colorado river at Colorado City, Tex., on July 16, 1897. The child was 3 years and 11 months of age. The location of the bridge is west and a few hundred yards distant from the station at Colorado City. The train that ran on the child was a freight train, composed of 15 cars loaded with fat cattle, a caboose, and the engine, and was 680 feet long. It was running east, at the rate of about 18 or 20 miles an hour, when it came out of a cut and around a curve to a point from which the engineer could look through the bridge in question, distant from that point about 1,300 feet (the witnesses vary slightly as to the distance). From that point the track is straight to and through the bridge. The bridge was a covered iron bridge, 290 feet long, with trestlework at either end connected with the dump, making the length of the bridge proper and trestlework about 400 feet. The 1,300 feet of straight track immediately west of the bridge over which the train ran just before running on the child is on a down grade 66 feet to the mile towards the bridge. The course of this track is approximately due east and west. The hour when the injury was inflicted was 6 p. m. No one saw the child at the time the injury was received except the engineer and the fireman.

The engineer, called for the defendant, testified: "I was on No. 1 out of Big Springs. It was a stock train,—fifteen cars of fat cattle; and coming to the top of Colorado Hill there is a heavy grade there; and I was coming down the hill at a pretty good rate. I had but a short time to make Lorraine station, beyond Colorado, for the passenger train. Coming to the salt spur, which is perhaps a half or three-quarters of a mile from Colorado, I eased the train up, as I usually do. There is a heavy cut and a sharp curve there, and I always ease the train up so that, as soon as we get out of the cut, we can see the yard. I whistled for the station in the cut. I was getting out of the cut, and saw no train in the yard, and I released my air. The train was then reduced down to twenty miles an hour at that point. After I got out of the cut and onto the straight track about two train lengths [from the bridge the witness doubtless means], I called for signal board. We have a practice of whistling four times for the board, and if the operator has any orders for you he will give you the board. I was watching for the board, and then cast my eye down the track through the bridge. I noticed some object on the track, evidently in the shade of the column of the bridge. At that time the engine was within a train's length of the bridge. Immediately I saw the object move. I put on the emergency air, and called to my fireman, and he helped me open the sand lever. At times it works hard. We opened the sand lever, and both streams of sand were running on the rails. I passed along down, and I could see that the train was slowing up, but it was going at such speed that it was impossible to stop there. * * * After I came out of the curve, it was about a train's length before I applied the air again. I was within about a train's length of the bridge. I didn't notice any object on the bridge until I had moved at least a train length. The train was fifteen cars, engine, and caboose. * * * I did all that mortal man could do to stop that train. I gave it all the air on the train that could be given, and gave it sand. We do not use hand brakes on trains when the air is working. No, sir; I did not reverse the engine. I did not think it would affect it any. The momentum of the train coming down that hill would tear the engine all to pieces, and throw her rods, and endanger the lives of all on the engine. I was just about a train length from the bridge when I first saw the object. I could not have stopped that engine by any means in the world except by wrecking it. The curve (the one coming out of the cut) is about five hundred feet in length. * * * I put on the air the first time on the upper bridge,—the bridge near two miles from Colorado,—so as to slow it down gradually, as I always do. At the salt spur I eased the train down so I could make the spot in the yard in case there was a train there. The air was released when I went on the straight track. Just where I went on the straight track there is a little hill that I can see over, and see the yard. I could see there was no train in the yard, and I released the air. I could not see through the bridge over two train lengths. I have been going through that bridge fourteen years. It is partly of wood and partly of iron. It is a truss bridge. Overhead, the

top of the bridge obstructs your view from the board. Nothing obstructs your view from the floor of the bridge after you get onto the straight track. I looked in the yard before I got on the straight track, and I was watching for the operator to give me a signal to pass through without stopping."

The conductor of the train, called for the defendant, testified: "It is something like three or four hundred yards west of the bridge to the curve. It was on the straight track that I felt the air applied. I do not know just how far my caboose was from the curve, but I was on the straight track between the bridge and the curve. The first application of air was before we got into the cut. The caboose brake was set, and the brake on the rear car was set. I did this in order that the engineer would not have to waste his air going down hill. If it became necessary to stop, he would have air enough. This is the heaviest grade from Clyde to Toyah. I have been running over this division nine years. We had fifteen cars, an engine, and a caboose; fifteen stock cars, besides the engine and caboose, all loaded with cattle. Sixteen loads is the capacity of the engine. They hardly ever put over fourteen cars of stock. They do not want fifteen cars if they can get less. That is a full train of stock. I do not know of anything else the engineer could have done to stop the train. I do not know whether he reversed the engine or not. It is my opinion he did not. He could have done so, but it would have been extremely dangerous. An engine often strips itself, and tears up the ties; and it would be extremely dangerous to reverse an engine on a bridge. You cannot get an engineer to do it. On this occasion I do not think the train could have been stopped before it went through the bridge, caboose and all. I do not believe it could have been stopped west of the river."

The fireman testified, in substance, that just before coming to the bridge in question he was down on the deck of the engine, breaking coal; that just as the engine got to the bridge he started to get up on the seat box; that in going into town he always got up on the seat box, and rang the bell going through town; that it was for this purpose that he was going to get on the seat box just as they were starting on the bridge; that, just as he started to get up, he saw the child, and he then helped the engineer to open the sand lever; that the sand lever was opened just before the engine got onto the iron part of the bridge; that the engineer had applied the air just before they got to the bridge.

J. K. Duke, called for the plaintiff, testified in substance: "I am a draftsman, and civil engineer, and trainman. I have been in the motive railway train service. I am familiar with the operation of Westinghouse air brakes. I have had a little over four years' experience as a trainman; three years with the Rock Island, at Ft. Worth. I became familiar with the running of trains. I never run a train; that is the train master's duty,—train dispatcher's. I am familiar with the handling of air brakes or set or hand brakes. I am familiar with the appliances in use on trains to stop them or check their speed. The ordinary means for stopping trains or checking their speed are air brakes and hand brakes. There is no other method that I know of by which the engineer stops his train. Reversing an engine means to reverse the direction in which it is going, and start the wheels back the other way. That is used sometimes, but hardly ever. If you should run into an open bridge, or something of that kind, and it became necessary to stop suddenly, they generally use that means. The method used principally is to apply the brakes and drop sand on the rails. * * * The purpose of dropping sand on the rails is to keep the wheels from slipping. That sand is controlled by the engineer. He has a lever running into the engine by which he can drop sand onto the rails, and then cut it off again. The air brakes are operated by the engineer. He operates the air brakes just as he does his engine. When it is necessary, he puts on air to slow up or stop the train. When he gets slowed up enough, he releases it. I mean the engine man does this. He sets the air, and that sets all the brakes on the train that have air. He can set it at different pressure. He can set readily, and as heavy as he wants to. In an emergency he puts it on with full force, and stops as quick as he can. A train running twenty-five or thirty miles an hour ought to be stopped on an ordinary road in from three to six hundred feet. If the grade was very heavy, it might cut some figure. If it was an incline like Pike's Peak, it could cut considerable figure. If the

grade is slight, I should not think it would cut much figure. * * * A train running fifteen miles an hour, equipped with air brakes, the track sanded, and the engine reversed, with fifteen loaded cars, ought to be stopped in a train's length. * * * I am not familiar with the railroad bridge across the Colorado river. I have passed over it. I do not think it would be possible for a train running fifteen miles an hour to run twelve hundred or fifteen hundred feet with the air brakes set and the engine reversed. I do not think it would go that far. That is over a quarter of a mile. In my opinion, a train going fifteen miles an hour, with fifteen loads, equipped with air brakes, ought to be stopped in seven or eight hundred feet. Just a slight grade would not cut much figure. Of course, it would cut some figure; but, if it was a slight grade, it would not cut much. If you had only fifty per cent. of air, it would not make much difference. Some roads, if they have fifty per cent. air, they leave the entire control of the train to the air. A train is not properly equipped unless it has air brakes."

It is not necessary to further quote or summarize the testimony. After the evidence had closed, the defendant requested the court to charge the jury as follows: "The court instructs the jury that the plaintiffs have failed to show a right to recover in this case, and you are instructed to return a verdict for the defendant." This request the court refused, and to this action of the court "the defendant excepted, for the reason that the plaintiffs have not shown that the engineer in charge of the train which hurt the child failed to do everything in his power, consistent with the safety of his train and the crew on it, to stop the train after he saw the child." Whereupon the court charged the jury, among other things, as appears in the assignment of errors, which, as far as it is necessary to notice, is as follows: "First. The court erred in refusing to give the following charge, which was requested by the defendant: 'The court instructs the jury that the plaintiffs have failed to show a right to recover in this case, and you are instructed to return a verdict for the defendant.' Second. The court erred in charging the jury as follows: 'While the railroad company has the right to use this track in the prosecution of its business as a common carrier of freight and passengers, and has a right to move its trains over its track and bridges, yet, at the same time, when anybody is upon the track, either man or child, and such person is in a perilous position, and this perilous position is discovered by the servants of the railway company operating the train, these servants operating the train must use such care and caution as an ordinarily prudent person would exercise to stop the train in order to prevent injury to the party upon the track; and in this behalf the care and caution an ordinarily prudent person would use would be to use every power within their ability and means to stop the train in order that injury might not be inflicted on the person on the track; and if they fail to exercise this care, and to use every power and means consistent with the safety of themselves in their position on the train, and by reason of the failure to exercise such care and caution the person is injured, then they would be liable for any damages sustained or loss occasioned by reason of the injury. In this case you are charged that if the engineer who was operating the engine discovered plaintiffs' child upon the bridge, then it was his duty to use such care to prevent injury to the child as a reasonably prudent and cautious person would have used under similar circumstances; and in this respect you are charged that a reasonably prudent and cautious person would have used all the efforts in his power and within his means and ability, consistent with the safety of those on the train and engine, to stop the train, and avoid injury to the child; and if, knowing of the peril of the child, the engineer failed to use such means to avoid the threatened danger, then he was guilty of negligence directly causing such injury to the child, which resulted in its death, and the defendant company would be liable. If, however, the engineer, after discovering the peril of the child, used all the efforts in his power, and all the means at his command, consistent with the safety of those on the engine and train, to stop the train, and avoid the injury, then the engineer was not guilty of negligence, and your verdict should be for the defendant. You should take into consideration all the evidence introduced in all its phases, and attempt to ascertain from that evidence and surrounding circumstances whether or not the engineer, after discovering the peril of the child, could have, by the

use of the means within his power, stopped his engine before inflicting injury on the child. That is the question you are called on to determine from the evidence before you. If you find that he could have stopped the train by the exercise of such care as I have indicated to you, and that he failed to do so, and by reason of his failure and neglect to do so this child was killed, then it would be your duty to find for the plaintiffs; but, if he could not have stopped the train by the exercise of the power and means at his command, it will be your duty to find for defendant.' To this portion of the charge, when given, the defendant duly excepted "because it is conflicting, and calculated to confuse the jury. It, in one part of it, makes the defendant liable if the perilous position of the child was discovered by the servants of defendant operating the train, and requires of them care and prudence, etc. There is no evidence that any servant but the engineer saw the child, who had any power to in any way control the train. It determines what a prudent man would do under the circumstances, instead of leaving that to the jury. In one part it charges that the engineer should do anything in his power, consistent with the safety of the crew, and does not leave him the right to act with reference to the safety of the train and freight; and, in event the servants were guilty of neglect as defined, they would be liable. In another part of the charge it is made the duty of the engineer to stop the train, if he could do so with the means at his command, without limiting this duty to the safety of the train and crew."

T. J. Freeman and R. L. Stennis, for plaintiff in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

After hearing the evidence, the court below practically withdrew from the jury all the issues but that of discovered peril, submitting only the question, did the engineer in charge of the engine which hit the child use proper care to prevent injuring it, after he discovered its peril? and the question of damages. The jury found for the plaintiffs the sum of \$750. We notice only the second of the errors assigned, because the view we have taken of it renders it necessary to reverse the judgment below, and on another trial the evidence may be materially different. In that portion of the charge given by the court to which the defendant excepted, and on which it has assigned error, the trial judge, in stating the general rule, said:

"When anybody is upon the track, either man or child, and such person is in a perilous position, and this perilous position is discovered by the servants of the railway company operating the train, these servants operating the train must use such care and caution as an ordinarily prudent person would exercise to stop the train in order to prevent injury to the party on the track."

Thus far the rule is stated with sufficient accuracy, but, without coming to a full stop, the trial judge proceeded to qualify it by adding:

"And in this behalf the care and caution an ordinarily prudent person would use would be to use every power within their ability and means to stop the train in order that injury might not be inflicted on the person on the track; and if they fail to exercise this care, and to use every power and means consistent with the safety of themselves in their position on the train, and by reason of the failure to exercise such care and caution the person is injured, then they would be liable for any damage sustained or loss occasioned by reason of the injury."

Thus qualified, the rule requires the use of a degree of care much beyond "such as ordinarily prudent persons would exercise," even the

utmost care that the most prudent persons would or could use. Such a high decree of care is not and cannot be exacted under such circumstances of corporations or of natural persons, because it could not be met in the operating of the character and amount of machinery used and necessary to be used in railroad transportation. As was said by the circuit court of appeals for the Eighth circuit, we have no question that the trial court had in mind the true rule applicable to the situation, but, unfortunately, the form in which the instruction was given would not convey the proper meaning to a jury composed of men unskilled in legal phraseology. *Manufacturing Co. v. Johnson*, 32 C. C. A. 309, 89 Fed. 677. The trial court probably had in mind this language, used by the supreme court of Texas in a somewhat similar case:

"If defendant, through the parties in charge of the engine, knew of Breadow's peril in time to have avoided same, such knowledge imposed upon it the new duty of using every means then within its power, consistent with the safety of the engine, to avoid running him down, and a failure so to do would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril. This new duty and liability for its breach is imposed, upon principles of humanity and public policy, to prevent what would otherwise be, as far as civil liability is concerned, the licensed destruction of persons negligently exposing themselves to peril." *Railway Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410.

It is to be considered that the language just quoted is not addressed as an instruction to a jury, but to trial judges and the legal profession. It is to be observed, also, that the using of "every means then within the power of the servants of the defendant" is subject to the qualification embraced in the further language, "consistent with the safety of the engine." In that case it was the running of an engine alone which inflicted the injury, and the words "consistent with the safety of the engine," in their application to this case, are equivalent to the words "consistent with the safety of the train," if these are understood to embrace the engine, the cars, the amount and character of freight, and the persons on the train. The analogous qualification actually given in this case in the statement of the general proposition is, "consistent with the safety of themselves in their position on the train."

The defect which we are attempting to point out was not cured or rendered less misleading and hurtful when the judge came to apply his general proposition to the case the jury were considering. Immediately, in the same brief paragraph, without the interposition of a full stop, the language is repeated:

"And in this respect you are charged that a reasonably prudent and cautious person would have used all the efforts in his power and within his means and ability, consistent with the safety of those on the train and engine, to stop the train."

Then, in the next sentence, stating the matter conversely, the judge says:

"It, however, the engineer, after discovering the peril of the child, used all the efforts in his power, and all the means at his command, consistent with the safety of those on the engine and train, to stop the train, and avoid the injury," etc.,

--Still clearly limiting the qualification of the duty to use all the means, etc., alone by the terms, "consistent with the safety of those on the engine and train." Then, further on, in concluding the charge on this subject, the judge said:

"If you find that he could have stopped the train by the exercise of such care as I have indicated to you, and that he failed to do so, and by reason of his failure and neglect to do so this child was killed, then it would be your duty to find for the plaintiffs; but, if he could not have stopped the train by the exercise of the power and means at his command, it will be your duty to find for defendant."

In the opinion of the supreme court of Texas from which we have quoted it is said:

"The principle [of humanity], however, has no application in the absence of actual knowledge on the part of the person inflicting the injury of the peril of the party injured in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired the same. The burden of proof was upon the plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employes might, by the exercise of reasonable care, have acquired such knowledge, but that they actually possessed it."

In this case there is an utter absence of proof that the engineer saw the child until the engine was within a train's length of the bridge, or that the fireman saw it until just as the engine got to the bridge, or that any other servant of the company saw it before it received the fatal injury. There is no evidence tending to show that the brakes and sand were not applied to the utmost as soon as the child's presence on the track was discovered. On the contrary, the proof is all one way, and conclusive, that both of these means were used as promptly and efficiently as was possible. The engine was not reversed. There was no dispute or room for question about what was done and what was not done. The very substance of the issue was, not what was done or what was not done, but whether what was done was the use of such care and caution as an ordinarily prudent person would exercise to stop the train in order to prevent the injury to the party on the track. That is not a question of law, otherwise the trial judge would not have submitted it to the jury. Further than this, there is no proof tending to show that the engineer could have done anything more than he did do, except to reverse his engine. It is doubtless true that a competent engineer in charge of such an engine, pulling such a train, at such a place, and exercising the care and caution of an ordinarily prudent person, would have used every power within his ability and means to stop the train, consistent, in his judgment, with the safety of those on the engine and on the train, and of the train and its freight. From necessity, it was, and must ever be, a question for enlightened judgment in the very emergent time, "What means of those within my reach can I use that are consistent with my own safety," the safety of other persons on the engine and train, and the safety of the train itself and its freight? It is true that the judgment of the jury is the final arbiter, and in particular cases it may be true that the defendant is liable for an error in judgment of its servant engineer. The engineer says that, having

in view the grade of the track, the weight of the train, its speed, its proximity to the bridge and to the child on the track, his judgment was that to reverse the engine would not affect the speed of the train or the safety of the child, but that it would tear the engine all to pieces, throw her rods, and endanger the lives of all on the train, and that he could not stop the engine by any means in the world except by wrecking it. It cannot be the law that the defendant or its servants are in duty bound to use means that will cause them to incur such extreme hazards on the barest possibility of being thereby able to prevent running onto a person, even a tender infant, whose presence on the track was not to have been expected, and was not discovered until the case presented the dire alternative of a fatal injury to the child or the most serious injury to the train and those thereon. We are not able to believe that the jury would or could have found as a fact that a competent engineer, using the care and caution of an ordinarily prudent person, would have reversed his engine under the circumstances and conditions shown by the proof; or that, if he had done so, the injury to the child would have been thereby prevented, if they had not been misled by the charge of the court, or by their misunderstanding of his charge, into accepting it as matter of law, binding on their consciences as sworn jurors, to find for the plaintiffs because the engineer did not reverse his engine. The tone of the instructions, and the reiteration of the definition of that care which a person of ordinary prudence would use, seems to us—as we think it must have appeared to the jury—to express that the judge's view of the law was that the engineer should have reversed his engine. We are far from deeming it our duty to limit the sound discretion of the trial judge in using large freedom in discussing the testimony in his charge to the jury. It is both his privilege and his duty to do so. But he should at the same time take care to inform them that his suggestions are not binding on them as matter of law; that, however high may be their regard for his views of the evidence in a case like this, it is their duty, and not his, to determine from all the facts admitted or established by proof whether the care and caution shown to have been used was up to that measure which, in their judgment, a person of competent skill and of ordinary caution and prudence, placed in the engineer's position, would have exercised. For the error in the charge of the court below, the judgment must be reversed, and the case is remanded to the circuit court, with instructions to grant a new trial.

FIRST NAT. BANK OF ARKANSAS CITY v. LEECH.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,140.

ACCORD AND SATISFACTION—EXECUTORY AGREEMENT.

An agreement to accept notes of a third person in part payment of a debt, and to extend the time for payment of the remainder, on the giving of certain security, must be fully executed before it can be pleaded as an accord and satisfaction.

In Error to the Circuit Court of the United States for the District of Kansas.

This is an action to recover the amounts due defendant in error from the plaintiff in error on two certificates of deposit. The defenses are that the bank having been placed in the hands of a receiver, plaintiff agreed with the bank, in writing, to accept in payment of his claims 10 per cent. in money, and certificates of deposit for the balance, payable in 10 installments, at intervals of three months, at 4 per cent. per annum; that afterwards, it having been ascertained that the bank would be unable to carry out these agreements, the plaintiff agreed with defendant to accept in payment of his claims a note for \$4,500 of one of the bank's debtors, to be secured by a mortgage on real estate of that debtor, and also by mortgage on three lots belonging to the bank, to be selected by the plaintiff from a large list of lots to be submitted to him, and the balance due the plaintiff was to be paid in 10 equal installments, at intervals of three months. There are no allegations of satisfaction or acceptance of the agreement, and upon the trial the court held the answer set up no defense, and sustained a demurrer to it, and directed a verdict for the plaintiff for the full amount of his claims. The contention of the plaintiff in error is that the court erred in sustaining the demurrer to the answer, and in refusing to permit the introduction of evidence to support its allegations.

Peters & Nicholson and Pollock & Lafferty, for plaintiff in error.

Stanley, Vermillion & Evans and Mathews, Heade & Mathews, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The agreements set up in the answer amount to nothing more than an executory contract for an accord. There are no allegations showing a satisfaction. It is a well-settled rule of law that accord without satisfaction is not a good answer. An agreement or accord which is to operate as a satisfaction of an existing liability must, before it can have that effect, be fully executed. It is not enough that there be a clear agreement or accord and a sufficient consideration; but the agreement or accord must be executed before it can be pleaded as an accord and satisfaction. If part of the consideration agreed on be not performed, the whole accord fails. *City of Memphis v. Brown*, 20 Wall. 289, 308, 309; *Clifton v. Litchfield*, 106 Mass. 34, 40, 41; *Crow v. Lumber Co.*, 16 C. C. A. 127, 69 Fed. 61; *Coblentz v. Manufacturing Co.*, 40 Ark. 180; *Ogilvie v. Hallam*, 58 Iowa, 714, 12 N. W. 730; 1 Smith, Lead. Cas. (5th Am. Ed.) 445, 446, and cases there cited.

The answer must allege that the matter was accepted in satisfaction. *Sinard v. Patterson*, 3 Blackf. 354; *Banking Co. v. Van Vorst's Adm'x*, 21 N. J. Law, 101. Mere readiness to perform the accord or a tender of the performance will not do, and a plea of accord and tender is bad upon demurrer. *Russell v. Lytle*, 6 Wend. 390; *Hawley v. Foote*, 19 Wend. 516; *Tilton v. Alcott*, 16 Barb. 599; *Clifton v. Litchfield*, supra. In the latter case the supreme judicial court of Massachusetts say:

"But an executory agreement to discharge such a demand, upon the giving of a promissory note by the debtor, or payment of a sum less than the amount actually due, is not binding upon the creditor, and cannot be enforced against him or set up in bar of a suit upon the demand; and therefore the mere offer of such note, or of such less sum in payment, will not operate to discharge the

debt, unless it is accepted by the creditor. His refusal to accept it is the breach only of an executory agreement without consideration. The whole transaction will then stand as an accord without satisfaction."

That the agreement in this case was merely executory is not controverted. It is alleged that the lots of the bank which were to be added to the security were to be selected by the defendant in error from a list of property owned by the defendant; but there is no allegation that these lots were ever selected, although it is charged that a large list of the bank's lots were tendered to defendant in error for a selection. As there was no satisfaction, the answer setting up accord and satisfaction, without averring satisfaction, was bad, and the court did not err in directing a verdict for the plaintiff. The judgment of the circuit court is affirmed.

COLORADO EASTERN RY. CO. v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,121.

1. **DISMISSAL FOR WANT OF PROSECUTION—REVIEW.**

An order of dismissal for want of prosecution, with judgment for costs, is a final judgment, from which an appeal will lie.

2. **APPEAL AND ERROR—FINALITY OF JUDGMENT.**

To constitute a final judgment for purpose of appeal it is not essential that it should be a bar to another suit.

3. **WANT OF PROSECUTION—DISMISSAL.**

Dismissal of cause for want of prosecution is within the discretion of the court, even in the absence of a rule permitting it.

4. **SAME.**

Where nearly six years had elapsed since the filing of the original petition without steps to bring cause to trial, during which time plaintiff had twice filed petitions praying that suit be not dismissed for want of prosecution, alleging the pendency of other suits involving the matter in dispute, and such suits were finally disposed of, and no further steps were taken in the cause until two years later, when defendant filed petition to dismiss for want of prosecution, the court did not abuse its discretion in granting the application.

5. **CONDEMNATION PROCEEDINGS—NATURE AS SUIT.**

A proceeding for condemnation of right of way is a suit, so as to authorize the court to dismiss it for want of prosecution.

In Error to the Circuit Court of the United States for the District of Colorado.

Application for dismissal for want of prosecution. Granted, and plaintiff brings error. Affirmed.

The plaintiff in error filed its petition in the state court of Colorado for condemnation of a right of way. The original petition was filed on September 12, 1892, and the cause was removed to the federal court by defendant in error on October 14, 1892. The transcript of the record was filed on November 1, 1892. No action was had on the petition until October 4, 1894, when the plaintiff in error filed a petition asking that the suit be not dismissed under the rule of the circuit court for the district of Colorado, which provides that all suits in which no progress has been made during the preceding year should be dismissed, setting up that at the time there were pending in the supreme court of the United States and the court of appeals of Colorado suits to determine the question of the right of plaintiff in error to condemn the land in dispute.

Nothing further was done in the cause until April 29, 1896, when another petition was filed by the plaintiff in error praying the court not to dismiss the proceeding, assigning the same reasons as were set up in the petition filed October 4, 1894. The cause pending in the United States supreme court was finally disposed of November 20, 1895, and the one in the Colorado court of appeals in October, 1896. No further steps were taken in the cause until June 29, 1898, when the defendant in error filed a petition to dismiss the suit for failure to prosecute. To this motion a reply was filed, and on July 5, 1898, the same came on for hearing, whereupon the court dismissed the cause "for failure duly to prosecute the same," and rendered judgment for costs against the plaintiff in error.

Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on brief), for plaintiff in error.

Willard Teller (Harper M. Orahood, on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts). The defendant in error moves to dismiss the writ of error upon the ground that the dismissal of a cause for want of prosecution is not subject to review by an appellate court. The motion must be denied. An order of dismissal for want of prosecution and a judgment for costs against plaintiff is a final judgment from which an appeal will lie. *Tunnel Co. v. Pell*, 4 Colo. 184; *Wood v. Coman*, 56 Ala. 283; *Dowling v. Polack*, 18 Cal. 626. To constitute a final judgment, it is not essential that it should be a bar to another suit. It is only when a suit is determined on its merits that it is a bar to another action. *Hughes v. U. S.*, 4 Wall. 232. The court below has promulgated the following rule:

"All causes at law and in equity in which no order or progress has been made and entered of record within one year last past shall be dismissed for want of prosecution, unless upon cause shown during the first twenty days of the May term the court shall otherwise order."

This is a very proper rule, but, in the absence of such a rule, every court has the power to dismiss a cause for want of prosecution. It is a matter of judicial discretion, and is frequently exercised. *Ashley v. May*, 5 Ark. 408; *Peralta v. Mariea*, 3 Cal. 185. There is no ground whatever for claiming that this discretion was abused or arbitrarily exercised in this case. Nearly six years had elapsed since the filing of the original petition without any steps being taken by the plaintiff to bring the cause to trial. The contention that a proceeding for condemnation is not a suit is fully disposed of by the decision in *Boom Co. v. Patterson*, 98 U. S. 403, where it is held that it is a suit and removable to the federal courts when the necessary diverse citizenship exists, or, as in the case at bar, one of the parties is a federal corporation. The judgment of the circuit court is affirmed.

LIVERPOOL & LONDON & GLOBE INS. CO. v. KEARNEY et al.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,127.

1. INSURANCE—CONSTRUCTION OF POLICY—IRON SAFE CLAUSE.

By a clause in a policy of insurance on a stock of merchandise the insured agreed to keep the books containing a record of his business, together with his last inventory, "securely locked in a fireproof safe at night, * * * or in some secure place not exposed to a fire which would destroy the house where such business is carried on." *Held*, that such clause gave the insured an option to keep the books either in a safe or some other secure place, which option he might exercise at any time, and was not violated by the removal of the books in the night from the safe to a place of safety outside on the approach of a fire to the building, such removal being but an act of prudence; nor did the accidental loss of the inventory during such removal preclude a recovery on the policy.

2. SAME.

A provision of an iron-safe clause in a policy of insurance on merchandise, which, in addition to requiring the insured to keep his books and inventory in a safe or other secure place at night, makes the policy void in the event that he shall fail to produce such books and inventory in case of loss, must be given a reasonable, and not a strictly literal, construction; and, so construed, in connection with the provision for the manner in which the books and inventory shall be kept to insure their safety, it requires the insured to produce them after the fire, if within his power to do so, and casts upon him the responsibility for their loss in all cases where such loss is due to a wrongful or fraudulent act on his part, or to his culpable negligence.

Sanborn, Circuit Judge, dissenting.

In Error to the United States Court of Appeals in the Indian Territory.

This suit is founded on two insurance policies, one for \$2,500 and one for \$1,000, which were issued by the Liverpool & London & Globe Insurance Company, the plaintiff in error, to T. K. Kearney and J. W. Wyse, composing the firm of Kearney & Wyse, the defendants in error. The policies covered a stock of hardware located in the town of Ardmore, in the Indian Territory, which was destroyed by fire on the morning of April 19, 1895, during the life of the policies. For a defense to the claim made under the policies the defendant company appears to have relied altogether on the following provision of the policy, termed "the iron-safe clause": "The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transactions, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and, in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Noncompliance with this clause was alleged in the defendant's answer, in that the insured did not keep books showing a complete record of their transactions, including all purchases or sales for cash and credit, nor any inventory of said business, or memorandum, securely locked in a fireproof safe at night, or in some secure place not exposed to fire; and in that they did not furnish to the insurer, as a part of their proof of loss, a record of their transactions,—that is, of the sales for cash or credit, or purchases,—or an inventory of their business. There was a verdict and a judg-

ment at nisi prius in favor of the plaintiffs below, which judgment was affirmed by the court of appeals in the Indian Territory. 46 S. W. 414. The defendant below brought the case here on a writ of error.

A. B. Quinton (E. S. Quinton, W. A. Ledbetter, and S. T. Bledsoe, on brief), for plaintiff in error.

A. C. Cruce (W. B. Johnson, W. I. Cruce, and Lee Cruce, on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant below, against whom the judgment was rendered, assigns several errors in the proceedings of the trial court, but each assignment presents only some special phase of the same general question, namely, whether the trial court properly construed and gave due effect to the "iron-safe clause" of the policy, above quoted in the statement. Concerning the facts of the case there is practically no dispute. On the night of April 18, 1895, between the hours of 1 and 3 a. m., a fire accidentally broke out in a livery stable in the town of Ardmore, which was about 300 yards distant from the plaintiffs' place of business. Efforts to arrest the progress of the conflagration failed, and when it had approached so near to the plaintiffs' place of business that the windows of their store were cracking from the heat, and the building was about to take fire, one of the plaintiffs entered the building for the purpose of removing the books of the firm to a safer place, thinking that it would be better to remove them than to take the chances of their being destroyed by fire. He opened an iron safe in the store, in which they had been deposited for the night, which was called a fireproof safe, and took them therefrom, and to his residence, some distance away. The books consisted of a ledger, a cash book, a day book or blotter, and a small paper-covered book containing an inventory that the firm had taken of their stock on or about January 1, 1895. In the hurry and confusion incident to the removal of the books, the inventory was either left in the safe, and was destroyed, or was otherwise lost, and could not be produced after the fire. The other books, however, were saved, and were exhibited to the insurer after the fire, and were subsequently produced as exhibits on the trial. There was neither plea nor proof that the loss of the inventory was due to fraud or bad faith on the part of the plaintiffs, or either of them. The trial judge charged the jury that the set of books which had been kept, and which were produced on the trial, "were substantially in compliance with the terms of the policy upon that subject," and no exception was taken by the defendant to this part of the charge. The books, though used at the trial as exhibits, do not form a part of the record. For these reasons no question arises as to the sufficiency of the set of books that was kept which we are called upon to consider. It must be taken for granted that it was a proper set of books, as the trial court held. The only substantial ground for complaint seems to be that the inventory was not produced. Does the fact that the inventory was lost under the circumstances afore-

said, and was not produced, vitiate the policies? It will be observed, from reading the "iron-safe clause," that the plaintiffs below did not bind themselves unconditionally to keep their books in a fireproof safe at night, and at all times when the store was not actually open for business. Their engagement was to so keep them, "or in some secure place not exposed to a fire which would destroy the house where such business is carried on." They had an option, therefore, either to keep them in a fireproof safe, or in some other secure place, where they would not be liable to be destroyed by a fire which might destroy their place of business. We perceive no reason why the plaintiffs were not entitled to exercise this option of removing their books to some other safe place at any time, and to exercise it, especially when a conflagration was sweeping towards their place of business, which bid fair to destroy it, and possibly to destroy their books as well, though contained in a safe. It cannot be said, we think, that, having placed the books in the safe on the night of April 18, 1895, at the close of business, they were bound to let them remain there until morning, no matter what might occur, and that in the meantime they lost the right given by the policy to remove and keep them elsewhere. The option was a continuing one, and it was eminently proper, we think, for the plaintiffs to exercise it during the night of the fire, when it became obvious to them that their place of business was about to be destroyed. They acted prudently, doing what any other man of ordinary caution would have done if he entertained lurking doubts as to the fireproof quality of his safe, or was unwilling to have his books buried perhaps for days under a mass of débris.

Counsel for the defendant company direct our attention, however, to the last paragraph of the "iron-safe clause," and urge, in substance, that the stipulation therein contained bound the plaintiffs, in any event, to produce the inventory after the fire; and that, even though it was lost, and cannot be produced, they are not entitled to recover. This argument proceeds upon the theory that the last paragraph of the "iron-safe clause" must be read literally, that it admits of no exceptions or qualifications, and that the failure to produce the books or inventory for any reason vitiates the policies. We cannot assent to this view of the case. Like all contracts made between private parties, and like all statutes, for that matter, they must receive a reasonable interpretation which will not work injustice or lead to absurd consequences. *U. S. v. Kirby*, 7 Wall. 482; *Heydenfeldt v. Mining Co.*, 93 U. S. 634; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 460, 461, 12 Sup. Ct. 511; *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843; *Thurber v. Miller*, 14 C. C. A. 432, 67 Fed. 371, and 32 U. S. App. 209; *Davis v. Bohle*, 92 Fed. 325. If it had been the intention of the defendant company that the final paragraph of the "iron-safe clause" should be construed as it now claims, then we perceive no motive for inserting the preceding clause, which required the insured to keep his books in a fireproof safe, or other secure place; and that clause might as well have been omitted, giving him the power to keep his books where he pleased, and making his right to recover dependent upon the actual production of his books, and throwing upon him in

all cases the responsibility for their production. Again, the construction contended for by the insurer might at times require the insured to produce his books when, without any fault on his part, it would be physically impossible to do so. For example, if a burglar should blow open a safe containing books, and start a fire which should destroy the insured's books as well as his stock in trade, then he could not recover on a policy containing the "iron-safe clause" construed as we are asked to construe it. Nor could a person insured under such a policy recover against the insurer if he kept his books in a safe which he had every reason to believe was invulnerable against heat, provided it turned out not to be so, and his books were destroyed by an accidental fire. These considerations lead us to conclude that the last paragraph of the "iron-safe clause" should not be read literally, and that neither party to the contract intended that it would be so read. It should be construed, we think, as requiring the insured to produce his books and inventory after a fire, if it is within his power to do so, and as throwing upon the insured the responsibility for the loss of his books and inability to produce them in all of those cases where their loss is due to a wrongful or fraudulent act on his part, or to his culpable negligence. In the case at bar we cannot say that there was any evidence tending to show that the inventory was lost, and not produced for either of the aforesaid reasons. The plaintiffs appear to have exercised their right under the policy to remove the books to a more secure place, under circumstances which fully justified their conduct, and we do not find any evidence which tends to convict them of culpable negligence in the manner of exercising that right. In conclusion we shall only add that the clause of the policy now under consideration has been construed by other courts in cases where the facts were only slightly variant from those disclosed by the present record, and the conclusions reached touching the proper interpretation of the clause are in substantial conformity with those which we have announced, and with the instructions which were given by the trial judge. *Jones v. Insurance Co.*, 38 Fed. 19, 21; *Brown v. Insurance Co.*, 89 Tex. 590, 35 S. W. 1060; *McNutt v. Insurance Co. (Tenn. Ch. App.)* 45 S. W. 61; *Insurance Co. v. Parker*, 61 Ark. 207, 213, 32 S. W. 507. The judgment of the United States court of appeals in the Indian Territory and of the United States court for the Southern district of the Indian Territory are therefore affirmed.

SANBORN, Circuit Judge (dissenting). Is opening a fireproof safe in one's place of business in which a book is securely locked, and either taking the book out and losing it, or leaving it in an open safe so that it is burned up by an approaching fire which destroys the building in which it is situated, the performance of an agreement to keep the book "securely locked in a fireproof safe, * * * or in some secure place, not exposed to a fire which would destroy the house where such business is carried on"? The opinion of the majority answers this question in the affirmative. I have been unable to resist the conclusion that it should be answered in the negative. The book certainly was not kept securely locked in a safe, nor was

it kept "in some secure place not exposed to a fire which would destroy the house where such business is carried on." On the other hand, the safe was unlocked, and the book was either lost or was actually exposed in the open safe or elsewhere to the fire which burned the house where the business was conducted, and was thereby destroyed. Is losing a book keeping it? Is exposing it to a fire by which it is destroyed keeping it in some secure place not exposed to that fire? It is said that the insured had the option to keep the book securely locked in the safe, or in some secure place not exposed to a fire which would destroy the business house, that this was a continuing option, and that they complied with their contract if they lost the book in transit in the night while they were attempting to exercise this option, and to take it from the safe to another secure place. But is this argument sound? The contract was that "at night, and at all times when the store mentioned in the within policy is not actually open for business," they would keep the book locked in the safe, or in some secure place not exposed to a fire which would burn the building in which the safe was situated. It was that they would keep the book in one of two secure places during all of every night while the store was closed. It was not that they would keep it in one of those places, or in transit between them. They undoubtedly had the right each day to choose in which place they would keep their book during the coming night, but, after the night had come, and after the store was closed, if they took the book from the place which they had selected, and exposed it to the fire against which they had agreed to guard it, I see no escape from the conclusion that they violated their contract, because they no longer kept it in either of the secure places specified; and this, whether they removed it with the intention of transferring it from one place to the other or with some other purpose. They were not keeping it in either place while they were transferring it from one to the other. The contention of the majority here proves too much. If the insured could exercise their option once during the night, and after the store was closed, and expose the book to the danger of fire, they could exercise it many times, and could thus keep the book continually in transit, and in neither of the safe places where they agreed to have it during the entire night. In my opinion, an agreement to keep an article in one of two specified secure places during certain hours of the night is not performed by losing it in transit between them during those hours.

There is another proposition of the majority to which I cannot yield assent. It is that an agreement to safely keep and to produce a book upon the trial of a lawsuit is not broken by a failure to keep and produce it, unless that failure is due to a wrongful or fraudulent act, or to the culpable negligence of the defaulter. The agreement of the insured here was as clear and unambiguous as the English language could make it. It was that they would keep the inventory securely locked in the safe, or in the other secure place specified, each night; that they would produce it in case of a loss under the policy, and that, if they failed to do so, no action upon the policy should be maintained. They failed to keep it in either of the places named in the agreement, and they failed to produce it. It is said, however, that they never

meant to agree to keep it or produce it; that they only intended to contract that they would not by any wrongful or fraudulent act or by any culpable negligence of theirs fail to keep and produce the book; that the contract should be construed according to this latter intention; and that, as the insurance company failed to prove any such fraudulent act or culpable negligence of the insured, there was no evidence of a breach of the agreement, although the defendants in error utterly failed to do the acts which, by the plain terms of the written contract, they agreed to perform. But there is no evidence of the intention of the parties to this contract except the policy itself. The policy contains no agreement that the defendants in error will not be guilty of fraudulent or wrongful acts or of culpable negligence in their care of the book. It nowhere mentions these terms, or makes any reference to the subjects which they suggest. It is only a bald, plain contract to keep the book in one of the places specified, and to produce it. The terms of this agreement seem to me too plain for construction. In my opinion, they bring these cases under the familiar rules that, "where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation without any uncertainty as to the object or extent of such an engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking, was reduced to writing" (Thompson v. Libby, 34 Minn. 374, 377, 26 N. W. 1; Barnes v. Railway Co., 4 C. C. A. 199, 54 Fed. 87, and 12 U. S. App. 1, 7; Wilson v. Ranch Co., 20 C. C. A. 244, 73 Fed. 994, and 36 U. S. App. 634, 643), and that "contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense" (Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 463, 14 Sup. Ct. 379; Fred J. Kiesel & Co. v. Sun Ins. Office of London, 31 C. C. A. 515, 88 Fed. 246). Under these rules I am unable to find anything in this contract to indicate that the parties to it intended to make any other agreement than that which it so clearly expressed. Would it be any defense to an action upon an absolute promise to pay a debt that the debtor only intended to agree that he would not be guilty of any fraudulent act or culpable negligence which would prevent him from paying it, and that he had not been? Would it be the province of the court, in the absence of other evidence, to construe a contract to build a house, to dig a well, to sell a horse, or to do any other act, into an agreement not to commit any fraudulent act or culpable negligence which would prevent the performance of the contract? The rule that courts may not make new contracts for parties which they never considered, and to which their minds never assented, answers these questions. The same rule seems to me to apply to an unconditional agreement to keep in a specified place, and to produce, a book. I can find in such a contract no evidence that the parties to it intended to make any other agreement. I am unable to see in it any proof that they intended that the insured should not agree to keep and produce the book, but that they should merely contract not to commit any fraudulent act or culpable

negligence that would prevent them from keeping and producing it. The latter contract seems to me to be in the teeth of the former. It destroys the written agreement, and I cannot persuade myself, in the face of its plain terms, that the minds of these parties ever met on a contract to so effectually abrogate it.

If this is the correct view of the meaning of this contract, it is immaterial whether its breach was caused by mistake, carelessness, from culpable negligence, or by an honest purpose to violate the agreement. By the terms of the agreement the insured voluntarily took upon themselves the chances of the effects of their own imprudence, carelessness, purpose, and performance. The record conclusively shows that their failure to perform their contract was not caused by any act of God or the public enemy, or by the interposition of any force which made it impossible for them to fulfill it. The breach is therefore without legal excuse, and its inevitable consequence follows. The agreement was that no action should be maintained upon the policies if the book was not kept and produced. It is conceded on all hands that it was not kept, and that it was not produced; and, in my opinion, the insured were estopped by their agreement and by this fact from maintaining any action upon the policy. This view of the meaning and effect of the "iron-safe clause" of policies of insurance is sustained by the following authorities, which hold that it is "an express promissory warranty in the nature of a condition precedent," and that a strict compliance with its terms is indispensable to a recovery upon a policy which contains it: *Assurance Co. v. Altheimer*, 58 Ark. 565, 575, 25 S. W. 1067; *Insurance Co. v. Parker*, 61 Ark. 207, 215, 32 S. W. 507; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex. Civ. App.) 28 S. W. 1027, 1031; *American Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.) 30 S. W. 384, 385; *Ostr. Ins.* § 238; and *Landmann v. Insurance Co.*, 18 Ins. Law J. (La.) 813, 815, in which the court pertinently said:

"In this case there is no room for interpretation or construction. The language used in expressing the clause is free from ambiguity. It is printed in large type, annexed to the face of, and is clearly a part of, the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to protect it against unfounded augmentation of the value of the property destroyed, and to enable it to obtain other evidence than that of the assured and his employes, however honest and correct they may be, of the damage sustained. Its purpose was, also, to enable the assured to make his loss mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that in the case of loss the books were to be the basis of the adjustment, and to enable them to be produced it was made a part of the policy that they should be kept in an iron safe. This the assured promised to do. The iron-safe clause in the policy is a promissory warranty. Being a warranty,—a part of the contract,—it is in the nature of a condition precedent to a right of recovery, and the parties whose rights are dependent upon such a condition must show they have performed it. 'Agreements legally entered into have the effect of laws on those who have formed them.' Rev. Civ. Code, art. 1901. The court cannot add to or detract from the laws they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it, however foolish, improvident, or immaterial it may be."

GARNER et al. v. TRUMBULL.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

No. 1,123.

1. RAILROADS—CARE REQUIRED AS TO PERSON ON TRACK.

When, for a considerable period, numerous persons have been accustomed to walk across or along a railroad track between given points, those in charge of passing trains are required to take notice of such fact, and to use reasonable precautions to prevent injury to persons whose probable presence on the track should be anticipated.

2. SAME—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE OF PARENTS.

Where the father of a child two years of age was absent from home, and the mother had gone to a neighbor's, a short distance away, leaving the child, with older children, at play in the yard, where a neighbor was also at work, and the child escaped, unobserved, and went upon a railroad track some 250 feet from the house, and was run over and killed by a passing train, it cannot be held, as a matter of law, that the parents were guilty of contributory negligence, but the question is one for the jury.

In Error to the Circuit Court of the United States for the District of Colorado.

John A. Gordon (A. P. Anderson, on the brief), for plaintiffs in error.

Tyson S. Dines and E. E. Whitted, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This suit was brought by W. A. Garner and Etta Garner, the plaintiffs in error, against Frank Trumbull, as receiver of the Union Pacific, Denver & Gulf Railway Company, the defendant in error, to recover damages on account of the death of their minor child, John C. Garner, who was run over and killed by a train which was being operated at the time for and in behalf of the receiver. The accident occurred in Las Animas county, Colo., about three miles from the city of Trinidad, and between that city and a town called "El Moro." In the immediate vicinity of the place where the accident occurred was a small settlement called "Chilili." The train which ran over the child was a coal train, consisting of a locomotive, seven empty cars, and a caboose. The complaint alleged, in substance, and there was evidence tending to show, that the parents of the child, who was about two years old, lived in a house which was about 256 feet from the track of the Union Pacific, Denver & Gulf Railway Company; that, during the temporary absence of the child's mother (she having gone on an errand to the house of her sister, who lived about a quarter of a mile distant), the child strayed away from home and from the custody of those in whose charge it had been left, and got on the railroad track, where it was run over and killed; that at the place where the accident occurred the track was perfectly straight, so that the child might have been seen from the direction in which the train approached for a distance of over 600 yards, the atmosphere being very clear; and that the track at that place, and for a considerable distance in either direction therefrom, had been used for a long time by the people and villagers,

who lived in considerable numbers along the right of way and on both sides thereof, as a footpath for the purpose of going to and from the city of Trinidad, and to and from their work, and to and from each others' houses, either on business or as visitors. At the conclusion of the plaintiffs' evidence, and without the production of any evidence on the part of the defendant, the court directed a verdict in favor of the defendant, which is the error complained of. This instruction was doubtless given on the theory that the child was a trespasser on the track of the railway company; that the engineer of the train, and other train operatives, on that account, owed the child no duty until they saw it; and that they were under no obligation to anticipate its presence on the track, or to be on the lookout either for it or other persons at the place where it was run over and killed. There are some adjudged cases which doubtless support such a view, but we are persuaded that it is not a correct rule, as applied to those portions of a railroad track which many people have been in the habit of using as a footpath for a considerable period, without objection on the part of the railway company, although without any express license to do so. Train operatives ought to be required to take notice of such usages and of conditions which actually exist, and to regulate their actions accordingly. A proper regard for the safety of persons and property intrusted to their charge, and for human life in general, should impel them to do so. When, therefore, for a considerable period, numerous persons have been accustomed to walk across a railroad track or along a railroad track between given points, either for business or pleasure, railroad engineers should take notice of such practice, and, when approaching such places, should be required to exercise reasonable precautions to prevent injuring them. Knowing the usage which prevails, they may reasonably be required to anticipate the probable presence of persons on or near the track at such places, and to be on the lookout when their attention is not directed to the performance of their other duties. The natural impulses of a person who has a proper regard for the welfare of others would prompt him to thus act. In the case of *Gulf, C. & S. F. R. Co. v. Washington*, 4 U. S. App. 121, 127, 129, 1 C. C. A. 286, and 49 Fed. 347, this court applied the same doctrine, in substance, to a case where stock had been killed on a railroad track; holding that in a country where great numbers of cattle ran at large, and the owners thereof were not bound to fence them in, nor railway companies to fence their tracks, railroad engineers were required to take notice of existing conditions, and exercise ordinary care to discover stock which might be on the track, and that they were justly chargeable with negligence for failing to do so. This rule is enforced in the state of Colorado; that is to say, it is held that when cattle are allowed to roam at large, and railroads do not fence their tracks, railroad engineers are bound to anticipate that cattle may stray on the track, and to keep a lookout for stock, and that railroad companies may be held liable to the owners of stock for a failure to exercise ordinary care in this respect. *Railway Co. v. Henderson*, 10 Colo. 1, 13 Pac. 910; *Railway Co. v. Patterson*, 4 Colo. App. 575, 577, 36 Pac. 913. In *Cahill v. Railway Co.*, 46 U. S.

App. 85-89, 20 C. C. A. 186, and 74 Fed. 287, the court said "that in places on railroad tracks where people are accustomed to come and go frequently in considerable numbers, and where, by reason of such custom, their presence upon the track is probable and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even to those who, in a strict sense, might be called trespassers." And in the case of *Felton v. Aubrey*, 43 U. S. App. 278-296, 20 C. C. A. 445, and 74 Fed. 359, the court of appeals for the Sixth circuit said that if a railroad company "has permitted the public for a long period of time habitually and openly to cross its track at a particular place, or use the track as a pathway between particular localities, it cannot say that it was not bound to anticipate the presence of such persons on its track, and was therefore not under obligation to operate its trains with any regard to the safety of those there by its license." In other jurisdictions the principle has also been enunciated that where a practice has become common of crossing a railroad track at a certain place, or using it as a pathway between certain localities, and such practice has grown up with the implied sanction of the railroad company, a duty is imposed upon its trainmen to anticipate the probable presence of pedestrians at such places, and to exercise ordinary care to avoid running them down. *Taylor v. Canal Co.*, 113 Pa. St. 162-175, 8 Atl. 43; *Barry v. Railroad Co.*, 92 N. Y. 289-292; *Roth v. Depot Co.*, 13 Wash. 525, 43 Pac. 641, and 44 Pac. 253, and cases there cited; *Frick v. Railway Co.*, 75 Mo. 595, 610; *Le May v. Railway Co.*, 105 Mo. 361, 16 S. W. 1049.

In view of the testimony tending to show the extent to which the track at the place where the accident occurred had been used by the public, and the length of time such use had continued, we think it was the province of the jury to decide whether such use had not been of such long standing and of such a nature as to impose on train operatives, on approaching that locality, the duty of anticipating the probable presence of persons on or near the track, and of exercising ordinary watchfulness to avoid injuring them. And, on the assumption that the jury would have found that the engineer or fireman was under an obligation to keep a lookout for persons who might be on or near the track, we are also of opinion that the testimony concerning the distance at which the child might have been seen before it was run over (one witness, who had measured the distance, saying that it could have been seen for 2,300 feet) rendered it necessary for the jury to determine whether the engineer and fireman did in fact exercise ordinary care to discover the child.

It is suggested in behalf of the defendant in error that the instruction given by the trial court may be sustained on the ground that the parents of the child were guilty of such contributory negligence as precludes a recovery, but we are of opinion that this proposition is untenable. The evidence showed that the child's father was absent from home on the day of the accident; that the mother, as before stated, had gone on an errand to her sister's house, a short distance away; that the child, in company with its three brothers and sisters, the eldest of whom was a girl eight years old, was

left playing in the front yard of the parents' house; and that a neighbor of the family, a full-grown man, was at work in the same yard where the children were at play. The child seems to have escaped, unobserved, and gone on the railroad track, some 256 feet from the house. On this state of facts, we are unwilling to say, as a matter of law, considering the station in life which these plaintiffs appear to have occupied, that they were guilty of contributory negligence. We think that this issue, like the others, was properly one for the jury. The judgment of the circuit court is therefore reversed, and the case is remanded for a new trial.

BOARD OF EDUCATION OF CITY OF HURON, S. D., v. NATIONAL LIFE INS. CO. OF MONTPELIER, VT. SAME v. PEASLEE. SAME v. MONADNOCK SAV. BANK OF EAST JAFFREY, N. H.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1899.)

Nos. 1,118, 1,119, and 1,132.

1. BOARD OF EDUCATION—CORPORATE NATURE—BONDS.

The board of education of the city of Huron, organized under Laws Dak. 1887, c. 47, is a body corporate, separate and independent from the city of Huron, and, in determining whether bonds issued by it increase the corporate indebtedness beyond the prescribed limit, its debts, and not the debts of the city, are to be computed.

2. SAME—LIMITATION OF INDEBTEDNESS.

Comp. Laws Dak. 1887, §§ 1149, 1150, providing that the limit of bonded indebtedness that may be incurred by a city or other municipal corporation shall be based on its assessed valuation for the year preceding the incurring of the indebtedness, do not apply to boards of education created under Laws Dak. 1887, c. 47, which is complete in itself, and restricts the power of boards of education to issue bonds to an amount not exceeding 3 per cent. of their assessed valuation, though it is silent as to what assessment shall be used in the computation.

3. SAME—COMPUTATION OF ASSESSED VALUATION.

Under Laws Dak. 1887, c. 47, restricting the power of boards of education to issue bonds to an amount not exceeding 3 per cent. of their assessed valuation, the computation must be based on the last completed assessment before the bonds were issued.

In Error to the Circuit Court of the United States for the District of South Dakota.

John L. Pyle (Henry C. Hinckley and H. S. Mouser, on brief), for plaintiff in error.

A. B. Kittredge (N. T. Guernsey, on brief in case No. 1,118), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These are suits which were brought separately by three different holders of coupons detached from municipal bonds which were issued by the board of education of the city of Huron, in the state of South Dakota, the plaintiff in error, hereafter termed the "board of education." The bonds from which the coupons were detached are of the same issue as those that were in-

volved in the case of National Life Ins. Co. of Montpelier v. Board of Education of City of Huron (decided by this court at May term, 1894) 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. 778, and for a full statement of the facts attending the issuance of the bonds, and the law under which the board of education acted, we refer to our statement and opinion in the former case. The National Life Insurance Company, Robert J. Peaslee, as assignee of the New Hampshire Trust Company, and the Monadnock Savings Bank of East Jaffrey, the defendants in error, who were the plaintiffs below in the respective cases, are confessedly bona fide holders of the coupons on account of which they respectively sue, having bought the bonds from which they were detached, in good faith, for value, and prior to maturity. To the complaints which were filed in the three cases the board of education filed answers, which were in substance the same, wherein it pleaded the same defenses, that were adjudged insufficient by this court in the former suit. *Id.* Demurrers to the several answers were interposed by the respective plaintiffs, which were sustained, and final judgments were thereupon entered in favor of the plaintiffs below.

It is unnecessary to discuss any of the questions which were considered and decided on the former occasion, and we shall refrain from doing so, as we have no doubt that the conclusions then announced were right, and as the facts pleaded in the present cases in no wise change the point of view from which any of the questions formerly considered were decided. It is claimed, however, on the present occasion, and the point must be regarded as new, that the board of education is not a separate and independent corporation, but a mere adjunct or department of the corporation known as the "City of Huron," and that in view of such fact all of the city indebtedness, as well as the indebtedness of the board of education, should be taken into account in determining whether the bonds in question, which aggregated altogether \$60,000, being 120 bonds of the denomination of \$500 each, when issued, increased the corporate indebtedness beyond the limit allowed by law. This contention we regard, however, as untenable. The board of education appears to have been organized under and in accordance with chapter 47 of the laws of the then territory of Dakota for the year 1887. This act appears in the Compiled Laws of Dakota of 1887, the most material provisions being found in sections 1808, 1810-1818, 1820, and 1824 of the Compiled Laws. Without setting out these sections in *hæc verba*, it will suffice to say that section 1808 provided that all cities thereafter organized under the general law for the incorporation of cities, to which class the city of Huron belongs, should be governed by the provisions of the act; that section 1810 provided that territory outside of the boundaries of any organized city or town, but adjacent thereto, might be attached to the city or town for school purposes upon application to the board of education of such city by a majority of the electors of the adjacent territory; that section 1811 declared, in substance, that the organization effected in pursuance of the provisions of the act should be a "body corporate," and should possess the usual powers of a corporation for public purposes, under the name of the board of educa-

tion of the city or town to which it appertained, and in that name might sue or be sued, and be capable of contracting and being contracted with, and of holding and conveying such real and personal estate as might come into its possession by will or otherwise, or that might be purchased under the provisions of the act. Section 1812 of the act provided, in substance, that the respective boards of education might require the city or town to which they appertained to convey to the board all school property within the limits of such city or town. Section 1814 provided, in substance, that the members of the board should be elected at an annual election, that each ward of the city should be entitled to elect as many members of the board as it had members in the city council, but that no member of the board of education should be a member of the city council, and that no member of the board of education should be a trustee of a town or village to which the board to which he was elected appertained, and that each board of education should have power to fill any vacancy which might occur in its body. Sections 1816 and 1817 provided, in substance, that the board of education should have power to elect its own officers, except the treasurer, and to make its own rules and regulations, and that at a regular meeting of each board, to be held in May of each year, each board should organize by the election of a president and vice president from among its own members, who should hold office for one year until their successors were elected and qualified, and that each board should also elect a clerk, who should hold his office during the pleasure of the board. Section 1818 made it the duty of the president to preside at all meetings of the board, to appoint all committees, and to sign all warrants for money ordered by the board to be drawn upon the treasurer for school moneys. Section 1820 made it the duty of the clerk to keep an accurate journal of the proceedings of the board, to take charge of its books and documents, and countersign all warrants for money which were drawn on the treasurer by order of the board. Section 1824 empowered the board of education to levy a tax for the support of the schools of the corporation for the fiscal year next ensuing, not to exceed in any one year 30 mills on the dollar, which levy, however, was required to be approved by the city council of the city to which the board appertained, when there was one. The clerk of the board was required to certify to the county clerk the amount of the tax levied when it was thus approved, and the county clerk, on receipt of the certificate, was required to place the tax on the tax roll of the county, to be collected by the treasurer of the county as other taxes.

It is manifest, we think, from an inspection of the various provisions of the act under which the board was organized, that it is in fact what section 1811 of the Compiled Laws of Dakota in unmistakable language declares it to be, namely, a "body corporate," or, in other words, a "distinct legal entity," having powers and functions to be exercised separate and apart from the city of Huron. The practice of creating such independent corporations within the territorial limits of other municipal corporations, like cities and towns, for the purpose of placing the control of schools and school property in the hands of persons who are not municipal officers or concerned in the

management of municipal affairs, is quite common, and we have no doubt that the act now in question was passed for that purpose. The claim that the issue of bonds was excessive, in view of the amount of the corporate indebtedness, is founded altogether upon the assumed identity of the two corporations,—that is to say, the city of Huron and the board of education,—and, as the assumption is false, it follows that the issue cannot be deemed excessive for that reason.

It is next insisted in behalf of the board of education that, in determining whether the issue of bonds was excessive, the assessment roll for the year 1889 must be consulted, rather than the assessment for the year 1890. The answer filed by the board of education alleged that the assessed valuation of property within the city of Huron for the year 1889 was \$1,575,001, that the assessed valuation for the year 1890 was \$3,365,008, and that the equalization of taxes for the year 1890 had been completed by the state board of equalization before the issuance of the bonds in question. The act creating boards of education, under which the plaintiff in error was organized, provided, with respect to issuing bonds for school purposes (vide section 1832, Comp. Laws 1887), that “no corporation shall issue bonds in pursuance of this act in any sum greater than three per cent. of its assessed valuation.” In view of the allegation of the answer last mentioned, showing that the assessment for the year 1890 had been completed before the bonds were issued, and the amount of that assessment, it is not denied that they were within the limit of indebtedness fixed by law, if section 1832 is controlling. It is urged, however, by the plaintiff in error, that another section of the Compiled Laws, namely, section 1149, is applicable to the case. This latter section of the Compiled Laws of 1887, and the one following (section 1150), are sections 1, 2, and 3 of an act that was passed by the territorial legislature of Dakota, in the year 1887, with reference to “bonds of municipal corporations,” which act was designed, apparently, to set a limit to the bonded indebtedness that might be contracted by a city or other municipal corporation of that kind, to wit, a town or village. It provided, in substance (vide sections 1149, 1150, Comp. Laws Dak. 1887), that the bonded indebtedness of any city or municipal corporation should not exceed 4 per cent. of its assessed valuation, as shown by the returns of the assessor for the year next preceding the time when the indebtedness should be incurred, and that the bonds therein referred to should be issued by the common council or board of trustees of any city or municipal corporation only upon a majority vote of the qualified electors of such city or corporation at an election called for that purpose. The claim is that the phrase “municipal corporation,” as used in this act, includes boards of education of the class to which the plaintiff in error belongs, and that when, on October 4, 1890, the board issued the bonds in suit, it should have been governed by the assessment roll of 1889, that being the assessment of the preceding year, rather than by the assessment of 1890, although the latter assessment was completed before the bonds were issued. We entertain a different view. We are of opinion that the act under which the

plaintiff in error was organized is complete in itself; that its powers and duties, as well as the limitations upon its power to issue bonds, are contained in the act under which it became a body corporate; and that, when section 1832 of that act restricted the power of boards of education to issue bonds to an amount not exceeding 3 per cent. of their "assessed valuation," it was intended that the computation should be based on the last completed assessment before the bonds were issued, which in the case at bar was the assessment of 1890. Sections 1149 and 1150 expressly provide that the bonds therein referred to shall be issued by the common councils or boards of trustees of cities or municipal corporations, no reference being made to boards of education, like the plaintiff in error, which are expressly empowered to issue bonds for school purposes in their own name. Vide Comp. Laws 1887, § 1832. In view of this fact, it seems clear that sections 1149 and 1150 were only intended to apply to those municipal corporations, such as cities or villages, which were governed by common councils or boards of trustees. If these two acts are thus construed as independent measures relating to different subjects, the one to boards of education, and the other to the bonded indebtedness of cities and villages, they are consistent in their several provisions, and neither act limits or controls the other. If the board of education is subject to the limitation found in section 1149, that computations for the purpose of issuing bonds must be based on the assessment "for the year next preceding the time" when they are issued, then we perceive no reason why it may not with equal reason be claimed that it was subject to other limitations found in the same section, in which event it was entitled to issue bonds to the extent of 5 per cent. of the assessed valuation for the year 1889, instead of 3 per cent., or, in other words, to issue bonds to the amount of \$78,750, since section 1149 was amended by an act approved on February 27, 1890, by raising the limit from 4 per cent. of the assessed valuation to 5 per cent. Vide Sess. Laws S. D. 1890, c. 59. In this aspect of the case the result would be that the plaintiffs below were clearly entitled to recover. They were innocent purchasers of the bonds for value. The bonds showed on their face that the total issue was less than \$78,750, and, not having actual knowledge of any other or greater indebtedness, the plaintiffs were entitled to rely on the recital, which each bond contained, "that the total amount of this issue of bonds, together with all other outstanding indebtedness of said board of education, does not exceed the statutory or constitutional limitation." Board Com'rs Gunnison Co. v. E. H. Rollins & Sons (recently decided by the supreme court of the United States) 173 U. S. 255, 19 Sup. Ct. 390; *Id.*, 49 U. S. App. 399, 411, 412, 26 C. C. A. 91, and 80 Fed. 692; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216. Without pursuing the subject at greater length, it is sufficient to say that we are satisfied that the judgments below were for the right party, and they are therefore affirmed.

WESTERN COAL & MINING CO. v. BERBERICH.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,094.

1. REVIEW—CONFLICTING EVIDENCE.

The court will not review the verdict of a jury where there is some evidence to sustain it, although it may be against the apparent weight of evidence.

2. SAME—OPINION EVIDENCE—SUFFICIENCY OF OBJECTION.

An objection to the opinion of a witness as irrelevant and incompetent is too general and indefinite.

3. EXPERT TESTIMONY—HYPOTHETICAL QUESTION.

Where a question asked an expert witness is framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them.

4. SAME.

An expert may be asked a question involving a point to be decided by the jury.

5. TRIAL—REQUESTS TO CHARGE.

Where the charge in chief was a clear and accurate statement of the law, covering every aspect of the case, it was proper to refuse special requests.

6. SAME—SINGLING OUT PARTICULAR EVIDENCE.

The court properly refused requests to charge that singled out and gave undue prominence to particular items of evidence.

7. DUTY OF MASTER—OPERATION OF MINES.

It is the duty of a master operating a mine to use all appliances readily attainable, known to science, for the prevention of accidents arising from the accumulation of gas or other explosive substances.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This action was brought by Joseph Berberich, plaintiff below, against the Western Coal & Mining Company, defendant below, to recover damages for personal injuries sustained by the plaintiff, while working for the defendant as a coal miner in its coal mine, by reason of an explosion of gas in the mine. The cause of action is thus stated in the complaint: "That prior to the 18th day of December, 1893, defendant employed and engaged plaintiff to work in said coal mine of defendant at Denning, Franklin county, Arkansas, as a miner to dig and mine coal; that by reason of said employment plaintiff was by defendant required to go down in said mine a great distance in the earth, and plaintiff says that, by reason of defendant's so employing him to work in said mines as aforesaid, it then and there became and was the duty of defendant to furnish plaintiff a reasonably safe place to work in said mine as said miner; yet plaintiff says that defendant wholly disregarded its duty towards plaintiff in that behalf, and that on the said 18th day of December, 1893, while plaintiff was engaged at work for defendant as such miner in one of the rooms of said mine at Denning, Arkansas, the defendant, by and through its agents and servants, so carelessly, negligently, and wrongfully conducted and managed said room in said mine, in this, that defendant failed to provide a sufficient amount of fresh air in said mine and room to keep them free from gas, fire damp, or other combustible matter unknown to plaintiff, and by reason of his failure aforesaid allowed the same to accumulate in said room and mine, which the defendant then well knew, or by the exercise of ordinary care and diligence, on the part of defendants and its agents, should have known; and that on the said 18th day of December, 1893, without any fault or negligence on plaintiff's part whatever, the said gases, fire damp, and combustible matter exploded, and by reason of said explosion plaintiff was burned, wounded, crippled, disfigured, and maimed for life."

The defendant denied the negligence, alleged the accident was caused by the negligence of the plaintiff's fellow servants, and that the plaintiff was guilty of contributory negligence. There was a trial before a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error. The following are some of the leading facts which the testimony tended to establish: Four or five days before the explosion occurred, a rock 15 to 18 feet long, 2 feet wide, and 18 inches deep in the middle, tapering to a feather edge, fell from the roof of the room in which the plaintiff and one Noll were working, leaving what miners call a "horseback." The fall of this rock was followed by a sudden flow of gas into the room, on account of which the pit boss gave orders not to work in the room on that and the following day. The third day after the explosion the pit boss examined the room, said there was gas in it, and gave them Davy or safety lamps to work with, which they used that day and the next. The next day was Sunday, and they did not work. About 7 o'clock on Monday morning the plaintiff and Noll, and Brown, the pit boss, met at the mine. Brown went into the room, examined it, and then called the plaintiff and Noll in and told them there was no danger, and to go to work with the miners' common open lamps, but to keep their lamps down, and not carry them on their hats. They went to work as directed, and worked until 3 o'clock in the afternoon, when a lump of coal which they had wedged off of the roof of the room fell to the floor, carrying with it a piece of slate two or three feet square and half an inch thick, and immediately the explosion of gas occurred. The main controversy between the parties was over the question whether the explosion was the result of a sudden rush of gas released by the removal of the lump of coal and slate from the roof, or whether it was produced by the sudden agitation of the gas already in the room by the falling of the coal and slate, or from the increased volume of gas resulting from its gradual or normal increase owing to the defective ventilation of the room resulting from the negligence of the defendant or its pit or fire boss.

The court gave the following instructions at the defendant's request: "If the jury believe from the evidence that the defendant's fire boss inspected plaintiff's room on the morning of the day plaintiff was injured, before plaintiff went to work therein, and the fire boss told plaintiff the room was safe, but to work with his lamp on the ground; that plaintiff entered the room about 7 o'clock in the morning, and continued to work therein without accident or injury up to about 3 o'clock in the afternoon; that the quantity of air circulating through plaintiff's room was the same from the time he began work until the time of the explosion; and that while working in that room, at about the hour of 3 o'clock in the afternoon, wedging the top coal, a piece of rock or slate fell, and that the falling of this rock exposed the gas feeders, and that instantly upon the fall of this rock the explosion took place,—then, under this state of facts, no such negligence as is charged in plaintiff's complaint is shown as entitles plaintiff to recover, provided you also find that the gas which exploded was gas coming from this feeder, or that whatever gas was in the room or working place would not have exploded except for the gas coming from the feeder. If the jury believes from the evidence that the explosion causing the injury for which plaintiff sues was produced by the unexpected developing and exposure of the gas, or the sudden outburst of gas caused by the fall of rock or slate from the roof of the room in which plaintiff was at work, then such explosion was an accident for which defendant is not liable, and the jury should find a verdict for the defendant. The law does not impose on the defendant company the duty and burden of insuring absolutely its employes against casualties and injuries, for there are certain dangers incident to, and inseparable from, the nature of such work, known to exist, or to be ordinarily attendant thereon, the risk of which the employé takes upon himself, and for which risk the law presumes he receives sufficient compensation from the wages paid him. For instance, if, in such a mine, there should be a sudden or unforeseen uncovering of a gas fissure, or feeder (as called by the miners), or, if there should be ever present in such a mine a certain per centum of fire damp or gas, which no reasonable foresight or exertion of the company can discover or prevent, and there should be more or less exposure to casualties on account of such incident, it would be of the risks assumed by the employes."

Ira D. Oglesby, for plaintiff in error.

Sam R. Chew (Henry L. Fitzhugh, on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). At the close of the testimony the defendant preferred a request for a peremptory instruction to the jury to return a verdict for the defendant, upon the ground that the testimony was not sufficient to warrant a verdict for the plaintiff. The court refused to give the instruction, and this ruling is the first assignment, and apparently the one chiefly relied on, as some 60 pages in the brief of 73 pages are taken up with its discussion. The testimony as to the facts was voluminous and conflicting, and the opinions of the experts, as commonly happens, supported the contention of the party calling them. There is no ground for the contention that there was no evidence to support the verdict, at most it could only be claimed that the verdict was against the apparent weight of the evidence; but that gives this court no warrant to meddle with the verdict of the jury. To do so would be an invasion of the province of the jury, and a practical denial of the right of trial by jury. It was the exclusive province of the jury to pass on the credibility of the witnesses, and, after rejecting the testimony of those whom they discredited, the great preponderance of the evidence may have been with the plaintiff.

David Allister, an old and expert miner, who had filled the position of fire boss in mines, and was familiar with the gas that accumulates in mines, and the causes of its accumulation, the dangers resulting from it, and the proper means of expelling it, and who was evidently familiar with the facts of the case and the contentions of the respective parties, was asked this question by the plaintiff:

"Take the character of room that we have spoken of,—that is, fifty feet back from the side entry, where a man is to enter and work towards the face of the working place, getting out the coal, and a horseback should fall out, say, 15 feet to 18 feet long diagonally across the room, that would be anywhere from 16 to 18 inches deep and 15 to 18 feet long across the room, left in that condition, and the fire boss came into the room in the morning, say, about 7 o'clock, with a safety lamp, and should discover some gas in that room or horseback, and he should inform [—] that [there] were to work there that they might go to work with their lamps down; then whether or not that would be an ordinary safe place to work."

To which question counsel for the defendant objected "because irrelevant and incompetent; and because the fact whether or not the room was a safe place to work was a question of fact for the jury, and not a matter of opinion for the witness, and because there is no proof upon which to base such hypothetical question, and the hypothetical question does not state the facts testified to in the case." The objection was overruled, and this ruling is assigned for error.

The question seems to be imperfectly reported. We will assume the record contains the substance of it. The question was probably not framed with as much nicety and precision as it might have been, but it is also true that no two lawyers would have framed the question in the same language; and, if the form of such questions is to be subjected to hypercriticism, very few of them will survive the

test. If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such an administration of the law would be intolerable. "But there is nothing," said Judge (now Mr. Justice) Brown, of the supreme court of the United States, "which tends to belittle the authority of the courts or to impair the confidence of the public in the certainty of justice as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. * * * Better by far the practice of the English courts and the federal supreme court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits,—errors which usually obviate the necessity of a second trial." Report American Bar Association, 1889, p. —. Though these remarks of the learned justice were not uttered from the bench, they express the rule upon the subject by which appellate courts should be guided, and they have our approval. There was a map of the room in the mine in which the accident occurred and of the adjacent rooms, which was before the witness, and he had heard the testimony tending to support the theories of the respective parties, and it was upon the supposition that the facts were as plaintiff claimed them to be that the witness' opinion was based. It is, in substance, the same question which the defendant propounded to its expert witness, by which it sought to and did elicit answers the very reverse of the answers given by the plaintiff's witness.

It was not objected at the trial, and it is not claimed here, that the witness was not qualified to testify as an expert, and it was not claimed in argument or in the brief that the facts of the case were not such as to make expert, or more properly opinion, testimony admissible. Indeed, it is expressly stated in the brief of the counsel for plaintiff in error:

"Had counsel put the questions in proper form, and embodied in them all the material facts testified to by the witnesses, they might have been asked to give their opinion as to the cause of the explosion."

But the form of the question will stand the test against any of the objections brought against it at the trial, which are all that can be considered by this court. It was objected to (1) "because irrelevant and incompetent," which is too general and indefinite to be dignified with the title of an exception (*Insurance Co. v. Miller*, 19 U. S. App. 588, 8 C. C. A. 612, 614, and 60 Fed. 254; *Railway Co. v. Hall*, 32 U. S. App. 60, 14 C. C. A. 153, and 66 Fed. 868); (2) "because the fact whether or not the room was a safe place to work was a question of fact for the jury, and not a matter of opinion for a witness;" as we have seen, this objection was properly abandoned on the argument and in the brief, and if it had been insisted on it would have been of no avail (*Rog. Exp. Test.* § 120; *Railway Co. v. Edwards*, 49 U. S. App. 52, 24 C. C. A. 300, and 78 Fed. 745); (3) "be-

cause there was no proof upon which to base such hypothetical question," but there was, as shown by the record, a large volume of proof upon the subject; and (4) "that the hypothetical question does not state the facts testified to in the case," but the law does not require that it should. The testimony of a witness who testifies to opinions is founded either on personal knowledge of the facts, or else is based on facts shown by the testimony of others, or on a hypothesis specially framed on certain facts assumed to be proved for the purpose of the inquiry. Where the opinion of the witness is based on facts testified to by others, it is not necessary that he should have heard all the evidence. It is sufficient if it appears he has heard all the testimony which is material to the subject of the inquiry. And when the question is framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them. It is not essential that he should state the facts as they actually exist. Rog. Exp. Test. §§ 24, 27, and cases cited. And it is no objection that an expert is asked a question involving the point to be decided by the jury. *Transportation Line v. Hope*, 95 U. S. 297; *Railroad Co. v. Meyers*, 24 U. S. App. 295, 11 C. C. A. 439, 442, and 63 Fed. 793.

The defendant preferred several requests for charges which were rightly refused, for two reasons: First, the charge in chief was a remarkably clear, logical, and accurate statement of the law of the case, and was comprehensive enough to cover every aspect of the case, under the evidence; and, second, the special requests singled out particular items of the testimony to the exclusion of all other evidence in the case, which the jury were bound to consider in forming their verdict. The practice of giving undue prominence to isolated facts in the case by singling them out and making them the subject of special instruction is vicious, and has been repeatedly condemned by the supreme court. *Smith v. Condry*, 1 How. 28, 36; *Railway Co. v. Ives*, 144 U. S. 408, 433, 12 Sup. Ct. 679. It gives undue prominence to the facts thus singled out, and tends to minimize and disparage other facts of equal or greater importance, and unnecessarily burdens the jury with instructions which tend to confuse and mislead them. Where the charge in chief comprehends all the facts the jury can rightfully consider in making up their verdict, all special requests to charge as to the legal effect of isolated facts ought to be rejected.

It is assigned for error that the court in the course of its charge told the jury:

"It was the duty of the defendant to use all appliances readily attainable, known to science, for the prevention of accidents arising from the accumulation of gas or other explosive substances in its mines."

In the case of *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, which was an action to recover damages for personal injuries resulting from the explosion of powder and caps in an iron mine, the court discusses at length the duty of mine owners to their employes, and laid down the following rule:

"Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all

reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

It will be observed that the clause of the court's charge excepted to is "laid down as a legal principle" by the supreme court. The charge is not that the defendant must use "all appliances attainable," etc., but all appliances "readily attainable." This is imposing a very reasonable burden, for "readily," according to the dictionaries that are accepted authority, means "quickly, speedily, easily [Century Dictionary]; at hand, immediately available, convenient, handy [Standard Dictionary]." In effect, the contention of the plaintiff in error is that the court should have charged the converse, and told the jury that in occupations attended with great and unusual danger there is no obligation resting on the employer to use the appliances known to science for the prevention of accidents, although they are readily and easily attainable and immediately available, convenient, and handy. The law has not yet reached that degree of barbarity. The case of *Pacific Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, does not conflict at all with the later case of *Mather v. Rillston*, *supra*. The former related to an "unblocked frog" on a railroad track, into which the deceased voluntarily placed his foot twice, after being admonished of the danger. "Unblocked frogs" are open and visible, and the danger connected with them known and avoidable by employees and all others. In the case of coal mines, employees can very often neither see nor detect the danger they are exposed to, and their safety is absolutely dependent on the intelligent and constant use of methods and appliances more or less scientific, over which they have no control. There would seem to be room, therefore, for a well-grounded distinction between an "unblocked frog" on a railroad track and a coal mine. But if there is not, and the opinions in the two cases conflict, the doctrine of *Mather v. Rillston*, being the later case, must prevail. This court has approved the rule in *Mining Co. v. Ingraham*, 36 U. S. App. 1, 17 C. C. A. 71, and 70 Fed. 219, and in principle applied it in *Railway Co. v. Jarvi*, 10 U. S. App. 439, 3 C. C. A. 433, and 53 Fed. 65, and its soundness is no longer open to question. There are other assignments, but such as do not fall within the reasoning of those we have decided are not of any general importance, and have no merit. They have all been carefully examined. The judgment of the circuit court is affirmed.

NATIONAL LOAN & INVESTMENT CO. v. ROCKLAND CO.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,123.

1. PROMISSORY NOTES OF CORPORATIONS—POWER TO EXECUTE — PRESUMPTION FROM SIGNATURES OF OFFICERS.

A private trading corporation has the implied power to issue promissory notes, and one who purchases notes executed in behalf of such a corporation, and signed by its officers, may rely on the presumption that such officers have discharged their duty, and have not exceeded their authority in executing them.

2. REVIEW—ESTOPPEL OF PARTY TO ALLEGE ERROR—FINDING OF REFEREE.

A party cannot assign as error a finding of a judge or referee made at his request.

3. CORPORATIONS—COMPENSATION OF OFFICERS FOR PAST SERVICES—POWER OF DIRECTORS TO FIX.

Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor; and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them; but such officers, who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable but indefinite compensation therefor, may recover as much as their services are worth, and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.

4. SAME—NOTE GIVEN FOR SALARY OF OFFICER.

Where, after the organization of a corporation, it was agreed and understood at an informal meeting of all the stockholders that the officers should be paid a reasonable compensation for their services, and by a by-law the board of directors was given power to fix the compensation of officers, their subsequent action in voting the president a reasonable salary for past services was legal, and a note of the corporation executed to him therefor was not without consideration.

In Error to the Circuit Court of the United States for the District of Minnesota.

George D. Emery (Charles A. Willard, on the brief), for plaintiff in error.

M. H. Boutelle (N. H. Chase, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action on a promissory note for \$3,747.64, dated October 1, 1896, signed, "The National Loan and Investment Company, by S. P. Howard, Vice Pres., A. B. Hush, Sec. and Treas.," payable to the order of Henry S. Jenkins, and indorsed by him to the defendant in error, the Rockland Company, a corporation, which brought the action and alleged these facts. The National Loan & Investment Company, the plaintiff in error, is a corporation; and it answered the complaint of the Rockland Company that it never made the note, and that it was without consideration and void. A jury was waived, and the case was tried by a referee, who made a special finding of the facts and of his con-

clusions of law. Exceptions were filed to these findings and conclusions, but they were overruled, and a judgment was rendered against the plaintiff in error for the amount of the note and interest.

It is assigned as error that the referee admitted in evidence the note in suit, and other notes of which this was the last renewal, over the objections of the investment company that they were incompetent, that no authority had been shown for either of the officers to execute them, and that no consideration for them had been proved. But the notes themselves were *prima facie* evidence of a valuable consideration. They recited that they were made for value received. When these objections were made, the defendant in error had proved that these notes bore the genuine signatures of the vice president and treasurer of the corporation, that the payee named in them was its president, and that the investment company was incorporated by the terms of its articles to buy, own, sell, and deal in all kinds of property, and to do any lawful business necessary or expedient for this purpose. A private trading corporation has the implied power to issue promissory notes. The signatures of its officers thereon are presumptive evidence of their authority to make negotiable paper on its behalf. The acts of the officers of corporations, within the scope of their powers, are *prima facie* evidence of the acts requisite to give them the necessary authority. One who purchases the notes of a corporation may rely upon the presumption that its officers have discharged their duty, and have not exceeded their authority in executing them, and the law will not deprive him of this presumption when he presents them to the courts. *Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co.*, 159 Mass. 505, 507, 508, 34 N. E. 1083; *City of Lincoln v. Sun Vapor Street-Light Co.*, 8 C. C. A. 253, 257, 59 Fed. 756, 760, and 19 U. S. App. 431, 438; *Thomp. Corp.* §§ 5730, 5741.

Another error alleged is that, in the absence of any evidence in support of such a finding, the referee found the facts set forth in the second paragraph below, which we quote from his report, and the court overruled an exception to that finding.

"(1) That the incorporators of said defendant, the National Loan & Investment Company, were Valentine G. Hush, Henry S. Jenkins, Alfred B. Hush, and Stephen B. Howard, and that, at the time of the agreement or understanding next hereinafter referred to, said incorporators owned the entire capital stock of said corporation. (2) That subsequent to the organization of said corporation, and at or about the time of the commencement of its corporate business, an informal meeting of said incorporators was held, whereat all of said incorporators were present, and whereat it was understood and agreed by and between all thereof that the officers of said corporation should receive from said corporation reasonable compensation for the services performed by them as such officers; and said agreement was not spread on the corporate records, save and excepting as it may appear to have been contemplated in the by-law next referred to. That no resolution was adopted, either by the incorporators or board of directors, fixing the amount of the salaries of the officers in advance."

An examination of the record, however, discloses the fact that the defendant in error cannot be permitted to urge this objection. Its counsel expressly requested the referee to make this finding. Parties cannot avail themselves of errors which they have themselves

committed, or which they have induced the referee or judge who tried their case to make. *Walton v. Railway Co.*, 6 C. C. A. 223, 225, 56 Fed. 1006, 1008; *Chase v. Driver*, 92 Fed. 780; *Long v. Fox*, 100 Ill. 43, 50; *Nitche v. Earle*, 117 Ind. 270, 275, 19 N. E. 749; *Dunning v. West*, 66 Ill. 366, 367; *Noble v. Blount*, 77 Mo. 235; *Holmes v. Braidwood*, 82 Mo. 610, 617; *Price v. Town of Breckenridge*, 92 Mo. 378, 387, 5 S. W. 20; *Fairbanks v. Long*, 91 Mo. 628, 633, 4 S. W. 499.

It is contended that the facts found by the referee do not warrant his conclusion of law that the defendant in error was entitled to a judgment upon the note. The position here urged is that the note was given for back pay voted to the president of the corporation by the board of directors of which he was a member, that this was an attempt to create a debt of the company by a mere vote of the board without any consideration, and that this act was beyond the powers of the directors and void. The directors of a corporation are trustees for its stockholders. They represent and act for the owners of its stock. Ordinarily the employment of a servant by a corporation raises the implication of a contract to pay fair wages or a reasonable salary for the service rendered, because it is the custom to pay such compensation, and men rarely sacrifice their time and expend their labor or their money in the service of others without reward. Directors of corporations, however, usually serve without wages or salary. They are generally financially interested in the success of the corporation they represent, and their service as directors secures its reward in the benefit which it confers upon the stock which they own. In other words, the custom is to pay the ordinary employes of corporations for the services they render, but it is the custom of directors of corporations to serve gratuitously, without compensation or the expectation of it. The presumption of law follows the custom. From the employment of an ordinary servant, the law implies a contract to pay him. From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or an agreement to the contrary, when directors are discharging the duties of other offices of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer. Moreover, as the members of boards of directors act in a fiduciary capacity, they are without the power or authority to dispose of the property of the corporation without consideration. Consequently they may not lawfully vote back pay to an officer who has been serving the corporation voluntarily without any agreement that he shall receive any reward for the discharge of his duties. It is beyond their powers to create a debt of the corporation by their mere vote or resolution. Some authorities have gone so far as to hold that officers of a corporation, who are also its directors, cannot recover for the discharge of their duties unless their compensation is fixed by a by-law or by a resolution of the board before their services are rendered. *Gridley v. Railway Co.*, 71 Ill. 200, 203; *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118, 121; *Wood v. Manufacturing Co.*, 23 Or. 23, 25, 23 Pac. 848. The fact is, however, that, in the active

and actual business transactions of the world, many officers of corporations, who are also members of their boards of directors, spend their time and their energies for years in the interest of their corporations, and greatly benefit the owners of their stock, under agreements that they shall have just, but indefinite, compensation for their services. We are unwilling to hold that such officers should be deprived of all compensation because the amounts of their salaries were not definitely fixed before they entered upon the discharge of their duties. A thoughtful and deliberate consideration of this entire question, and an extended consideration of the authorities upon it, has led to the conclusion that this is the true rule: Officers of a corporation, who are also directors, and who, without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor; and it is beyond the powers of the board of directors, after such services are rendered, to pay for them out of the funds of the corporation, or to create a debt of the corporation on account of them. *Jones v. Morrison*, 31 Minn. 140, 147, 16 N. W. 854; *Blue v. Bank*, 145 Ind. 518, 522, 43 N. E. 655; *Doe v. Transportation Co.*, 78 Fed. 62, 67; *Association v. Stonemetz*, 29 Pa. St. 534; *Railroad Co. v. Ketchum*, 27 Conn. 170; *Road Co. v. Branegan*, 40 Ind. 361, 364. But such officers, who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite, compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices. *Missouri River Co. v. Richards*, 8 Kan. 101; *Rogers v. Railway Co.*, 22 Minn. 25, 27; *Railroad Co. v. Tiernan* (Kan. Sup.) 15 Pac. 544, 553; *Stewart v. Railroad Co.*, 41 Fed. 736, 739; *Rosborough v. Canal Co.*, 22 Cal. 557, 562.

This rule is well illustrated in the two cases from Minnesota which we have cited. In *Jones v. Morrison*, 31 Minn. 140, 147, 16 N. W. 854, the board of directors voted \$39,375 back pay to the president of the corporation, who had served as such under a previous understanding that he should receive nothing for his services, and \$7,200 to the vice president, who had served for a stipulated salary, which had been paid. The supreme court of Minnesota held that this act of the board was ultra vires, and that the notes of the corporation issued in pursuance of it were void. On the other hand, in *Rogers v. Railway Co.*, 22 Minn. 25, 27, that court held that a member of the board of directors of the railway company, who had been chosen by the board, and who had served as secretary under a by-law which authorized the directors to fix the compensation of the officers, and under an implied agreement with the corporation that he should receive a fair salary for his services, was entitled to recover as much as he had earned, although the amount of his compensation had never been fixed or allowed by the board, either before or after he rendered his services.

Under the rule which we have announced, and thus illustrated,

the objection of the plaintiff in error to the conclusion of the referee and the judgment of the court in the case in hand cannot be sustained. These essential facts were found by the referee: The defendant in error was incorporated on September 24, 1886. At the time of the commencement of its corporate business, but after its organization, all its incorporators, and all the persons interested in it, understood and agreed with Henry S. Jenkins, who was chosen its president, that all the officers of the corporation should receive from it reasonable compensation for the services which they performed, and a by-law of the corporation was adopted by its stockholders at the time of its organization to the effect that the board of directors should fix the salaries of all the officers of the corporation. Jenkins served as president from October 14, 1886, until after the year 1892. On October 30, 1890, he presented to the board of directors a claim for \$600 per annum for his services as president from September 1, 1887, to September 1, 1890; and his claim was allowed by the board, and regularly entered upon the books of the corporation. On May 18, 1892, he presented a claim for \$600 for his services as president from September 1, 1890, to September 1, 1891; and this claim was allowed by the board of directors at their annual meeting on that day, and was duly entered on the books of the corporation. At the times when these claims were allowed, there was an oral agreement between Jenkins and the board that they should draw the current bank rate of interest, which was then 8 per cent. per annum, until they were paid. On October 2, 1893, the investment company made a promissory note for the amount due upon these claims, payable one year from that date, with interest at 8 per cent. per annum, and delivered it to Jenkins. The note in suit is the last renewal of the note thus made. At the times when the claims of Jenkins were allowed, Jenkins, Hush, and Howard were the members of the board of directors, and the claims were unanimously allowed; so that the vote of Jenkins was unnecessary to pass them, and his presence was not necessary to form a quorum of the board. The corporation had no creditors, and owed no debts. The directors owned a majority of the stock of the corporation. Some of this stock had been pledged, but the pledgees had not caused it to be transferred to their names, and were not entitled to vote it. No objection was ever made by the corporation, or by any one in its behalf, to the acts of the directors in allowing the claims of Jenkins, until this action was brought, in 1897; and all the acts of the directors were done in good faith, and without fraud. The defendant in error was the owner of the note in suit when this action was brought. In this state of the facts, the note cannot be said to be without consideration, nor can the acts of the board of directors be justly held to have been beyond their powers or void. The stockholders expressly empowered the board of directors to fix the salaries of all the officers of the corporation. This by-law itself raises a strong presumption that the owners of the corporation intended to pay its officers for their services. The board of directors could not fix the salaries of officers, if no salaries were to be paid. When to this by-law is added the express finding of

the referee that it was understood and agreed at the inception of the business of the corporation between all its incorporators and Jenkins, who was chosen president, that he should receive reasonable compensation for his services in that office, and the further fact that he served under this by-law and agreement, and his salary was fixed and allowed without objection thereunder, the conclusion is irresistible that his right to compensation rests upon a valid implied contract between him and all the parties interested in the corporation made before his services were rendered. The acts of the board in fixing the amount of his salary were expressly authorized by the by-law, and were naught but the performance of the prior agreement by which the corporation was bound. The note was not without consideration, and the judgment upon it was right.

There are 48 assignments of error in the record in this case. We have carefully examined them all. The conclusions at which we have arrived upon those already discussed are decisive of all the material questions in the case, and it is unnecessary to extend this opinion further. The assignments which we have not discussed were either intended to present the questions considered in other forms, or are without substantial merit. The judgment below must be affirmed, and it is so ordered.

SCOTT et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. May 2, 1899.)

No. 774.

1. RAILROADS—RIGHT OF WAY—ADVERSE POSSESSION—CONTRACTS.

That a railroad did not for the statutory period adversely occupy its entire right of way is not material, where the contract under which the right of way was acquired has been fully complied with; the title under the contract alone being sufficient.

2. SAME—EVIDENCE—ESTOPPEL.

Evidence of a partial occupancy of a right of way, to show that there was not an adverse holding of the remainder, is not admissible, where the suit, at its inception, was one for damages for occupancy of the entire right of way, in violation of the contract under which it was acquired.

In Error to the Circuit Court of the United States for the Eastern District of Texas,

This case is substantially as stated by plaintiffs in error as follows:

"This action was brought on the 12th day of January, 1893, in the district court of Harrison county, Tex., and was removed to the circuit court of the United States, at Jefferson, in the Eastern district of Texas. The plaintiff in error sued to recover damages for the abolition or removal of the depot known as 'Scottsville,' in Harrison county, Tex. The Southern Pacific Railway Company and W. T. Scott, in the year 1856, entered into a verbal contract, by which said Scott agreed to allow the said company to have the use of land for a right of way across his farm of 5,000 acres, if the company would establish a depot, with a regular agent, at the point on said lands then and now known as 'Scottsville,' and, further, if said company would permanently maintain said depot at said place, and furnish to the said William T. Scott free passage on the cars of said company for himself. The right of way was laid out 100 feet wide and 700 yards long, and used by the company for its track

from that time. The company established and maintained said depot, under and in accordance with said contract, until April, 1892, when the same was abolished. The abolition of said depot had caused the plaintiff a damage of \$50,000. The plaintiff prayed judgment for said damages, or, in the alternative, for the land, if the damages could not be awarded. It was shown that the defendant in error had succeeded, by consolidation under legislative permission, to all of the rights of the Southern Pacific Railway Company. The acts of the legislature of the state of Texas, approved May 24, 1871, November 25, 1871, and May 2, 1873, relative to the consolidation of the Southern Pacific Railway Company and defendant, were read in evidence, and may be copied in the briefs of counsel in the appellate court; the Texas & Pacific Railway Company succeeding to all of the rights of the Southern Pacific Railway Company. The plaintiff in error alleged that W. T. Scott had died, and that he acquired the Scott farm by purchase, and owned the land at Scottsville, and was entitled to the damages. Subsequently the other heirs of W. T. Scott intervened, and claimed that they and plaintiff in error were all of the heirs at law of W. T. Scott, and that they were entitled to the recovery of the damages or the land. The heirs, as such, now prosecute the case. The case was tried in the circuit court, and that court held that the plaintiffs in error could not recover any damages for the abolition of the depot, but that they were entitled to recover the value of the land occupied as a right of way, and assessed the damages according to the rule obtaining in condemnation proceedings when lands are taken for right of way. The circuit court of appeals reversed this judgment (23 C. C. A. 424, 77 Fed. 726), and held: (1) That the company had acquired the right of way by adverse use and prescription, and therefore plaintiffs could recover neither the land nor pay for same; (2) that the defendant in error had complied with its contract, and was not amenable to any suit whatever. This ruling was based on *Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846.

"Before the case was tried the second time in the circuit court, the plaintiffs in error filed the second supplemental petition (a replication) to plea of limitation and prescription, in which they averred that the defendant in error had actually occupied and used only a strip of land 25 feet wide, and not a strip 100 feet wide, and that defendant would be entitled to recover on its plea of prescription only the strip 25 feet wide. On the second trial the defendant relied on the general demurrer and the following answer: 'Defendant says that plaintiffs cannot recover in this cause, because the evidence shows that this defendant company and its predecessors have substantially complied with the contract set out in plaintiffs' petition, by keeping the station referred to at the place of Scottsville fully equipped and repaired and operated from the year 1856, continually, to April, in the year 1892, whereby the defendant has fully complied with said contract sued on, and the plaintiffs cannot recover.' The court made the following ruling on the demurrer: 'This day came on to be heard the demurrer of the defendant, and the court sustains said demurrer, and holds that the contract set up had been complied with by the defendant, and that no damages for removal of station can be recovered.' To this ruling the plaintiff and interveners excepted. On the first supplemental petition, asking pay for the land used as a right of way, the court made this ruling: 'The court refused to hear any evidence on the allegations of the first supplemental petition, as to assessing damages and fixing compensation for plaintiff and interveners as in condemnation proceedings.' To this ruling interveners and plaintiff excepted. The plaintiffs in error on the trial introduced evidence proving the allegations of the petition as to the contract, and the abolition of the depot in 1892, and then offered further evidence to maintain the case as follows: 'Thereupon the plaintiff and interveners offered the following evidence: That the defendant, in April, 1892, fenced the right of way along the track, on the land described in the petition, and that the fence so erected by the defendant inclosed a strip of land 100 feet wide, and the same which is described in the petition, and that, prior to the time said land was so fenced, all of it, except a strip 40 feet wide, through the center of which the track lay, had been used, cultivated, and occupied by the plaintiff and interveners, and that there had been no occupancy of any of said land by defendant, except the strip 40 feet wide, and that the plaintiff and interveners had occupied the re-

mainder of said strip 100 feet wide; that the depot at Scottsville was removed in April, 1892; also, the allegations of their pleadings as to removal of said depot; also, the allegations as to the rental value of that part of the land occupied by the defendant and inclosed in its fences built in 1892, and which it had not occupied prior to said date as a right of way; and, also, all other allegations of said pleadings of interveners and plaintiff showing the violation of the contract on which the suit was brought. Whereupon the defendant objected to all of said evidence, because the allegations of the plaintiff's pleadings and the plaintiff's evidence showed that the defendant had complied with said contract set up in the petition, and had kept said depot at Scottsville until April, 1892, and that the said petition showed that under the contract the defendant was entitled to a right of way 100 feet wide when it complied with the contract; and thereupon the court sustained said objections, and excluded all of said evidence, and held that said contract had been complied with, and gave the jury a peremptory instruction to find for defendant.

"The first, third, fourth, and fifth assignments of error are as follows: '(1) The court erred in sustaining the demurrers of defendant, and holding, on said demurrers, that the contract set up in the petition had been complied with, and in refusing to hear the evidence as to damages.' '(3) The court erred in holding that the pleadings of plaintiff and interveners and the evidence showed that the contract had been substantially complied with. (4) The court erred in giving the jury a peremptory instruction to find for the defendant. (5) The court erred in holding that the pleadings of the plaintiff and interveners showed that the contract had been complied with by the defendant, and that they, the plaintiff and interveners, were not entitled to any relief.'"

S. P. Jones and T. P. Young, for plaintiffs in error.

F. H. Prendergast, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. When this case was formerly before this court, the contention of the railway company was that the contract sued on, not being in writing, nor to be performed within one year, was void under the statute of frauds, and that the railroad company had acquired the right of way in question, 100 feet wide through the lands described, by the use and enjoyment thereof during a period of 36 years, which use had been exclusive, uninterrupted, continuous, and under a claim of right adverse to the owner of the fee; and, in the alternative, that, if the contract sued on was valid, then the railroad company had acquired the right of way in question by having fully complied in all respects with the terms of said contract. This court sustained the contention of the railroad company, reversed the judgment of the circuit court, and remanded the cause for a new trial. *Railway Co. v. Scott*, 41 U. S. App. 624, 23 C. C. A. 424, and 77 Fed. 726. The questions presented in this present writ appear to be the same as presented in the former, with the exception that, although the contract provided for a strip, or right of way, 100 feet wide, the railroad company, prior to 1892, only used and occupied a strip 25 feet wide, and therefore the plaintiffs, on the theory that the contract was void, are entitled to recover all of the right of way in controversy except a strip 25 feet wide.

The record shows that, to maintain this contention, the plaintiffs offered evidence to prove that, except for the strip 25 feet wide, prior to 1892, the plaintiffs and their ancestors used, occupied, and cultivated the same, and that the railroad company was not in possession, and this evidence was rejected. If the right of the railroad company

to hold the right of way in question is based solely upon adverse use and possession, it would seem that the evidence offered should have been admitted. If, however, the title of the railroad company is based upon the contract as a valid executed contract, the evidence was properly rejected. The court held, on the former writ, that, if the contract was invalid, the railroad company had an easement by adverse use and occupancy; yet it appears clear that the court also decided that the contract sued on, having been fully performed and executed, was a valid and binding contract, and that thereunder the railroad company had acquired full title to the right of way as specified and described in the contract, and that was, as admitted by the plaintiffs in their original petition, a strip 100 feet wide, 50 feet on each side of the center of the track. Under this view of the case, and considering, further, that the contention of the plaintiffs in error that the strip taken for the right of way was only 25 feet wide is in conflict with his former judicial admissions, we are of opinion that the ruling of the court below rejecting the evidence was correct.

The judgment of the circuit court is affirmed.

REISTERER v. LEE SUM.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 105.

1. MALICIOUS PROSECUTION—WHEN ACTION LIES.

One who both makes an arrest, and originates the proceeding in which it is made, may, though protected as to the arrest, be liable for malicious prosecution.

2. SAME—PROBABLE CAUSE—MALICE.

Where defendant put in motion a criminal proceeding against plaintiff, a Chinaman, under the Chinese exclusion act, on the ground that he had not a certificate of residence as required thereby, thus subjecting him to imprisonment and compelling him to establish his innocence, the only incriminating circumstances at the time being want of resemblance between plaintiff and the indistinct photograph attached to the certificate in his possession, and the existence of scars on his face, while the certificate stated that the person named in it had no physical marks or peculiarities for identification, and the photographer testified that in his opinion the photograph was one of plaintiff, and that it might originally have shown the scars, and that they might have faded out, and defendant did not attempt to compare the photograph with the one which the act required to be filed in the office of the collector of internal revenue, and did not inquire when the scars were received, a finding of want of probable cause, from which malice may be inferred, is justified, though at a subsequent investigation, before trial before the commissioner, there was sufficient evidence of probable cause, in that plaintiff made contradictory statements as to his residence, when he obtained the certificate, and as to whether he had the scars before the photograph was taken, and he was found to be an inch taller than described in the certificate.

In Error to the Circuit Court of the United States for the Northern District of New York.

Chas. A. Brown, for plaintiff in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon a verdict. The action was for malicious prosecution and false imprisonment. The plaintiff was a Chinese laborer employed in September, 1897, in a laundry at Tonawanda, and the defendant was an officer of the customs at that place. On September 17, 1897, the defendant arrested the plaintiff, and took him before a United States commissioner within the district; assuming to do so conformably to the provisions of the Chinese exclusion act. That act provides that all Chinese laborers entitled to remain in the United States shall apply to the collector of internal revenue of their respective districts for a certificate of residence, and that, if they shall be found within the United States without such certificate, they shall be deemed to be unlawfully within the United States, and may be arrested by any United States customs official, and taken before a United States commissioner, whose duty it shall be to order that such Chinaman be deported from the United States. The act also provides that the certificate shall contain the name, age, local residence, occupation, and such other description of the Chinaman as may be prescribed by the secretary of the treasury. Act May 5, 1892 (27 Stat. 25). The act further provides that any Chinese person arrested under its provisions shall be adjudged to be unlawfully within the United States, unless he shall establish by affirmative proof to the satisfaction of such commissioner his lawful right to remain in the United States. As amended by the act of November 3, 1893, the act provides that a photograph of the Chinaman shall be attached to the certificate, and that a duplicate be attached to a copy of the certificate, and be filed with it in the office of the collector issuing the certificate.

About a week previous to the arrest the defendant visited the laundry where the plaintiff was at work, and asked him to exhibit his certificate. The plaintiff did so, and the defendant examined it and returned it to the plaintiff. September 17th he again called upon the plaintiff, and, after again examining the certificate, took the plaintiff in custody, and went with him before Mr. Collins, his superior officer, to the custom house in Buffalo. Thereafter, by the direction of Mr. Collins, the defendant took the plaintiff before a United States commissioner in Buffalo, and preferred a complaint against him as a Chinese person unlawfully within the United States, and falsely impersonating one to whom a certificate had been issued. The plaintiff was committed to the custody of a United States marshal pending an examination before the commissioner, and after an examination was discharged by the commissioner.

Error is assigned of the refusals of the trial judge (1) to direct a verdict for the defendant upon the cause of action for malicious prosecution; (2) to instruct the jury that the plaintiff had failed to establish a want of probable cause for commencing the prosecution; and (3) to direct a verdict for the defendant upon the ground that the plaintiff had failed to establish a cause of action either for malicious prosecution or for false imprisonment.

It appeared in evidence upon the trial that the certificate produced to the defendant by the plaintiff was issued by the collector of the

Third internal revenue district, at New York City, March 31, 1894, and, among other things, recited that the residence of the applicant was at 138 Mott street, New York, that his height was five feet two inches, and that he was without physical marks or peculiarities for identification. The photograph was indistinct. The plaintiff had several scars upon his face, but the photograph did not exhibit any.

When the defendant took the plaintiff before Mr. Collins at the custom house, the latter called in the immigration commissioner of the port and a Chinese interpreter; and the two officers questioned the plaintiff, to ascertain whether he was the person named in the certificate. In answer to their questions he made contradictory statements; saying at one time that when he obtained his certificate he lived on Pell street, in New York, and at another that he lived on Mott street, and stating at one time that the scars were upon his face before he obtained the certificate, and at another that they were not. Upon measuring him he was found to be five feet three inches in height, instead of five feet two inches, as stated in the certificate. It was after this examination that Mr. Collins directed the defendant to take the plaintiff before the commissioner and make the charge against him. The commissioner discharged the plaintiff, after the examination before him, upon the testimony of a photographer, who stated that in his opinion the photograph was a photograph of the plaintiff, and that it might originally have shown the scars upon his face, but that it was indistinct and they might have faded out.

It further appeared that the defendant did not communicate with the collector at New York City, or attempt to compare the photograph attached to the certificate with the duplicate filed with that officer. Evidence was also introduced on behalf of the plaintiff tending to prove that he came to this country in 1890, and lived in Mott street, New York City, when he obtained his certificate. He testified that the scars were upon his face before he got his certificate.

If it be assumed that by the provisions of the Chinese exclusion act the defendant was authorized to take the plaintiff into custody without criminal process, nevertheless the trial judge would not have been justified in taking the whole case from the jury if a cause of action for malicious prosecution had been established by the evidence. The action for false imprisonment does not lie for an arrest made by an authorized officer upon criminal process regular upon its face, and issued by a magistrate having jurisdiction. *Whitten v. Bennett*, 30 C. C. A. 140, 86 Fed. 405; *Carman v. Emerson*, 18 C. C. A. 38, 71 Fed. 264; *Marks v. Townsend*, 97 N. Y. 590. If the act of congress authorizes an arrest without process, the officer who makes it is as fully protected as he would be if he made the arrest under valid process. But an officer who makes an arrest under valid process, if he is also the complainant or the person who originates the proceeding, does so at the risk of an action for damages if he acts maliciously and without probable cause. He is no more shielded by his process or his official capacity than any other person instituting a groundless and malicious charge would be. The real inquiry consequently is whether the facts proved justified a recovery for malicious prosecution. If they did, the plaintiff was entitled to a verdict,

notwithstanding he might not have been entitled to one upon the cause of action for false imprisonment.

When the defendant took the plaintiff into custody there were but two incriminating circumstances against the plaintiff. These were the want of resemblance between the plaintiff and the photograph, and the existence of scars upon his face; while the certificate stated that the person named in it had no physical marks or peculiarities for identification. According to the evidence of the photographer, the photograph was a reasonably correct picture of the plaintiff; and, in view of its indistinctness, the absence of any appearance of scars did not seriously impeach its authenticity. The first incriminating circumstance was therefore of little significance. If the plaintiff did not receive the wounds until after he had obtained his certificate, the second incriminating circumstance was of no weight. The defendant did not inquire of the plaintiff, or endeavor otherwise to ascertain, when they were received. And, if the scars were on the plaintiff's face when he applied for the certificate, the collector might not have noticed them, or thought them sufficiently conspicuous to be noted in the certificate. Thus, in any view, the second incriminating circumstance was of no more value than the first. With no other evidential facts that the plaintiff was an offender, a just consideration for his rights demanded some effort by the defendant to verify his suspicions. It must be presumed that a duplicate of the photograph was on file with a copy of the certificate with the collector at New York; yet the defendant did not attempt to procure a comparison of the two. Nor, so far as appears, did he make the slightest effort to get information about the antecedents of the plaintiff. We cannot doubt that the case justified the conclusion that the defendant acted hastily and overzealously in making the arrest, and allowed his suspicion to overmaster the discretion and judgment which he ought to have exercised.

After the investigation made at the custom house by Mr. Collins and the immigration commissioner, there was sufficient evidence of probable cause, because the contradictory statements of the plaintiff, and the discrepancy between his height and that given in the certificate, were facts then developed of a sufficiently incriminating nature to warrant a judicial investigation. But the defendant was responsible for the arrest, and for putting in motion the criminal proceeding which subjected the plaintiff to imprisonment and compelled him to establish his innocence; and he cannot escape the consequences because, as it turned out, there was a stronger case against the plaintiff when he was put on trial before the commissioner than there was when the proceedings were initiated.

In an action for malicious prosecution the jury are at liberty to infer malice from facts that establish want of probable cause. It was not necessary, therefore, for the plaintiff to prove that the defendant was actuated by any personal ill will towards him in instituting the criminal proceeding.

We conclude that the evidence justified the jury in finding want of probable cause, and authorized them to infer malice; and, it having been shown that the criminal charge against the plaintiff had terminated by his acquittal, all the elements of the cause of action for

malicious prosecution were complete. It follows that there was no error in the rulings of the trial judge.

The trial judge, in ruling as he did, expressed the opinion that the question of probable cause was one for the jury. When facts are undisputed, and but one inference can be drawn from them, that question is one of law for the court. It may be that the photograph which was in evidence sufficiently demonstrated that the plaintiff was not its subject to authorize the jury to disregard the testimony of the photographer, and prefer their own judgment to his opinion. In that view, the question of probable cause may have been one to be submitted to the jury under proper instructions, and this was probably what the trial judge meant. However this may be, the ruling was right. A correct ruling is never vitiated because a wrong reason may be assigned.

We find no error in the record, and the judgment is affirmed.

BREWER v. PENN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,141.

MORTGAGES—OPTION TO DECLARE DEBT DUE ON DEFAULT—RIGHT TO SUE AT LAW ON NOTES.

Notes, and a mortgage securing the same, executed at the same time, constitute a single contract, and a provision of the mortgage that, on the failure of the maker to perform any agreement contained in either the notes or mortgage, the entire debt may be collected, gives the holder the right, on default in the payment of interest, to declare the notes due for all purposes, and to collect them by suit in the ordinary form, as well as by foreclosure.

In Error to the Circuit Court of the United States for the District of Colorado.

The Penn Mutual Life Insurance Company, the defendant in error, brought a suit against Behn Brewer, the plaintiff in error, to recover a balance due on a note for \$20,000, which remained unpaid after certain foreclosure proceedings had been taken under a deed of trust which was given to secure the payment of the note. The note and deed of trust were executed on January 23, 1890, and the note was made payable in five years, with interest at the rate of 6½ per cent., which was payable half-yearly until the note was satisfied. On May 28, 1895, the payment of the note was extended by a written agreement until January 23, 1900, and the interest was reduced to 6 per cent., on condition that certain third parties who had acquired an undivided one-half interest in the mortgaged property would assume the payment of the note, and on the further condition that the interest on the note should be paid half-yearly, as before, and that \$1,000 of the principal should be paid each year, beginning said payments on January 23, 1897, until January 23, 1900, at which latter date the whole of said note was to be paid. A default was made in the payment of the interest which became due on January 23, 1897, and thereafter, on April 13, 1897, the holder of the note declared the whole debt due, pursuant to a provision in the deed of trust or mortgage securing the note, which provided "that, if default be made in the payment of any one of the said interest notes at the time and place therein specified, or * * * in the payment of said principal note at its maturity, or if said party, of the first part, his heirs * * * or assigns, shall fail to perform, fulfill, and keep all and singular the covenants, conditions, stipulations, and agreements herein or in said notes contained, * * * then, and in either such case, the said principal sum of twenty thousand dollars and all arrearages of interest may be collected at any time after

ten days' notice, without any relief from any valuation, appraisal, or exemption laws." A sale was made by the trustee in the mortgage in the month of June, 1897, for the purpose of satisfying the amount due on the note, which left a balance due thereon of \$3,329, for which sum the present suit was brought. To a complaint alleging, in substance, the foregoing facts, the defendant below demurred, upon the ground that the debt sued for was not due, and that the action was prematurely brought. The demurrer was overruled. The case was subsequently tried before the court without the intervention of a jury, and a judgment was entered in favor of the plaintiff below for the amount claimed in its petition, whereupon the defendant below brought the case to this court by a writ of error.

Charles D. Hayt, for plaintiff in error.

W. C. Kingsley, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By the terms of the principal note, the defendant below promised to pay "interest at six and one-half per cent. per annum from maturity until paid," the same to be paid half-yearly. The deed of trust contained a provision, above quoted, that, if the defendant failed to perform any agreement "in said notes contained," the principal sum named in the note and all arrears of interest "may be collected at any time after ten days' notice"; and the extension agreement of May 28, 1895, continued these stipulations in force by providing "that nothing herein shall in any wise or manner interfere with or modify any of the covenants or conditions which are contained in the trust deed heretofore given by the said Brewer for the security of the said loan, except as to the time of payment of the same and interest thereon, as hereinbefore provided." The case made by the plaintiff in its petition is thus brought within the exact language of the several stipulations aforesaid, the defendant having failed to pay the interest due on January 23, 1897, which was agreed to be paid in the principal note, and 10 days' notice having been given by the plaintiff, after said default, of its intention to collect all that was due. The only question, therefore, which requires consideration, is whether the agreement contained in the deed of trust that, in case of any default, the whole amount due on the notes might be collected after 10 days' notice, should be construed as an agreement that it might be collected by foreclosure proceedings only, or as an agreement that it might be collected by any appropriate form of procedure which the noteholder elected to pursue. This question has given rise to some conflict of opinion. It was early held in this circuit by the then Circuit Judge, now Mr. Justice, Brewer, that, where notes and a deed of trust securing the same are executed at the same time, they should be regarded as one instrument, and read together, and that, if a deed of trust contains a provision giving the holder an option in a certain event to declare the notes due in advance of the time specified on their face, such option, when lawfully exercised in the mode provided, should be regarded as rendering them due for all purposes, and not merely for the purpose of a foreclosure. *Manufacturing Co. v. Howard*, 28 Fed. 741.

Since this decision it has been very generally regarded as establishing the rule in this circuit, the question being one of general law. Decisions in accordance with the views expressed in *Manufacturing Co. v. Howard* have been made in the following cases: *Chambers v. Marks*, 93 Ala. 412, 9 South. 74; *Noell v. Gaines*, 68 Mo. 649,—while views at variance therewith are to be found in the following cases: *White v. Miller*, 52 Minn. 367, 54 N. W. 736; *McClelland v. Bishop*, 42 Ohio St. 113; *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802. It would serve no useful purpose to add to what has already been said on the question at issue in the cases above cited, and we shall refrain from doing so. In the case at bar the controversy is between the original parties to the note and deed of trust, the question as to the rights of indorsers in such cases, whatever the same may be, being in no wise involved. We accordingly adhere to the rule which has heretofore obtained in this circuit, holding in the present case that the right to collect the note which was given to the mortgagee by the terms of the mortgage in question in case the mortgagor made default in paying the interest thereon when it became due was a right to collect it by suit in the ordinary form, as well as by proceedings in foreclosure. Such was the view of the circuit court, and its judgment is hereby affirmed.

RAND et al. v. COLUMBIA NAT. BANK OF TACOMA, WASH., et al.

RAND v. TILLINGHAST.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

Nos. 1,151, 1,152.

NATIONAL BANKS—STOCKHOLDERS—ESTOPPEL TO DENY LIABILITY FOR ASSESSMENT.

Subscribers to the capital stock of a national bank previously organized and carrying on business, who accepted certificates of stock representing a portion of the original capital stock, obtained by the bank in some manner from the former holders, are estopped, after the lapse of five years, during which they retained the stock, received two dividends, and paid one assessment thereon, to deny that they are stockholders, in a suit by the receiver to collect a further assessment, on the bank's insolvency, on the ground that they supposed they were purchasing a part of an issue of increased stock which the bank had voted to issue, but the issuance of which had not then been authorized by the comptroller.

Appeal from the Circuit Court of the United States for the District of Minnesota.

In Error to the Circuit Court of the United States for the District of Minnesota.

A. B. Jackson, for appellants and plaintiff in error.

Phillip Tillinghast, for appellees and defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These are two suits, one in equity and one at law, which grew out of the same transaction, and were tried together, and may therefore be disposed of by a single opinion, as they were by the trial court. 87 Fed. 520. In case No. 1,151, Alonzo

T. Rand, Rufus R. Rand, and Kate Ogle, the appellants, sought to obtain a decree adjudging that they were not stockholders of the Columbia National Bank of Tacoma, Wash., hereafter termed the "Bank," and an injunction restraining the prosecution of certain suits at law which had been brought against them by Phillip Tillinghast, the receiver of said bank, to recover a certain assessment which had been levied against them as stockholders therein, the bank having become insolvent. Case No. 1,152, on the other hand, is an action at law, which was brought by Tillinghast against Rufus R. Rand to recover an assessment which was levied against him, and is one of the actions at law the prosecution of which the appellants, in case No. 1,151, sought to restrain. The law case was tried without the intervention of a jury, in connection with the equity case, and the court made a special finding of the facts, which must be accepted as conclusive. From this finding it appears, in substance, that on July 13, 1892, the Columbia National Bank was a duly-organized national bank, having a capital stock of \$200,000, which had been subscribed, and the amount thereof duly paid in; that on the preceding 12th day of January, 1892, the stockholders of said bank had passed a resolution to increase the capital stock of the bank from \$200,000 to \$500,000, and had provided in the resolution that, as new capital was paid in to the amount of \$50,000 or more, the president or cashier be authorized to certify the fact to the comptroller of the currency, and to continue to so certify until \$300,000 had been paid; that on July 18, 1892, Alonzo T. Rand, the plaintiff in error, was in Tacoma, and while there was solicited to become a subscriber to the stock of the bank, and was at the same time informed by an officer of the bank, either its president, vice president, or cashier, that they were increasing the stock of the bank, and would like to have him become a subscriber, and that he subsequently signed three subscription papers, two of the same being for 50 shares each, and one for 100 shares, which subscriptions did not express on their face whether the stock to be delivered to the subscriber in pursuance thereof should be old stock, forming a part of the original capital of the bank, or whether it should be new stock, forming a part of the increase, which had not at that time been authorized by the comptroller, no certificate having been made that any portion of the increased capital had been paid in. The trial court further found that four stock certificates were issued by the bank on July 18, 1892, one being in favor of A. T. Rand, and the others in favor of Rufus R. Rand, Kate Ogle, and H. W. Brown, respectively, each of which certificates was in the following form, except as to the number of the certificate and the name of the shareholder:

"No. 147.

Fifty Shares.

"State of Washington. Columbia National Bank of Tacoma, Washington.

"Capital Stock, \$200,000.

"This certifies that A. T. Rand is the owner of fifty shares, of one hundred dollars each, in the capital stock of the Columbia National Bank of Tacoma, Washington, transferable only on the books of the bank, in person or by attorney, upon the surrender of this certificate.

"Tacoma, July 19, 1882.

N. B. Dolson, Cashier.

"W. G. Peters, Vice President."

That, at the time these certificates were issued, the bank was in the habit of issuing other certificates of stock, representing new capital, which expressed on their face that they were for a part of the "increased capital," and did not show the amount of the capital of the bank; that the several persons to whom the certificates aforesaid were issued, to wit, A. T. Rand, R. R. Rand, and Kate Ogle, each accepted and paid for the stock so issued to them at the rate of \$101 per share, and subsequently received two dividends thereon of 4 per cent. each, and also paid an assessment thereon, which was levied by the bank as late as August 10, 1895. The trial court also found that neither of the persons to whom the aforesaid certificates were issued were at all solicitous whether they received old stock or a part of the increased stock, and that this was not a material fact inducing the aforesaid subscriptions. In view of the aforesaid findings, the trial court further inferred that the stock which was issued to the several appellants on July 19, 1892, was a part of the old stock which had been acquired by the bank from some of its original shareholders, or in some other lawful manner, and that it was not a part of the proposed new issue. This seems to have been a reasonable deduction, in view of the fact that on July 19, 1892, no authority had been obtained to issue any of the new stock; also in view of the fact that the form of the certificates which were issued to the appellants indicate that it was a part of the original capital, and that the bank was in the habit of issuing certificates in a different form, representing the increased or new capital. But whether the inference thus drawn was reasonable or otherwise is now immaterial, since it was essentially an inference of fact, and the conclusion reached by the trial judge is not open to contradiction, there being abundant evidence to support it.

This leaves for consideration by this court but a single question, namely, whether the receipt by the appellants of the stock in question without objection on their part, and the acceptance of two dividends thereon, and the payment of the assessment which was levied on them as shareholders on August 10, 1895, estops them from denying that they are stockholders in a suit brought by the receiver to recover an additional assessment. The trial court decided this question in the affirmative, and we are of opinion that such decision was clearly right. The fact, if it be a fact, that the appellants supposed that they were receiving a part of the increased stock, instead of certificates representing a part of the original capital, will not authorize them to deny their liability as stockholders after the lapse of five years; they having in the meantime exercised all the rights of shareholders, and accepted all the benefits flowing from that relation. This is especially true so far as the receiver is concerned, who is vested with all the rights of creditors of the insolvent bank. *Scott v. Latimer*, 60 U. S. App. 720, 33 C. C. A. 1, and 89 Fed. 843, 855, and cases there cited; *Bank v. Newbegin*, 40 U. S. App. 1-10, 20 C. C. A. 339, and 74 Fed. 135.

Having reached the conclusion last announced, it is wholly unnecessary to consider what might be the rights of the appellants if they in fact held a portion of the increased or new stock. That is a

question which has been twice considered by the circuit court of appeals for the Ninth circuit in parallel cases, and the conclusion reached on both occasions was at variance with the position taken by counsel for the appellants. *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934, and *Brown v. Tillinghast*, 93 Fed. 326. The decree in the equity case and the judgment in the law case are each affirmed.

In re VON BORCKE.

(District Court, D. New Jersey. April 24, 1899.)

BANKRUPTCY—TIME OF FILING PETITION.

A petition in bankruptcy is to be deemed "filed," within the meaning of the bankruptcy law, when it is delivered personally to the clerk of the court of bankruptcy, and received by him for the purpose of being kept on file, though not at his office, nor during office hours.

In Bankruptcy. Wolf S. A. Von Borceke, the alleged bankrupt, gave a chattel mortgage on his property to a trustee to secure certain of his creditors; the same being dated October 31, 1898, and recorded November 3, 1898. A petition in involuntary bankruptcy against him, alleging the giving of such mortgage as an act of bankruptcy, was placed in the hands of the clerk of the district court, at his residence, at 8 o'clock in the evening of March 3, 1899, and was taken by the clerk to his office on the following day. Counsel for the bankrupt, contending that the petition had not been "filed" within four months after the commission of the alleged act of bankruptcy, sued out a rule on the petitioning creditors to show cause why the petition should not be marked filed as of March 4, 1899. Rule discharged.

Joseph Anderson, for petitioning creditors.

William M. Dougherty, for bankrupt.

KIRKPATRICK, District Judge. It appears from the testimony which has been taken in this matter, and from the file mark on the papers, that the petition for the adjudication of Von Borceke as a bankrupt was delivered to the clerk of this court, in person, on the third day of March last, at 8 o'clock p. m. It is beyond dispute that the clerk was the proper officer to receive the petition, and there is no denial of the fact that it was delivered to, and received by, him for the purpose of being kept on file. "A paper is said to be on file when it is delivered to the proper officer to be kept on file." 7 Am. & Eng. Enc. Law, p. 960. The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same. It was upon the ground that the person to whom the paper was delivered was not such officer authorized by law to retain its custody, but merely the messenger of such officer, that the decision of *Garlick v. Sangster*, 9 Bing. 46, was rested. The paper had not reached the hands of the court's custodian.

The case of *People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co.*, 4 U. S. App. 609, 2 C. C. A. 126, and 51 Fed. 130, is very much in point. There the law required certain papers to be "filed" before

a writ of attachment could be issued. These papers were delivered to the clerk outside of his office, after office hours, and by him marked "Filed." The attachment issued immediately, and before the papers so marked had actually reached the clerk's office. The United States circuit court of appeals for the Eighth circuit held that the levy made by virtue of the writ issued under these circumstances was valid, saying that a construction of the law such as is contended for in this matter "would be too narrow and technical for the practical and business methods that should obtain in the administration of the law." I am of the opinion that the petition in this cause was filed on March 3, 1899, as appears by the indorsement of the clerk thereon, verified by the testimony adduced on the hearing. The rule heretofore granted in the cause will be discharged.

In re LIPMAN.

(District Court, S. D. New York. May 13, 1899.)

1. **BANKRUPTCY—PROVABLE DEBTS—STATUTE OF LIMITATIONS.**

A claim founded on a judgment is not provable in bankruptcy against the estate of the judgment debtor when at the time of filing the petition in bankruptcy all right of action thereon was barred by the statute of limitations of the state where the judgment was recovered and by that of the state where the creditor resides, as well as by the law of the state where the bankruptcy proceedings are pending.

2. **SAME—DEBT LISTED IN SCHEDULE.**

The fact that a bankrupt includes in his schedule of debts a claim already barred by the statute of limitations does not revive such claim, so as to make it a provable debt against his estate, to the prejudice of his other creditors.

3. **SAME—EXPUNGING CLAIM.**

A claim duly proved and allowed against the estate of a bankrupt may be expunged, on motion, when it is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed.

In Bankruptcy.

Oppenheim & Severance, for creditors.

Wolf, Kohn & Ullman, for bankrupt.

BROWN, District Judge. Pending the taking of testimony before the referee upon specifications in opposition to the discharge of the bankrupt, a motion was made to expunge a proof of claim made by Brown Bros. & Co., a firm creditor of the bankrupt, stated in the schedules. The motion was granted by the referee, whose decision thereon has been brought before me for review. The claim proved, is a judgment recovered in Utah on November 2, 1888, for \$2,330, for debt and costs, upon a demand for goods sold and delivered to the bankrupt at Salt Lake City, where he then resided. The firm creditor was located and did business at San Francisco, where the holders of the claim still reside. By the statute of limitations of Utah, no action can be brought upon any judgment recovered in any state or territory after the lapse of five years. 2 Comp. Laws 1888. p. 224, §§ 3141, 3142. The same limitation of five years is prescribed by section 336 of the Code of Civil Procedure of California. The bank-

rupt continued to reside in Utah for more than five years thereafter, namely, until September, 1895, when he removed with his family to this city. His petition in bankruptcy was filed in January, 1899. The period of limitation for the commencement of actions on judgments in this state is 20 years (Code, § 376); but a special provision (section 390) enacts as follows:

"Where a cause of action * * * accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state, * * * (1) where the cause of action originally accrued in favor of a resident of the state; or (2) where before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the state."

From the above provisions it is evident that at the time the petition in bankruptcy was filed, the claim of these creditors was barred by the statutes of limitation, not only in the states of Utah and California where the parties then resided, and where the judgment was obtained, but also in this state. Many, if not all, of the states have provisions similar to that of section 390 of the Code of this state above cited; and the principle of such statutes as statutes of repose, interstate comity and the public convenience, required the general application of that rule. By the federal law the state statute of limitation is ordinarily applied in legal proceedings arising within the state. Notwithstanding the decision in the case of *In re Ray*, 1 N. B. R. 203, Fed. Cas. No. 11,589, I think the weight of authority and of sound reason requires the claim to be expunged (*In re Cornwall*, 9 Blatchf. 114, 126, 137, 138, 6 N. B. R. 305, Fed. Cas. No. 3,250, and cases there cited; *In re Noesen*, 12 N. B. R. 422, Fed. Cas. No. 10,288; *In re Kingsley*, 1 N. B. R. 329, Fed. Cas. No. 7,819; *In re Harden*, 1 N. B. R. 395, Fed. Cas. No. 6,048), and the decision of the referee is therefore sustained.

The insertion of this debt in the schedules of the bankrupt was no revival of the claim. The rights of other creditors to the assets, if there are any assets, could not be thus prejudiced.

In re CLIFFE.

(District Court, E. D. Pennsylvania. June 2, 1899.)

No. 45.

1. **BANKRUPTCY—SUFFICIENCY OF PETITION—WAIVER OF OBJECTIONS.**

A petition in involuntary bankruptcy which alleges, as the act of bankruptcy on which an adjudication is asked, that the debtor suffered creditors to obtain a preference through legal proceedings, is insufficient if it merely follows the words of the statute, without specifying the details of the transaction constituting the preference. But this defect is amendable, and is waived by the respondent if he files a general denial, and demands a trial by jury.

2. **SAME—ACTS OF BANKRUPTCY—SUFFERING PREFERENCE.**

Under Bankruptcy Act 1898, § 3, cl. 3, providing that it shall be an act of bankruptcy if a debtor shall have "suffered or permitted, while in-

solvent, any creditor to obtain a preference through legal proceedings," and has not vacated or discharged such preference "at least five days before a sale or final disposition of any property affected," where suit is brought against an insolvent debtor, and he makes no defense, and judgment is rendered against him, and execution issued and levied on his goods, and he allows a sale thereunder to be made without applying to be adjudged bankrupt, he commits an act of bankruptcy.

In Bankruptcy. On motion for new trial.

Andrew W. Crawford, for petitioning creditors.

John S. Freeman, for the bankrupt.

McPHERSON, District Judge. The petition avers that Walter R. Cliffe is insolvent, and charges as an act of bankruptcy that "on the 27th day of January, 1899, [he] suffered, while insolvent, other creditors to obtain a preference through legal proceedings, and not having at least five days before sale or final disposition of his property affected by such preference vacated such preference." Suits had been brought against him, upon which judgments had been obtained shortly before the petition was presented, followed by executions and a sheriff's sale of his personal property. He made no defense to the suits, and allowed the sale to be held without applying to be adjudged a bankrupt. He answered the petition, denying "that he had committed the act of bankruptcy set forth in said petition," averring "that he should not be declared bankrupt for any cause in said petition alleged," and demanding "that the same may be inquired of by a jury." At the trial he objected orally to the insufficiency of the petition, but his objection was overruled, and the jury were instructed that he had committed an act of bankruptcy if he was insolvent at the time the executions were issued. His answer did not aver that he was solvent when the executions were levied, and it may be that his silence upon this point was equivalent to an admission of insolvency. Nevertheless, the question of insolvency was treated as a disputed question of fact, and to this issue the evidence was almost exclusively directed. The jury found the fact against him, and he now asks for a new trial, mainly on the ground that the petition is insufficient, because it does not specify the details of the preference charged. This would have been a good objection if it had been made in season, either by a motion to dismiss the petition or by the answer. But, as the defect is clearly amendable, the objection was too late at the trial, and is too late now. It was waived by demanding an issue on the merits, and requiring the petitioning creditors to prepare for trial on the disputed facts. The bankrupt's failure to vacate the preference obtained by the levy brings the case within the principle of *In re Moyer*, 8 Pa. Dist. R. 214, 93 Fed. 188. The motion for a new trial is refused, and judgment for the plaintiffs in the issue will be entered on the verdict. It is also ordered that Walter R. Cliffe be adjudged a bankrupt.

KLIPSTEIN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 27, 1899.)

No. 2,572:

CUSTOMS DUTIES—CLASSIFICATION—ALIZARINE VIOLET.

Alizarine violet, known as "alizarine cyanine R" was entitled to free entry as an alizarine color or dye, under paragraph 368 of the act of 1894, and was not dutiable as a coal-tar product, under paragraph 14 of said act.

This was an application for a review of a decision of the board of general appraisers in respect to the classification for duty of a certain color or dye known as "alizarine violet." The evidence showed that the merchandise was commercially known as an artificial alizarine color or dye, first imported in October, 1894; and that it was a product of alizarine Bordeaux, which is a product of the oxidation of alizarine. The merchandise was classified by the collector, and by the board of general appraisers on appeal, as a coal-tar product, at 25 per cent. ad valorem, under paragraph 14 of the tariff act of August 28, 1894.

Edward Hartley, for appellants.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. This importation was called "alizarine violet," and appears to have been known as "alizarine cyanine R." The question about it is whether it is a coal-tar, or an alizarine, color or dye. The decision heretofore filed was made upon the testimony of one of the importers taken before the board, without that of the same witness taken in this court, which had not been sent. That testimony indicated that it was a coal-tar color with some doubt, arising somewhat, perhaps, from the fact that artificial alizarine is produced from anthracene, which is a coal-tar product. *Cochrane v. Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455. The decision of the board upon that evidence was followed. The testimony taken in this court, considered with, and notwithstanding, that given before, seems to show fairly that it is, and was known as, an artificial alizarine color or dye. This leads to an opposite conclusion from that reached before. Affirmance set aside, and decision reversed.

UNITED STATES v. TUBBS.

(District Court, D. South Dakota, S. D. May 24, 1899.)

1. INDICTMENT FOR MAILING PROHIBITED MATTER—SUFFICIENCY—IDENTIFICATION OF LETTER.

An indictment under Rev. St. § 3893, charging the defendant with having deposited in a post office, for mailing and delivery, a letter giving information where, how, and of whom might be obtained an article designed and intended for the procuring of abortion, must in some manner identify such letter, to the end that the accused may be informed of the nature of the charge, and that a judgment may be pleaded in bar to a second prosecution for the same offense; and the letter should be set out in the indictment, or a sufficient reason given for not doing so.

2. SAME—MOTION IN ARREST—BILL OF PARTICULARS.

It is not the office of a bill of particulars to cure a bad indictment, and the failure of a defendant to ask for such bill does not deprive him of the right to object to the sufficiency of the indictment by motion in arrest.

3. CRIMINAL LAW — EFFECT OF ARREST OF JUDGMENT AS TO ONE COUNT OF INDICTMENT.

The arrest of judgment upon some of the counts in an indictment on which the defendant was tried and found guilty because of their insufficiency necessitates the setting aside of the verdict, and the granting of a new trial as to the remaining counts, where the evidence introduced under the defective counts was such as to prejudice the defendant in his trial on the others.

On Motion in Arrest of Judgment.

Wm. G. Porter, Asst. U. S. Atty.

Frank R. Aikens and Steven B. Van Buskirk, for defendant.

CARLAND, District Judge. On the 24th day of April, 1899, the defendant was convicted upon an indictment containing eight counts. The jury returned a verdict of not guilty as to the third count, upon direction of the court, and a verdict of guilty as to each of the other counts. On the 23d day of May, 1899, the date fixed for passing sentence upon said conviction, the defendant's counsel moved the court to arrest judgment on counts 1, 6, 7, and 8, for the reason that neither of said counts state facts sufficient to constitute an offense under any law of the United States. The motion in arrest of judgment has been argued by counsel for the United States and for defendant. The counts in controversy are based upon section 3893, Rev. St. U. S., as amended, which, so far as material, provides as follows:

"Every article or thing designed or intended for the prevention of conception or procuring an abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind, giving information directly or indirectly, where or how or of whom or by what means any of the hereinbefore mentioned matters, articles or things may be obtained or made, whether sealed as first class matter or not, are hereby declared to be nonmailable matter. * * * Any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be nonmailable matter * * * shall be punished," etc.

The language of the counts is alike, with the exception of the alleged date of the commission of the offense, and except that counts 6, 7, and 8 contain the words "and medicine" after the word "article." Count 1 alleges that the defendant, on the 20th day of April, 1898, did unlawfully, willfully, and knowingly deposit and cause to be deposited in the post office of the United States, to wit, the post office at Alcester, in the county of Union, state of South Dakota, for mailing and delivery by the post-office establishment of the United States, certain nonmailable matter, to wit, a letter inclosed in an envelope, the said letter so inclosed in an envelope as aforesaid giving information where, how, and of whom might be obtained an article, the exact name of which is to the grand jurors as yet unknown, designed and intended for the procuring of abortion, and which said envelope containing the letter as aforesaid was then and there directed and addressed as follows; that is to say, "Miss Clara Saltness, Alcester,

S. D.,”—he, the said Richard A. Tubbs, then and there well knowing the contents of said letter, and the character thereof. The crime denounced by the statute, so far as the counts in question are concerned, is the depositing in the United States post office, for mailing and delivery by the post-office establishment of the United States, of a letter giving information where, how, and of whom might be obtained an article designed and intended for the procuring of abortion. The letter alleged to have been deposited is not set out in the indictment, nor is any reason given why the same is not set out. There is no allegation in any of the counts in question which identifies the letter alleged to have been deposited. The date of the deposit in the post office is of very little importance, as that date in the indictment is not binding upon the prosecutor. The fact, also, that it is alleged that the letter was addressed to Miss Clara Saltness, Alcester, S. D., is of but very little importance, as it appears from the indictment in this action that several letters were so addressed.

At the commencement of the trial counsel for the defendant objected to the introduction of any testimony to sustain the counts in question, for the reason that they did not state a public offense. The impression of the court at that time was that the motion was well taken, and only overruled the motion in deference to what was claimed by counsel for the United States to have been decided by *Bates v. U. S.*, 10 Fed. 93, being an opinion by Drummond, C. J., in the circuit court of the Northern district of Illinois. Upon a careful reading of said case, I do not think it decides all that is claimed for it by counsel for the United States, and, if it did, an examination of the decisions of the supreme court of the United States demonstrates that it is no longer law.

In *Evans v. U. S.*, 153 U. S. 587, 14 Sup. Ct. 936, the supreme court says:

“The rule of criminal pleading which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *U. S. v. Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *U. S. v. Carll*, 105 U. S. 611, ‘fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.’ The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *U. S. v. Cook*, 17 Wall. 168; *U. S. v. Cruikshank*, 92 U. S. 542. The fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. *U. S. v. Carll*, 105 U. S. 611. Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the mind of the accused or of the court of the exact offense intended to be charged; not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offense to which the plea relates. *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *In re Greene*, 52 Fed. 104.”

It will thus be seen that the case of *U. S. v. Mills*, 7 Pet. 138, upon which Judge Drummond relied in *Bates v. U. S.*, has been greatly limited, and can hardly now be said to be the law upon that subject.

In *Cochran v. U. S.*, 157 U. S. 290, 15 Sup. Ct. 630, the court, in speaking of indictments,—in that case an indictment under the national banking act,—said:

"But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, to sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead the former acquittal or conviction."

We have here the law as laid down by the supreme court of the United States for the guidance of this court, and, applying the test thus prescribed, a mere glance at the counts of the indictment in question demonstrates to the reader that they fall far short of coming up to the requirements of the law, in this: that there is nothing alleged in the counts which identifies the letter alleged to have been deposited. If the defendant should be convicted or acquitted on either one of these counts, it is impossible to ascertain how he could plead the judgment in bar of any prosecution brought against him for mailing prohibited letters at Alcester, S. D., at any time within the statute of limitation. The indictment and plea, when the exemplified copy of the record should be offered in evidence, would be the only means of ascertaining as to what issues were litigated, and the court trying the case would be unable to ascertain from the counts now in question what letter it was intended to charge the defendant with having mailed unlawfully. If the letter was of such a nature as to pollute the records of the court, the indictment should have said so, and, if it was not so obscene as to make it unfit to be spread upon the records, then the letter ought to have been set out in the counts, or some of its language used, so that the letter could be identified, to the end that the judgment might be pleaded in bar, and that the accused should be informed of the nature of the charge against him.

Fortunately we are not without controlling authority upon the sufficiency of these counts. In *Grimm v. U. S.*, 156 U. S. 608, 15 Sup. Ct. 471, which was an indictment upon the same section of the statute as the present indictment, except that the letter alleged to have been deposited gave information where obscene and lewd pictures might be obtained, the letter in the case referred to is set out in the indictment; but it was objected that the letter itself did not specify some particular picture, to which the information had special reference, being in line with the objection made in this case that the count does not state what kind of medicine or what article the defendant informed Clara Saltness concerning. This criticism was overruled, and the court in so doing makes a distinction between the matters about which information is given and the letter itself which was deposited containing the alleged information; and Justice Brewer, in delivering the opinion of the court, uses the following language:

"Again, it is objected that it is not sufficient to simply allege that the pictures, papers, and prints were obscene, lewd, and lascivious; that the pleader should either have incorporated them in the indictment, or given a full description of them, so that the court could, from the face of the pleading, see whether they were in fact obscene. [The court is here referring to the pictures about which information was given.] We do not think this objection is well taken.

The charge is not the sending of obscene matter through the mails, in which case some description might be necessary, both for identification of the offense and to enable the court to determine whether the matter was obscene, and therefore nonmailable. Even in such cases it is held that it is not necessary to spread the obscene matter in all its filthiness upon the records. It is enough to so far describe it that its obnoxious character may be discerned. There the gist of the offense is the placing of a certain objectionable article in the mail, and therefore that article should be identified and disclosed. So, here, the gist of the offense is the mailing of a letter giving information, and therefore it is proper that such letter should be stated so as to identify the offense. But it does not follow that everything referred to in the letter, or concerning which information is given therein, should be spread at length on the indictment. On the contrary, it is sufficient to allege its character, and leave further disclosures to the introduction of evidence. It may well be that the sender of such a letter has no single picture or other obscene publication or print in his mind, but, simply knowing where matter of an obscene character can be obtained, uses the mails to give such information to others. It is unnecessary that unlawful intent as to any particular picture be charged or proved. It is enough that in a certain place there could be obtained pictures of that character, either already made, and for sale or distribution, or from some one willing to make them; and that the defendant, aware of this, used the mails to convey to others the like knowledge."

It will thus be seen that upon reason and authority the counts in question are clearly bad, and the motion of the defendant to arrest the judgment of this court as to these counts must be granted.

Counsel for the United States seeks to avoid the criticism of defendant's counsel concerning these counts by answering that a bill of particulars might have been demanded by defendant in case he was not sufficiently informed of the nature of the crime charged against him. This position involves a mistaken opinion of the office of a bill of particulars, which may be granted on motion of the defendant in the discretion of the court, in cases where the indictment is good as a pleading, and where the court, in its discretion, should be of the opinion that the defendant was entitled to some further information before compelling him to go to trial. To hold that the right to demand a bill of particulars will cure a bad pleading would make the returning of a good indictment by the grand jury discretionary with the court, which could not be entertained for a moment. It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest.

It now remains to be seen as to what effect the granting of the motion in arrest upon the counts mentioned has upon the conviction upon the other three counts which were submitted to the jury, to wit, counts 2, 4, and 5. In *Ballew v. U. S.*, 160 U. S. 197, 16 Sup. Ct. 263, the jury returned a general verdict of guilty against the defendant on two counts. The supreme court held that the court below erred in its charge to the jury, but that the portion of the charge held to be error only applied to one of the counts in the indictment, so the supreme court reversed the general judgment rendered upon the general verdict of guilty, and instructed the court below to pass sentence upon the good count. In *Putnam v. U. S.*, 162 U. S. 687, 16 Sup. Ct. 923, the jury convicted the defendant upon the second and seventh counts of an indictment. On writ of error to the supreme court of the United States the court held that there was error committed by

the trial court in allowing a witness' recollection to be refreshed by improper memoranda. The supreme court held, however, that the existence of the error related to and affected only the conviction under the second count of the indictment, and reversed the judgment as to the second count and affirmed it as to the seventh. In *Graves v. U. S.*, 165 U. S. 325, 17 Sup. Ct. 395, the supreme court of the United States held that the trial court erred in its charge to the jury upon matters of law which related to one of the counts of the indictment only, but the court said: "This charge had necessarily a prejudicial effect upon the defendant with regard to the other counts, fifth and eighth, of the indictment." And the court reversed the whole case. So it seems to be the law that whether the granting of a new trial as to one count, or the arresting of the judgment as to one count, will affect the conviction upon the other counts, depends upon whether the error which is found to have been committed necessarily prejudices the defendant upon his trial upon the other counts.

The letters introduced into evidence in the case at bar under the counts upon which judgment must be arrested, under the peculiar conditions surrounding this case, could not be otherwise than very prejudicial to the defendant upon his trial upon the other counts. The authorship of the letters was a vital point in issue, and stubbornly contested by both sides. Experts were sworn as to the handwriting of the defendant, and testimony was introduced as to the handwriting of all the letters, and the chief expert testified that the letters were all in the same handwriting. The authorship of the letters may have been wholly determined by something in the letters introduced under the counts upon which judgment is arrested. The court cannot say that the letters did not prejudice the defendant on his trial on the other counts, but, on the other hand, the conclusion is irresistible that they did, and therefore it results that a new trial must be granted as to counts 2, 4, and 5. Such will be the order of the court. The defendant will be released from custody upon giving a good and sufficient bond in the sum of \$1,500 to appear for trial at some future term of this court.

TOWER V. EAGLE PENCIL CO.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 132.

PATENTS—VALIDITY AND INFRINGEMENT.

The Tower patent, No. 378,223, for a penholder with a layer of cork, called a "sleeve," at its lower end, to form a cushion (supposed to be antineurotic), construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Levi L. Tower against the Eagle Pencil Company for alleged infringement of a patent for an improved pen-

holder. The circuit court held that the patent was valid and infringed, and accordingly entered a decree for the complainant. 90 Fed. 662. From this decree the defendant has appealed.

Marcellus Bailey, for appellant.

W. S. Logan, for appellee.

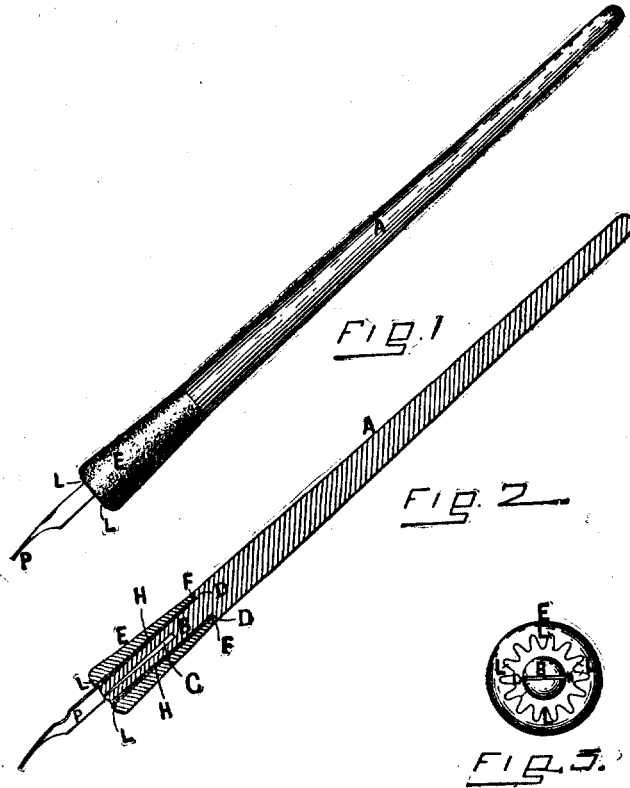
Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned upon this appeal of the decree of the court below adjudging the validity, and the infringement by the defendant, of letters patent No. 378,223, dated February 21, 1888, granted to Levi L. Tower for a penholder.

The invention described and claimed in the patent consists in the means whereby the ordinary penholder is provided at the pen end with a layer of cork, called a "sleeve"; the object being to form a cushion (supposed to be antinervous) for the part held by the fingers and thumb in writing. Cork and various antinervous materials had been used for penholders; and the materials, except cork, had been used in the form of a thin sleeve upon the penholder to form a cushion for the fingers. The penholder of the British patent to Welch, of 1857, was of wood, surrounded by a metal tube at the pen end, and having a sleeve of rubber, velvet, leather, cloth, "or any other soft and flexible material," as the cushion. The penholder of the patent to Rodrigue was of wood, and had a rubber sleeve at the pen end for the cushion, which surrounded the tenon, and formed a square joint with the body of the holder at the shoulder of the tenon. As no tenon was used in the Welch penholder, the sleeve projected beyond the line of the rest of the penholder; making the holder thicker at the pen end than above. The Rodrigue sleeve did not project, but was on a line with the rest of the penholder, because he placed his sleeve directly upon the tenon, without interposing the metal re-enforce tube of Welch. Cork being a more fragile material than rubber, leather, or other antinervous cushions, Tower, the patentee of the present invention, thought it desirable not only to use a re-enforce tube, but also to protect his sleeve from abrasion at both its lower and upper ends. He constructed his penholder like that of Rodrigue, substituting cork for rubber, interposing the re-enforce tube, and introducing special means for protecting the sleeve at each end. The means he adopted for doing this were modifications of those of Welch and Rodrigue. He employed the metal tube of Welch, and the tenon of Rodrigue, and surrounded the tube with a cork sleeve, as Welch had done with a velvet or leather sleeve; but he made his tube with projections at the pen end, and at the other end, instead of using the shoulder of Rodrigue, he made a peculiar joint, by making an annular recess in the shoulder, and forming his sleeve to correspond. He also used a slotted tenon, but this feature was not new, and does not enter into the invention claimed. The means of housing the cork sleeve, and protecting it from abrasion at the ends, are described in the specification as follows:

"A represents the main or body portion of the holder, constructed of wood or other desired material, and provided at the lower end with a round tenon,

B, having a longitudinal slit, C, and an annular groove or short conical socket, D, formed in the body portion, A, at the intersection of the said tenon, B, with the body, A, as shown. Now, I provide this tenon, B, with a sleeve, E, formed of cork, having its upper end, F, conical, and fitted into the annular conical groove, D, whereby the thin, edge-like portion of the cork at this end of the sleeve is protected by the harder covering portion of wood forming such joint, as shown in Fig. 2. In order that the sleeve, E, of cork, may be pro-



ted from abrasion when inserting the pen, P, in position in the holder, I provide a metal re-enforcement tube, H, which fits snugly upon the slotted tenon, B, and within the longitudinal opening formed through the said cork sleeve, E, and has its lower end portion formed into a series of radial points L, which are turned outward over and upon the lower end of the cork sleeve, whereby the rigidity of the pen is secured within the cork sleeve, and the liability of its being broken is greatly diminished, as it is protected by the points, L."

The patentee then inserts in his specification the following disclaimer:

"I do not claim cork, or any other material, but limit my invention to the novel construction of the thin cork sleeve, re-enforced with a metal tube, and protected from abrasion at the ends, as set forth."

The claim is as follows:

"A penholder consisting of the body portion, A, provided with a tenon, B, having an annular socket or groove, D, provided with a cork sleeve, E, one

end of which is fitted within the said groove, and its opposite end portion provided with a re-enforce metal tube, H, having a series of points, L, which contact with the end of the said sleeve, as shown; all being constructed and arranged substantially as described."

We agree with the court below that while the mere substitution of cork for rubber, leather, velvet, or other "antinervous" material, would not, in view of the prior use of cork for penholders, be sufficient to support the patent, there was patentable novelty in the means devised to strengthen and protect the new material so as to adapt it to practical and satisfactory use as a cushion. It required but slight modifications of existing penholders to devise these means, yet we cannot say that they were obvious changes, which could have been supplied without the exercise of any inventive thought.

We cannot agree with the court below that the penholder of the defendant is an infringement of the patent. It would be if it did not dispense with the peculiar joint between the sleeve and the body of the holder, which, by the specification and the terms of the claim, must be regarded as an essential feature of the patented invention. While the defendant's penholder does not have the series of radial points (forming practically a shoulder) at the lower end of the metal tube, it has a projecting flange or shoulder at that place which protects the sleeve from abrasion. In both, the devices perform the same office in the same way, and thus in every sense one is an equivalent for the other. The two penholders are differentiated, however, by the different means for housing and protecting the sleeve at its upper end. The means pointed out in the specification are an annular groove or short conical socket in the body of the penholder at the intersection of the tenon, and a sleeve conical at the end, and fitted into the annular groove so as to be covered and protected by the overlapping wood, thus forming a recessed joint. Instead of the joint of the patent, the penholder of the defendant has the square or unrecessed joint of the Rodrigue patent. This end of the sleeve is not, as in the penholder of the patent, "protected by the hard covering portion of wood forming such a joint." If this is a disadvantage, to that extent the defendant has not profited by the patented invention; but by dispensing with the joint the penholder can be produced at less expense, and to this extent the defendant obtains a counter-vailing advantage. The patent is limited, by the express terms of the claim, as well as by the description in the specification, to a penholder which embodies this special detail of construction. To infringe the claim the body portion of the penholder must contain "the annular socket or groove, D," and a sleeve, "one end of which is fitted within the said groove." The defendant's penholder contains neither. If it be said that the square joint in the defendant's penholder protects the upper end of the shield as efficiently as does the recessed joint of the patented penholder, the reply is that it was open to both the patentee and the defendant to adopt this form of joint. The patentee might have availed himself of the Rodrigue joint, but obviously supposed that it would not suffice. The defendant concluded that it would, and, if he gained any advantages by adopting it, he is entitled to hold

them. The narrow boundaries of the invention preclude a construction of the claim not strictly warranted by its terms.

The decree is reversed, with costs, and with instructions to dismiss the bill.

THE PURITAN.

(District Court, N. D. Illinois. May 2, 1899.)

SHIPPING—LIMITATION OF LIABILITY BY VESSEL OWNERS—ACT OF 1884.

The act of June 26, 1884 (23 Stat. 53), permitting the owner of a vessel to limit his liability for indebtedness incurred on behalf of the vessel, contemplates only liabilities incurred during the last or pending voyage, allowing a reasonable time after knowledge of the liability within which to surrender the vessel, providing it is, at the time of surrender, in practically the same condition as at the close of such voyage; and a vessel owner cannot incur indebtedness for supplies furnished to a vessel during an indefinite number of voyages, and then, after the vessel has been lost or destroyed, relieve himself from personal liability therefor by offering to surrender its remains to the creditor.

This was a proceeding in admiralty by John Seymour and others to limit their liability as owners of the steamer Puritan.

C. E. Kremer, for libelants.

Lee & Lawrence and H. E. Page, for claimant.

KOHLSAAT, District Judge. The facts in this case are as follows: The steamer Puritan was during the navigation season of 1895 operated by petitioners, its owners, upon Lake Michigan and adjoining waters. Upon different voyages during the months of August and September of that year coal was furnished to said steamer by the O. S. Richardson Fueling Company, claimant herein. The last delivery of coal by claimant was on September 28, 1895, subsequent to which date the steamer made no voyage. On November 20, 1895, petitioners paid claimant \$250 on account of the sum due for coal furnished as aforesaid, leaving a balance of \$1,071.03. On December 31, 1895, the steamer was burned at Manistee, where it was put up for the winter, without fault of any one, so far as this record shows. On March 17, 1898, said claimant commenced a suit in the circuit court of Cook county, Ill., against petitioners, for the collection of the aforesaid balance of account. On April 9, 1898, petitioners filed their petition herein to limit their liability under the act of congress of June 26, 1884 (23 Stat. 53), in which they offer to surrender the remains of said steamer, alleged to be lying at the bottom of the lake at Manistee, and ask that said claimant be restrained from the further prosecution of the aforesaid suit in the Cook county circuit court.

The question for decision in this case is, can vessel owners, under the said act, avoid personal liability for indebtedness incurred on behalf of the vessel for an indefinite number of preceding voyages, or does the act only cover liabilities incurred during the last voyage, allowing a reasonable time after knowledge of such lia-

bilities within which to claim the benefit of the act? Petitioners' proctor admits that under the act of 1851 such personal liability could only be limited with respect to damages arising out of the last voyage, but insists that the wording of the act of 1884 is sufficiently broad to include all unpaid claims on account of the vessel outstanding at the time the petition to limit liability is filed, irrespective of the time the liability was incurred. I cannot agree with this contention. To say that a vessel owner may navigate his vessel for an indefinite number of voyages, neglect or fail to pay the liabilities incurred during such voyages, but receive the benefit of the freights earned thereby, and then, upon subsequent disaster to the vessel, turn over to all prior creditors its remains, and thus exonerate himself from any personal liability, would, to my mind, be putting a construction upon the purpose of the statute that would not be justified unless the plain wording of the act precluded any other conclusion as to the intention of congress. I am inclined to concur in the reasoning of Judge Brown in the case of *The Rose Culkin*, 52 Fed. 328, 332, in so far as it applies to the facts in this case, and to hold that the act of 1884 contemplates only the liabilities incurred in the last or pending voyage; allowing a reasonable time after knowledge of the liability within which to surrender the vessel, providing that at the time of its surrender the vessel is in practically the same condition as at the close of said voyage. Therefore, with respect to the said claim of the O. S. Richardson Fueling Company, the prayer of the petition is denied.

RUNDELL v. LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(District Court, N. D. Illinois, N. D. May 15, 1899.)

No. 9,175.

ADMIRALTY — MARITIME LAW OF FOREIGN NATION — ACTION FOR WRONGFUL DEATH.

Courts of admiralty of the United States will not enforce the maritime law of a foreign nation, giving a right of action for death caused by a tort, on the ground that the alleged cause of action arose on a vessel of that nation, where it was at the time on the high seas, outside of waters subject to the jurisdiction of such nation.

This was a suit in admiralty by Rundell, administrator, against *La Compagnie Générale Transatlantique*, to recover for the death of his intestate while a passenger on defendant's steamship *La Burgogne*, through the alleged negligence of defendant. Heard on exceptions to the libel.

McClelland & Monroe, for libelant.

Isham, Lincoln & Beale, for defendant.

KOHLSAAT, District Judge. The libel in this cause recites the loss of the French steamship *La Burgogne* by collision on the high seas, and the death of libelant's intestate, by reason of the alleged

fault and negligence of defendant, the owner of the steamship,—a corporation organized under the laws of France. Without passing upon the sufficiency of the allegations of the libel respecting the laws of France governing similar actions, I will consider only the salient feature of the controversy, upon the decision of which depends libelant's right to maintain this action in this court. Libelant admits in argument that the general maritime law of this country gives no right of action for death, but claims that the laws of France do give such a right, that the death in question occurred under such circumstances that the laws of France controlled, and that this court will enforce the said laws, under the circumstances of this case.

The decisions of our supreme court in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, and *The Alaska*, 130 U. S. 201, 9 Sup. Ct. 461, settled what had been theretofore a point of considerable dispute, and in regard to which numerous conflicting decisions in the lower courts had been rendered, to wit, that the admiralty courts of this country could not take cognizance of a suit to recover damages for the death of a human being upon the high seas, caused by negligence, in the absence of an act of congress or a statute of a state giving a right of action therefor. The cases arising since the latter decision (1888) which throw any appreciable light on the question in controversy herein are *The City of Norwalk*, 55 Fed. 98 (decision by Judge Brown), and *Robinson v. Navigation Co.*, 20 C. C. A. 86, 73 Fed. 883 (decision by the court of appeals of the Sixth circuit). In the former case the court held that it had jurisdiction to enforce the law of a state within the navigable waters of which the tort causing death occurred; and the latter extended the doctrine to the enforcement of similar laws of a foreign state (the province of Ontario), where the tort causing death occurred within the waters over which such foreign state had jurisdiction. In the case at bar, libelant seeks to have this court go still further, and enforce the general maritime law of a foreign nation in regard to a death caused by a tort occurring on a vessel of that nation while on the high seas, and outside of waters subject to the jurisdiction of that nation, on the theory that the vessel is a part of that nation, and that such nation would enforce its own laws under the circumstances. The latest and principal authority cited in support of this contention is that of *U. S. v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, although other previous authorities are also cited. The decision in the *Rodgers Case* was based upon section 5346 of the Revised Statutes of the United States, which gives the federal courts jurisdiction of crimes "arising upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state"; and all the other cases cited by libelant on this point, so far as jurisdiction of our federal courts is concerned, are criminal cases, and are based on federal statutes sought to be enforced. In *The Scotland*, 105 U. S. 29, our supreme court, after deciding that rights are to be generally determined by the laws of the particular country or state in which they arise, used the following language:

"But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law, as presumptively expressing the rules of justice; but, if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of that nation, carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum (that is, the maritime law as received and practiced therein) would properly furnish the rule of decision. In all other cases each nation will administer justice according to its own laws. And it will do this without respect of persons,—to the stranger as well as to the citizen. * * * Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to forms of ownership, charter party, and nationality. Others follow the vessel wherever she goes, as the law of the flag,—such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. * * *

The nearest analogy which these rules bear to the present controversy would be in a case of a collision between an American and a foreign vessel, and in such case the question would be as to whether or not our courts would be governed uniformly by the maritime law recognized by them generally, or would only be governed by it at pleasure, and would be at liberty to follow the maritime law as administered by the nation of the foreign vessel, when the latter would tend to increase the rights of our own citizens. None of the cases cited by libellant decide that the law of the flag will be considered as governing a tort of a vessel towards its passengers while on the high seas, to such an extent that it will be enforced in a foreign forum as the maritime law applicable, in lieu of the general maritime law as recognized in that foreign forum, which, with respect to that particular tort, gives no right of action.

I am unable to find that this question has ever been passed upon by our courts, but, while the cases cited by defendant do not specifically refer to the point actually in controversy here, yet the wording of the generalized statements contained in the authorities upon which it relies seems to cover its contention; and, as a number of other suits will depend upon the final decision of this point, a speedy decision by the courts of last resort upon the question is desirable, before litigants are put to the trouble and expense of a full trial upon the merits. In order, therefore, that the matter may go up on a simple record, and at a minimum expense, I will sustain defendant's exception upon this point, and dismiss the libel.

SUPREME LODGE, KNIGHTS OF PYTHIAS, v. ENGLAND.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,126.

1. REVIEW—FINDINGS OF FACT.

It is the settled rule of the supreme court and the circuit courts of appeals that, where a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its general findings of fact cannot be considered by the appellate court.

2. JURISDICTION OF FEDERAL COURTS—FEDERAL CORPORATIONS.

It is not the domicile of a corporation created by an act of congress which confers jurisdiction on the federal courts of suits to which it is a party, but the fact that it was so created, and that any suit by or against it arises under a law of the United States.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

W. M. Hough (W. S. McCain, on the brief), for plaintiff in error.

J. M. Moore and W. B. Smith, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was tried below by the court, a jury having been waived by the parties. There was an agreed statement of facts, and also other evidence. At the close of the evidence the bill of exceptions recites that:

"On this evidence the plaintiff moved for judgment against defendant for the amount of the certificate, \$3,000, and interest, which the court gave, over and against the objection of the defendant, to which defendant excepted."

The court made no special findings of fact. There was no demurrer to the evidence, no exceptions to the admission or rejection of evidence, and no declarations of law made by the court, and none asked by the defendant.

It is the settled rule of the supreme court of the United States and of this court that, when a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its general findings of fact cannot be considered by the appellate court. *Hoge v. Magnes*, 56 U. S. App. 500, 29 C. C. A. 564, and 85 Fed. 355, and cases there cited; *Minchen v. Hart*, 36 U. S. App. 534, 18 C. C. A. 570, and 72 Fed. 294. In *Lehnen v. Dickson*, 148 U. S. 71, 77, 13 Sup. Ct. 481, the supreme court declare with emphasis that:

"The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

The jurisdiction of the court below is questioned because the plaintiff in error, although created by an act of congress, has its domicile in the District of Columbia. In *Supreme Lodge v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, the supreme court failed to dismiss the case for want of jurisdiction; and although it is true, as claimed by counsel, that the question of jurisdiction was not raised, yet the statement of the case shows that it was originally brought in a state court, and removed to the federal court upon the ground that it was a federal corporation. The supreme court does not have to be moved

to notice a question of jurisdiction. It is always on the alert for that question, and is quick to dismiss a case of which the lower court had no jurisdiction. It is highly improbable that the court overlooked the question. In *Supreme Lodge v. Hill*, 42 U. S. App. 200, 22 C. C. A. 280, and 76 Fed. 468, the court of appeals for the Fourth circuit held, and we think rightly, that the federal courts could entertain jurisdiction of suits against this corporation because it was created by an act of congress. It is not the domicile of a corporation created by an act of congress which confers the jurisdiction upon the federal courts, but the fact that it has been so created; and any suit by or against it arises under a law of the United States, and is therefore within the jurisdiction of those courts, under the present ruling of the supreme court of the United States. The judgment of the circuit court is affirmed.

MYERS v. HETTINGER.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1899.)

No. 1,097.

1. JURISDICTION OF FEDERAL COURTS — ALLEGATION AND PROOF OF JURISDICTIONAL FACTS.

It is sufficient to support the jurisdiction of a federal court that the facts requisite to confer it appear in any part of the record, or are the necessary consequences of the facts stated in the pleadings or the findings of the court.

2. SAME—SUIT BY RECEIVER OF NATIONAL BANK.

A receiver for an insolvent national bank, appointed by the comptroller of the currency, may sue in a federal court, without regard to his citizenship or the amount in controversy.

3. REVIEW—FINDINGS OF FACT.

Where a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court.

4. PROMISSORY NOTE—DEFENSES—FAILURE OF CONSIDERATION.

The maker of a note given in payment for stock in a national bank, and transferred to the bank by the payee with the maker's knowledge and acquiescence, cannot defend against an action thereon by the receiver of the bank on the ground of failure of consideration, because of the bank's insolvency, where he has been fully indemnified against loss by the payee.

In Error to the Circuit Court of the United States for the District of Kansas:

Franklin P. Hettinger as receiver of the Hutchinson National Bank, the plaintiff below, brought this suit against James Myers, the defendant below, to recover the contents of a nonnegotiable promissory note for \$1,000 payable to W. L. Little, and by him indorsed and transferred for value to the Hutchinson National Bank. In addition to the general denial, the answer set out that the note was procured by fraud and was without consideration; that it was given for bank stock, concerning which the parties, at the time it was given, entered into the following contract:

"This writing witnesseth, that W. L. Little, of Hutchinson, state of Kansas, has this the 17th day of August, 1893, sold to Jas. Myers, the same city and state, ten shares (10) of stock of the Hutchinson National Bank, of said city, of the par value of one hundred (\$100.00) dollars per share, for the sum of one thousand (\$1,000.00) dollars, upon the following conditions, to wit: That said

W. L. Little herein agrees and binds himself, his heirs and assigns, to repurchase the aforesaid ten shares of stock at the expiration of six months from this date at the price above stated, together with any interest or losses paid by said Myers on said stock during the said term of six months, if the said Myers shall so elect. In witness whereof, we have hereunto set our hands and seals this day and date as above written.

W. L. Little. [Seal.]
"Jas. Myers. [Seal.]"

It is averred that the bank was insolvent at the date of the contract; that on the 21st day of October, 1893, Little notified the defendant of the bank's insolvency, and "that thereupon the said Little, for the purpose of securing the promises and agreements in said contract, made and delivered to this defendant two promissory notes for \$1,000 each, payable one year from the date, and secured the same by mortgage upon real estate owned by the said Little in Reno county, Kansas; that, by oral agreement between the said Little and this defendant, it was agreed that one of said notes should be security against the note sued upon herein, and that the other should be security for defendant's liability as a stockholder in said bank; that he has sold one of the said \$1,000 notes made by Little to James Duklow for enough to pay the assessment made against him as a stockholder in said bank; that he still holds and is the owner of the other note; that he has instituted suit upon the same in the district court of Reno county, Kansas, for the purpose of obtaining judgment thereon, and to foreclose the mortgage securing the same; that said suit is still pending and undetermined." The answer pleads the last-named \$1,000 note as a set-off or counterclaim; but the plaintiff filed a motion "to compel the defendant to elect which cause of action stated in his answer, if any are stated, he elects to stand on, for the reason that said answer sets up and pleads a counterclaim which is inconsistent with the other defenses plead by him, to wit, fraud and no consideration." The court sustained this motion, and the record recites: "Whereupon the defendant elected to stand upon the first three counts of the answer, and withdraws the fourth and last count of the same," which was the one which set up the \$1,000 note as a set-off or counterclaim. 81 Fed. 805.

F. L. Martin, for plaintiff in error.

James McKinstry, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. At the threshold of this case we are constrained to remark that the record presents an inexcusable amount of rubbish. We fully agree with the learned trial judge that there is a "want of simplicity in the pleadings." They are prolix, and contain much that is frivolous and irrelevant. The presentation of the case to this court is characterized by the same faults. As has been stated, the cause was tried before the court, who made a special finding of facts; and notwithstanding the repeated decisions of the supreme court and of this court, and, indeed, of all the appellate courts of the United States, that in such cases the appellate court cannot inquire whether the evidence supports the special findings of facts, but only whether the facts found are sufficient to support the judgment, there are various assignments of error to the effect that the evidence was not sufficient to support the special findings of facts, and the testimony is set out, and lengthy arguments made to support that contention. The record discloses that contentions were made in the lower court which were frivolous and hypercritical, and they are renewed in this court.

The jurisdictional averment of the complaint was that "the plaintiff, Franklin P. Hettinger, receiver of the Hutchinson National Bank, of the city of Hutchinson, state of Kansas," states "that he is the

duly appointed, qualified, and acting receiver of the Hutchinson National Bank; that as such receiver he is in charge of all the assets of said bank, with power to collect them by suit or otherwise; * * * that the plaintiff, Franklin Hettinger, receiver of the Hutchinson National Bank, is an officer of the government." The circuit court made two findings on this subject,—one to the effect "that on October 18, 1893, the said Hutchinson National Bank closed its doors, being insolvent; and was taken in charge by the comptroller of the currency, and the plaintiff in this action was appointed receiver," and the other to the effect that "the court further finds that Franklin P. Hettinger, the plaintiff, was at the commencement of this suit, and is now, the duly appointed, qualified, and acting receiver of said bank." It is sufficient to support the jurisdiction of a federal court that the facts requisite to confer it appear in any part of the record, or are the necessary consequences of the facts stated in the pleadings or the findings of the court. *Ward v. Manufacturing Co.*, 12 U. S. App. 295, 5 C. C. A. 538, and 56 Fed. 437.

It is further contended that the court below had no jurisdiction because the amount in controversy was less than \$2,000, exclusive of interest and costs. But it has been repeatedly decided that a receiver appointed by the comptroller of the currency to close up the affairs of an insolvent national bank may sue in the federal court, without regard to his citizenship or the amount in controversy. *Price v. Abbott*, 17 Fed. 506. The opinion was by Mr. Justice Gray, who cited *Platt v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215; *Stanton v. Wilkeson*, 8 Ben. 357, Fed. Cas. No. 13,299; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Kennedy*, 17 Wall. 19; *U. S. v. Hartwell*, 6 Wall. 385. The later cases are *Armstrong v. Ettlesohn*, 36 Fed. 209; *Stephens v. Bernays*, 41 Fed. 401, and cases there cited.

While the special findings of facts and declarations of law are somewhat mingled, the special findings of facts are conclusive on the merits of this case. The court below found that the note in suit was sold, assigned, and transferred to the bank by the payee, Little, in the presence of the defendant, who made no objection thereto; that the two notes for \$1,000 each, secured by mortgage on real estate, were executed by Little to the defendant, Myers, to secure him against loss on account of the note here sued on, and by reason of his liabilities as stockholder in the bank, growing out of his purchase of the \$1,000 of its stock; that the defendant's liability to loss by reason of his being a stockholder in the bank has been fully satisfied with the proceeds of one of the notes, and that at the time defendant filed his answer he was foreclosing a mortgage given to secure the other \$1,000 note; that the property mortgaged "is reasonably sufficient to secure the payment" thereof; "that the defendant has failed to allege or prove that he has suffered any damage by reason of the purchase of the bank stock from W. L. Little"; and "that defendant has not in any way been defrauded in the purchase of the bank stock." As we construe the special finding of facts, Little, for the purpose of indemnifying the defendant against loss by reason of the purchase of the bank stock, and to indemnify him for paying the \$1,000 note which he executed for the purchase money

of the stock, and which had been transferred to the bank in the presence of the defendant, and apparently with his knowledge and consent, executed his two notes of \$1,000 each, secured by a mortgage on real estate; that the purchase of one of these notes has satisfied the defendant's liability as a stockholder; and that he still holds, and is proceeding to foreclose, the mortgage given to secure the remaining note, to meet his liability on the note here in suit. Much is said about the fraudulent means by which defendant was induced to purchase the bank stock, and the damage resulting to him therefrom; but all contention on these subjects is foreclosed by the special findings of the court that the defendant was "not in any way defrauded in the purchase of the bank stock," and "that he has failed to allege or prove that he has suffered any damage by reason of the purchase of the bank stock." This court cannot look into the evidence with a view to determine whether it supports these special findings of fact by the court. In *Supreme Lodge v. England* (at the present term) 94 Fed. 369, we said:

"It is the settled rule of the supreme court of the United States and of this court that, when a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its general findings of fact cannot be considered by the appellate court. *Hoge v. Magnes*, 56 U. S. App. 500, 29 C. C. A. 564, and 85 Fed. 554, and cases there cited. *Minchen v. Hart*, 36 U. S. App. 534, 18 C. C. A. 570, and 72 Fed. 294. In *Lehnen v. Dickson*, 148 U. S. 71, 77, 13 Sup. Ct. 484, the supreme court declare with emphasis that: 'The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts.'"

It was not set up in the answer, and is not claimed in the brief, that the defendant is not fully indemnified for the payment of the note in suit. It is clear to our minds, from the facts found by the lower court, that the defendant, in consideration of the execution of the two \$1,000 notes, and the mortgage to secure the same, was to pay and satisfy the note held by the bank, and here in suit. He now seeks to escape the obligations of that agreement, and to defeat the collection of the note in suit, and at the same time retain the securities given him to pay it. Upon the facts found by the lower court, the judgment was for the right party and for the right amount, and the same is affirmed.

PIKE v. GREGORY.

(Circuit Court of Appeals, First Circuit. May 11, 1899.)

No. 268.

1. CITATION—NECESSITY ON APPEAL—SPECIAL APPEARANCE.

With reference to the rule that there is no necessity for issuance of citation where appeal is taken in open court, one who appears for the purpose of making a motion to dismiss, even though the motion relates to a want of jurisdiction and lack of proper service, is in court for all purposes relating to the disposition of the motion, whether on appeal or otherwise.

2. JURISDICTION AS BASIS OF MOTION TO DISMISS APPEAL.

That the court below had no jurisdiction of the parties cannot be made the basis of a motion to dismiss an appeal.

3. SUBSTITUTED SERVICE IN ANCILLARY PROCEEDINGS.

Service in ancillary proceedings on the attorney of record in the original cause is sufficiently supported by an order permitting such substituted

service, on bill alleging that defendant is not an inhabitant of the district, and cannot be served with process and summons therein, and that he has an attorney appearing for him in the case to which the suit is ancillary, and asking that service be made on such attorney.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Thomas H. Talbot, for appellant.

Francis A. Brooks, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. The principal facts to which this appeal relates, and the principles governing it, were stated by us in our opinion passed down March 13, 1897, in the same case, under the title of Gregory v. Pike, reported in 25 C. C. A. 48, 79 Fed. 520. Subsequent to the mandate which issued in accordance with that opinion, the complainant, by leave of the court below, amended her bill by adding thereto as follows:

"Said Charles A. Gregory, being a resident of Chicago, in the state of Illinois, as set forth in said bill, is not an inhabitant of this district of Massachusetts, and cannot be found therein, so as to be served with process and summons to appear as defendant in this suit; and at the same time said Gregory has an attorney appearing for him in this suit, and who appeared for him in said suit No. 2,170 from its institution to its termination, and appeared for said Gregory in sundry other suits, mostly in this court, brought by said Gregory concerning the matter in controversy in said suit 2,170, some of which are still pending, namely, Francis A. Brooks, of this city of Boston. Wherefore said Mary H. Pike prays that this court may order that notice of this suit and a summons to appear therein may be served on said Brooks, and that such notice, being thus duly served, may be held to be notice of this suit duly served on said Gregory."

Suit 2,170, referred to in this amendment, was the principal case, with reference to which we used the expression, in the opinion of March 13, 1897, that the proceedings now under consideration are undoubtedly ancillary in their nature. The circuit court allowed the amendment, and thereupon ordered that "substituted service be made on the attorney of record for Gregory in No. 2,170." Thereupon a subpoena issued and was duly served on Mr. Brooks. Subsequently thereto, Mr. Gregory filed a special appearance, and a motion to dismiss, of which the following is a copy:

"And now Charles A. Gregory, above named, not admitting the jurisdiction of the court in or over the above-entitled cause, and for the purpose of objecting to the exercise by the court of any such jurisdiction, comes and moves the court that the writ of subpoena issued out of the clerk's office of said court on the nineteenth day of May, A. D. 1897, which has not been served on him as by law required, may be quashed, and that said cause may be dismissed by the court for want of jurisdiction of the same.

"By his solicitor, F. A. Brooks, who appears specially for the purpose of raising the said question of jurisdiction, and that alone.

"F. A. Brooks, Solicitor for Gregory."

The court below thereupon entered a decree dismissing the bill, stating in the rescript accompanying the dismissal that "the motion in this case to dismiss the bill of complaint for want of proper service

of subpoena is granted." Thereupon Mary H. Pike took an appeal in open court, which was duly allowed.

In this court Gregory seasonably made a motion to dismiss for the reasons that no citation ever issued, and that he was never made a party defendant to the suit in the circuit court, and never appeared therein, and also because Mary H. Pike, on the record, is a citizen of the state of Maine and himself a citizen of the state of Illinois, and because the only relief sought by Mary H. Pike is an injunction to restrain him from bringing or prosecuting certain suits, so that it was, therefore, within the discretion of the circuit court whether to grant or refuse such relief, and its refusal is not a proper subject of an appeal. The last ground of the motion was not urged at the hearing, and clearly concerns the merits of the case, and is properly to be considered only after the parties are brought into court. The second ground is clearly insufficient, as this proceeding is ancillary in its nature, and, also, it could not be the basis of a motion to dismiss an appeal. The first ground for the motion is sufficiently met by the propositions of the appellant that, as the appeal was taken in open court, no citation was required, and that, inasmuch as Gregory had come into the circuit court for the purpose of making the motion to dismiss, even though it related only to want of jurisdiction and lack of proper service, he must be considered in court for all purposes relating to the disposition of that motion, whether on appeal or otherwise.

With reference to the merits of the appeal, we are unable to perceive wherein the appellant has not fully complied with all that was required by our opinion of March 13, 1897; and we think the circuit court must have been misled into making the order which it did by those portions of our former opinion which refer to the attempt of Mary H. Pike, on the former appeal, to maintain that the proceedings are in the nature of an intervening petition, and not of an original bill. In disposing of this appeal, we wish to state that we have in no manner considered the merits of the bill, or whether or not it can be maintained as an ancillary proceeding; but we hold only that, by the substituted service, the complainant has sufficiently brought Gregory before the circuit court to enable it to pass on all such matters, and all other like matters which the bill presents.

The decree of the circuit court is reversed, and the cause remanded to that court for further proceedings, and the costs of appeal are awarded to the appellant.

RICHARDSON et al. v. LOREE et al.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1899.)

No. 769.

1. JUDGMENT—IMPEACHMENT IN EQUITY FOR FRAUD.

A holder of bonds of a corporation, the value of which is impaired by a collusive decree, to which he was not a party, establishing other claims against the corporation as liens upon its property superior to the lien of its bonds, may maintain a suit to impeach such decree, as otherwise he would be without remedy.

2. EQUITY—DEMURRER TO BILL—MATTERS WHICH MAY BE CONSIDERED—ANCILLARY SUITS.

A suit in equity in a federal court to impeach a former decree of such court, to which the complainant in the bill was not a party, for fraud and collusion, while ancillary to the suit in which such decree was rendered for purposes of jurisdiction, so that it may be entertained without regard to the citizenship of the parties, is an original suit, in a chancery sense; and, in passing on a demurrer to the bill which states the facts, the court cannot look into the record of the former suit, except so far as it is made a part of the bill, nor can such record be brought before the court by any averments or recitals in the demurrer.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

The bill was filed on April 5, 1898. A general demurrer was filed, which was sustained by the circuit court, in a decree dismissing the bill. The bill is by F. L. Richardson, a citizen of the state of Louisiana, as receiver of the American National Bank, and Edward Weil and Sumpter Turner, citizens of the state of Louisiana, as syndics of the insolvency of M. Schwartz & Co., against William M. Loree, who describes himself as a citizen of Iowa; J. Bancroft Ellis, alleging himself to be a citizen of Leicester, England; the Teche Railroad & Sugar Company, Limited, a corporation organized and domiciled in the state of Louisiana; Seaman A. Knapp, a citizen of the state of Louisiana; the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, a corporation organized under the laws of Louisiana, and domiciled in that state. The bill charges that complainants, in their representative capacities, hold the mortgage or debenture bonds of the Teche Railroad & Sugar Company, Limited, secured by first mortgage on all the property of said corporation, the commercial firm of M. Schwartz & Co. holding 5 of said mortgage bonds; that orators, in their representative capacities, hold 25 of said mortgage bonds, aggregating in English money 1,250 pounds sterling, and in American money \$6,250; that defendants had fraudulently and collusively combined and confederated, upon false and fictitious claims, to secure possession, under cover of judicial process, of the property of said railway company, using improperly and fraudulently the jurisdiction of the said circuit court; that in furtherance of said combination and conspiracy, and falsely alleging the jurisdiction of the circuit court, the said Loree, upon a false and fictitious claim, brought a bill of complaint for moneys had and received; that said Loree never at any time had any business relations with said company or its officers, except in furtherance of the conspiracy conceived by him; that he was a person interposed for the purpose of creating and investing the court with jurisdiction; that the claim sued upon by him for materials furnished was due, if to any one, to Seaman A. Knapp and the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, and that any assignment or transfer of the claim to Loree was collusive and fraudulent, and for the purpose of creating jurisdiction; that said Loree was without interest in the matter, and his invocation of the powers and process of the court was a fraud upon the court and its jurisdiction; that contemporaneously with the filing of the said Loree bill, and in furtherance of said conspiracy, the solicitor, acting for him, also filed a cross bill in behalf of J. Bancroft Ellis, as the alleged trustee of the notes and mortgage bonds given by said company as security for the debenture bonds; that said J. Bancroft Ellis was at no time requested by the mortgage bondholders to file said cross bill, or to take measures looking to the protection of their interests, and that, in filing said cross bill, he did so under the direction of Seaman A. Knapp and those combining with him to obtain possession of the corporate property of said company; that, as appears by the record, contemporaneously with the filing of the Loree bill and the cross bill of Ellis service of subpoena was accepted by the company, appearance entered, delays waived, motion for a receiver immediately presented, accompanied by an affidavit of Bradford Knapp, brother of said Seaman A. Knapp, as secretary of the corporation, and the consent of the corporation to the appointment of a receiver; that the proceeding being apparently one by consent, the court made the appointment; that said parties defendant, taking advantage of the conscience of

the court, proceeded by consents to enter up orders looking to the disposition of the property and the settlement of the estate, in the interest of those who had combined and confederated to wrong and injure the creditors of the corporation, without calling upon the court for any official or independent action, the effect of which was to despoil the creditors of the corporation, with only the shadow of judicial indorsement for their protection; that the entire proceeding was one in furtherance of the scheme to spoliage the creditors; that by consent a decree was entered, based upon the report of the master, under and by terms of which decree the mortgage or debenture bonds were fraudulently subordinated to the claims of Loree and the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, when they should have been subordinated only to such receiver's certificates and charges as insured to the benefit of the property, or as had gone into the hands of third parties in good faith; that by consent, and based upon the report of the master, who was acting under the instructions of the solicitor for the complainant, a judgment was entered in favor of William M. Loree for \$23,648.64, with interest, to operate as a first lien, superior to all other liens, mortgages, or privileges, and subordinate only to the receiver's costs and charges; that a decree was also entered in favor of the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, for the sum of \$117,813, with interest, which was declared to be a lien prior and paramount to all others upon the real estate, except the receiver's costs and charges (a copy of said decree is annexed as an exhibit to the bill); that by consent receiver's certificates were authorized and issued on representations that the same were to operate the railway, the fact being suppressed from the court that said certificates were issued, not for the purpose of operating the road alone, but of cultivating a sugar plantation owned by the corporation,—a business at all times extremely hazardous, and the operation of which the court was without power or authority to supervise, it being simply a private enterprise, without any public or quasi public duty; that the granting of these decrees in favor of said Loree and said Louisiana & Southern States Real-Estate & Mortgage Company, Limited, aggregating the sum of \$141,000, together with the receiver's certificates in the sum of \$40,000, and the charges and costs of administration, and all of which, under the decrees, are preferred to the mortgage bonds held by complainants, practically destroyed the only security that they had; that alleged indebtedness to the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, was subordinate in rank to the mortgage bonds held by complainants, and had in fact been discharged by stock of the said railway company issued to the holders of said alleged indebtedness, who were not entitled to any decree whatever on said alleged indebtedness; that the receiver's certificates issued were used, not for the purpose of advantaging and improving the property, but were employed extravagantly, in operating a sugar plantation, and the results of which were disastrous and entailed heavy losses; that complainants, immediately upon their appointment, exercised reasonable diligence in examining into the affairs of said Teche Company, and thereby discovered the fraudulent and collusive combination charged in the bill. Upon the charges thus made in their bill of complaint, complainants prayed: For the postponement of the sale then advertised, and a permanent injunction against the sale or disposition of the property and merchandise. That the receiver be directed to file a complete inventory of the property of the company which went into his hands. That the receiver file a specific account for all moneys received by him, from whatever source, and of all disbursements and moneys expended. That he file a detailed statement of his administration as receiver, showing what improvements had been made since his possession, and whether such improvements were permanent in character; the amount of receiver's certificates he issued; to whom; for what purpose; if sold for money, at what price; if exchanged for commodities, at what rate; how the moneys or commodities received in exchange were applied,—whether in permanent improvement of the property, or the cultivation of the sugar plantations. And that, after hearing, a decree be entered annulling all orders, judgments, and decrees entered by consent, and dismissing the bill of Loree and the cross bill of J. Bancroft Ellis, on the ground that the jurisdiction was fraudulent and collusive,—and this without prejudice to the bona fide creditors whose debts were contracted by the receiver, and

which inured to the benefit or improvement of the property,—and for such other and further relief as the equity of the case might require. The bill exhibits the said decrees alleged to be fraudulent, but does not exhibit any other part of the record in the case. It is assigned as error that the court sustained the demurrer and dismissed the bill.

H. L. Lazarus and J. N. Luce, for appellants.

A. H. Leonard, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The complainants own \$6,250 of the bonds of the Teche Railroad & Sugar Company, which are secured by mortgage on the property of the company. In a case pending in the United States circuit court for the Western district of Louisiana, according to the averments of the bill, William M. Loree has obtained a decree against the company for \$23,648.64, and the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, has obtained a decree for \$117,813. These decrees were rendered in the same suit. The complainants in this case were not parties to that suit. They had no opportunity to defend against the decrees. The decrees were obtained by collusion between the parties to the suit. The company did not owe Loree anything, and had never dealt with him in any way. It had been indebted to the Louisiana & Southern States Real-Estate & Mortgage Company, Limited, but had paid its indebtedness. So that both judgments were unjust, and obtained by fraudulent collusion between the parties, and by an imposition on the court. These statements, for the purpose of considering the demurrer, must be taken as true. These decrees are made preferred claims, and the effect of them is to render worthless the bonds held by the complainants. It must be regarded as well settled that a stranger to a suit, who, if a judgment therein were given full credit and effect, would be prejudiced in regard to some pre-existing right, is permitted to impeach the judgment. Being neither a party to the action, nor entitled to manage the cause or appeal from the judgment, he is allowed by law to impeach it; otherwise, he would be without remedy. 2 Freem. Judgm. (4th Ed.) §§ 335, 505a, 512; Pacific R. Co. of Mo. v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Sayre v. Land Co., 73 Ala. 85; Bergman v. Hutcherson, 60 Miss. 872; Carey v. Railway Co., 150 U. S. 171, 14 Sup. Ct. 63; Schuster v. Rader, 13 Colo. 329, 22 Pac. 505; Palmer v. Martindell, 43 N. J. Eq. 90, 10 Atl. 802; Edson v. Cumings, 52 Mich. 52, 17 N. W. 693.

In the printed argument filed by counsel for the appellees it is stated that the demurrer was argued before the circuit court on the theory that this suit was ancillary to the case of Loree against the Teche Railroad & Sugar Company. "That record, however," counsel adds, "is not before this court now, and, of course, the reasons referred to do not appear on the face of the transcript as it has been brought to this court." It is suggested that this court "cannot properly decide this case without that record." No motion is made for a writ of certiorari, for manifestly that could not be granted. The bill in this case did not make the record in the case of Loree against

the Teche Railroad & Sugar Company a part thereof. It only made the decree in that case an exhibit. It is true that the case at bar, for the purposes of the jurisdiction, is ancillary to the case referred to, but in other respects it is an original bill. Upon this question the court, in *Pacific R. Co. of Mo. v. Missouri Pac. Ry. Co.*, 111 U. S. 522, 4 Sup. Ct. 592, said:

"On the question of jurisdiction the suit may be regarded as ancillary to the Ketchum suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific R. R. v. Missouri Pac. Ry. Co.*, 1 McCrary, 647, 3 Fed. 772. The bill, though an original bill, in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the circuit court. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633."

In the case last quoted (*Pacific R. Co. of Mo. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 590), an effort was made to have the court, in deciding a demurrer, refer to records not made a part of the bill. The court held that, as the bill charged that the foreclosure decree was obtained by fraud and collusion,—the facts being stated in the bill,—a demurrer to it must be overruled. On the question of examining the record in the case in which the alleged fraudulent decree was rendered, the court said:

"We are of the opinion that this court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented, as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill."

The fact that these records were placed before the court on the trial of the demurrer, and cited in the argument, as stated in the briefs filed here, may have unintentionally led the learned judge who presided in the circuit court to believe that such record was a part of the bill to which the demurrer was addressed; but the record in that case does not appear in the transcript here, and is no part of the bill in this case. The allusion to and use of the records in the demurrers cannot change the result, even if the demurrers had, in the writing, referred to them; for it is a fundamental principle of pleading that a demurrer must be based exclusively upon matter apparent on the face of the bill. The objection must be to matter in the bill, or because of the omission of matter that should be inserted. If the demurrer recites facts not in the bill by way of defense, it is called a "speaking demurrer," and the new facts cannot be considered. A defendant is not permitted to make up the complainant's case for him. If the defendant needs for his defense other facts, he must file either an answer or plea. 1 Beach, Mod. Eq. Prac. § 226; 1 Daniell, Ch. Prac. (2d Am. Ed.) 679, marg. p. 656; 6 Enc. Pl. & Prac. 393.

In *Stewart v. Masterson*, 131 U. S. 151, 9 Sup. Ct. 682, it was held:

"A demurrer to a bill in equity cannot introduce as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer. * * * Where there is matter in the bill which is properly pleaded, and is properly ground for equitable relief, and requires an answer or a plea, a demurrer to the whole bill will be overruled."

The decree of the circuit court is reversed, and the case is remanded to that court, with directions to overrule the demurrer, with costs, and to take such further proceedings in the suit as shall be proper, and not inconsistent with the opinion of this court.

LANSING et al. v. STANISICS et al.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,100.

REVIEW—CONFLICTING EVIDENCE—FINDINGS OF FACT.

The findings of the chancellor on a question of fact will not be disturbed, unless clearly shown to be against the weight of evidence.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Suit by Theodore Stanisics, as trustee, against James F. Lansing and Emma Lansing, to foreclose a mortgage. Judgment for plaintiff, and defendants appeal. Affirmed.

Lionel C. Burr (Charles L. Burr, on brief), for appellants.

Alfred W. Scott, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The appellee filed in the court below his bill to foreclose a mortgage on lots in Lincoln, Neb., given to secure a note for \$2,000, and \$41.20 taxes. The appellants answered that, after the execution and delivery of the note and mortgage, they were altered and changed by inserting in each instrument the words "of Chicago, Ill.," and "in gold coin." The connection in which these words occur in the instrument is this: The note reads:

"On the second day of April, 1898, I promise to pay Theodore Stanisics (trustee), of *Chicago, Ill.*, or order, two thousand (*in gold coin*) dollars."

It is claimed the italicized words are interpolated. The plaintiff denied that the instrument had been altered. The evidence on the issue thus raised is conflicting. The learned chancellor of the circuit court found the issue in favor of the plaintiff, and decreed a foreclosure of the mortgage. The finding of the chancellor in the lower court on a question of fact is presumptively right, and will not be disturbed unless the appellate court can clearly see that it is opposed to the weight of evidence. *Snider v. Dobson*, 40 U. S. App. 111, 21 C. C. A. 76, and 74 Fed. 757. We have read very carefully all the evidence in this case, and are not able to say that the lower court erred in its finding; indeed, we think its finding is supported by the weight of the evidence. The decree of the circuit court is affirmed.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. GENERAL ELECTRIC CO.

(Circuit Court, N. D. New York. May 22, 1899.)

CONTRACTS—CONSTRUCTION—SALE OF PATENTED ARTICLES.

A provision of a contract that it shall not be deemed to authorize either party to make sales of articles covered by patents owned by the other, cannot be construed as a covenant against the making of such sales, so as to afford a basis for a suit by one party to enjoin the other from making them, but it leaves the parties, as to such sales, as they stood before the contract was made.

In Equity. On demurrer to bill.

William D. Guthrie, M. B. Philipp, and Paul D. Cravath, for complainant.

W. B. Hornblower and Frederick P. Fish, for defendant.

COXE, District Judge. This is a suit in equity in which the court acquires jurisdiction by reason of diverse citizenship. The bill seeks to enjoin the defendant from selling certain electrical devices to its licensee in New York City in alleged violation of an agreement entered into between the parties to this action, March 31, 1896. The bill rests solely upon this agreement. Whatever right the complainant possesses must be found there. Unless the agreement forbids the contemplated sale the action must fall. If the defendant has covenanted not to make the sale the action is well brought; if it has not so covenanted the action is without foundation. This proposition is conceded on all sides. The agreement, so far as it is necessary to consider the same, may be epitomized as follows: (1) Each party grants to the other a license under all United States patents owned or controlled by it subject to outstanding licenses. (2) Territorial licenses and obligations existing thereunder are not affected by the sweeping cross-licenses. (3) Neither party is permitted to grant licenses to its territorial licensees under the patents of the other party. (4) The contract neither authorizes nor forbids the defendant to sell to its licensee in New York City apparatus covered by the patents of the complainant. The complainant is, of course, treated in the same manner. (5) These sales are recognized, but the party making them has no power to grant licenses to use or sell such apparatus under the patents of the other party. The cross-licenses granted by the agreement are thus qualified so as to preclude territorial licensees from receiving licenses or rights under the patents of the other party. In short, the contract provides for a broad interchange of licenses, carefully guarding, however, the vested rights of existing licensees. As to them, the situation was delicate and complicated and it was evidently deemed best to leave it precisely as it existed before the contract was signed. They gained no new rights and lost no existing rights by reason of the agreement between their principals. That the defendant could have sold the multiphase apparatus to its New York licensee prior to March 31, 1896, is beyond dispute. It can do so now unless it has agreed that it will not make such sales. The agreement will be searched in vain for such a

covenant. In making the sale prior to March 31, 1896, the defendant took the risk of an infringement suit; it takes the same risk now. The court understands that the complainant does not pretend that the contract contains an express covenant not to sell, but it is argued that this agreement may be implied. In order to reach such a construction it is necessary to torture the provision that sales by defendant to the New York company of multiphase apparatus shall not be deemed to be authorized by the agreement, and the provision that such apparatus shall not be licensed under the Tesla patents, into a positive covenant that defendant will not make such sales. No rule of interpretation familiar to the court will permit this to be done. There is a vast difference between a provision which declines to sanction an act and one which forbids it. The one is passive and inert; the other active and enforceable. The demurrer is allowed.

DURANT v. CORBIN.

(Circuit Court, D. Washington, E. D. May 22, 1899.)

1. MINERAL LANDS—JOINT LOCATION OF PLACER CLAIMS.

It is the policy of the government, in disposing of its mineral lands, to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use, and it is contrary to this policy, and to the provisions of Rev. St. §§ 2330, 2331, to permit one person to cover more than 20 acres of placer ground by one location by the device of using the names of his employés or friends as locators.

2. SAME—RIGHTS IN CLAIMS ON INDIAN LANDS—NECESSITY OF SHOWING ACTUAL MINERAL CHARACTER OF LAND.

Where mineral claims in litigation are located on lands recently a part of an Indian reservation, and which have not been opened to occupation by white people except for mining purposes, the actual mineral character of the land involved must be shown, otherwise the court will not adjudicate rights therein in favor of either party.

This was a suit in equity to adjudicate conflicting rights in mining claims on the public lands.

Heyburn, Price, Heyburn & Doherty, for complainant.
Albert Allen, for defendant.

HANFORD, District Judge. This is a suit in equity, brought under section 2326, Rev. St. U. S., in support of the complainant's adverse claim, filed in the United States land office at Spokane, against the application of the defendant for a patent for Sheep Creek placer claim. The complainant claims, by purchase from the locators thereof, the Lost Axe and Clifford mining claims, each containing 20 acres, which are within the boundaries of Sheep Creek placer claim, containing 160 acres, located by a company of eight persons, seven of whom have executed deeds conveying their rights to the defendant. In their pleadings each party claims priority in point of time in the making of their respective locations, both being made on the same date, to wit, February 20, 1896. There is, however, such preponderance of the evidence in favor of the defendant on this point that counsel for the complainant upon the hearing

practically conceded that the location of the Sheep Creek placer claim was prior in point of time to the locations of the Lost Axe and Clifford. The complainant, however, contests the validity of the Sheep Creek location on the ground that the same was not made bona fide by all of the eight persons named, and charges that all of them except R. A. Hutchinson, who has not given a deed of his interest to the defendant, were either employes of the defendant, and acting for him in locating said claim, or they were friends of the defendant, who had nothing whatever to do with making said locations, and that the defendant simply used their names as locators, in the expectation that they would afterwards convey whatever colorable rights might be acquired in their names to him without consideration. The evidence fully sustains the contention of the complainant that the location of Sheep Creek placer claim was merely a scheme on the part of the defendant to acquire title to the ground by using the names of his employes and friends as locators. I have no difficulty in finding this to be the case from the testimony of the defendant himself, who frankly admits that he arranged for and directed the location of said claim, and that his purpose was to be sure of having the ground located in the names of his friends, with whom he could deal on terms satisfactory to himself; and he also admits that he has paid no consideration for the conveyances which the locators have made to him. The evidence shows, however, that he did pay some of the locators who went upon the ground for doing so. The defendant claims that the location of the Sheep Creek placer claim in the manner in which it was made is authorized by section 2330, Rev. St. U. S., which reads as follows:

"Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands or authorize the sale of the improvements of any bona-fide settler to any purchaser."

It was necessary to use the names of eight persons, because section 2330 provides that no location of a placer claim shall include more than 20 acres for each individual claimant, and it was considered necessary to secure the largest area allowed to an association by section 2330, in order to secure the water rights necessary, as the defendant claims, to profitably work the ground. The advantage of securing a large area is obvious, and no doubt selfishness would dictate the claiming of a much larger tract than 160 acres if the utmost limit of the law would permit it. But the policy of the government in disposing of the mineral lands, as well as other portions of the public domain, is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use, rather than to favor a few individuals, who might wish to acquire princely fortunes by securing large tracts of such land; and it is contrary to this policy, and to the provisions of sections 2330

and 2331, for one person to cover more than 20 acres of placer ground by one location by the device of using the names of his employes and friends as locators. *Gird v. Oil Co.*, 60 Fed. 545.

If only the contentions of the parties were to be considered, I would hold that the defendant's claim is valid to the extent of 20 acres only, and that he should select the 20 acres within the boundaries of the claim, so as to relinquish all right to the Lost Axe and Clifford locations, and that the complainant be adjudged to have the superior right to the ground claimed by him; but, considering that these claims are within the boundaries of a tract once set apart for an Indian reservation, which has not been opened to occupation by white people for any other purpose than locating, developing, and operating mines, it is quite important that, before either party shall be adjudged to have acquired the right to a patent, there should be a showing that the ground claimed is in fact mining ground, containing gold or other precious metals in sufficient quantity to pay for working, and that the purpose of the parties in acquiring title is to develop and operate mines. Having read with care all of the evidence offered, I am forced to conclude that the parties have intentionally refrained from attacking each other on the ground that the land claimed is not subject to entry under the placer mining laws, and that they have assumed that the court would take it for granted that the land claimed is mineral land, in the absence of any dispute in that regard. The defendant claims to have expended \$2,000 in locating and developing the Sheep Creek placer claim, but the character of any development work which may have been done is not shown by the evidence; neither does the evidence show the nature of any work done by the complainant or his vendors. In answer to leading questions, two of the complainant's witnesses stated that they had found gold within the Lost Axe and Clifford claims, and no further questions were asked either upon direct or cross examination; and on the part of the complainant there is no further showing as to the value of his claim for mining purposes. The evidence on the part of the defendant is equally vague and unsatisfactory. Some of the witnesses testify that they found a number of colors; that they found evidence of placer-mining work having been done in the past; that miners who had been engaged in such work had been driven away by the Indians. There is other testimony to the effect that this ground is richer than some other ground along the Columbia river, but there is no evidence whatever as to the value of the Columbia river ground referred to for mining purposes. I am unable to draw even an inference as to the value of this ground by comparison with unidentified ground in the vicinity of the Columbia river. Presumably, the land and water rights are valuable for purposes other than mining, and, without evidence to show affirmatively that the land located is the character of land which the law authorizes individuals to enter, the court cannot decide that either party is entitled to receive a patent. For lack of evidence that the ground in dispute, or any part of it, is subject to entry under the laws as placer-mining ground, it will be decreed that neither party is entitled to any part of the land claimed.

CLEVELAND CITY RY. CO. v. CITY OF CLEVELAND.

CLEVELAND ELECTRIC RY. CO. v. SAME.

(Circuit Court, N. D. Ohio, E. D. May 16, 1899.)

Nos. 5,839 and 5,840.

1. CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — ORDINANCES GRANTING STREET-RAILROAD FRANCHISES.

City ordinances making grants of franchises to street-railroad companies on specified conditions, when accepted by the companies, constitute contracts, which cannot be annulled or amended except by consent of both parties, and which are protected from impairment by the fourteenth constitutional amendment.

2. EQUITY JURISDICTION — RESTRAINING ENFORCEMENT OF UNCONSTITUTIONAL ORDINANCE.

A federal court of equity may grant relief by injunction against a city ordinance which impairs the contract rights of complainant, or deprives him of his property without due process of law.

3. STREET RAILROADS—RIGHT OF MUNICIPALITY TO FIX RATES OF FARES.

The statutes of Ohio confer power upon municipalities to determine the conditions of the grant of a franchise to a street-railroad company, including the rates of fare to be charged, but no power to thereafter prescribe rates of fare; and where the grant itself fixes the rate of fare a reserved right of regulation does not authorize the municipality to thereafter change it during the life of the grant.

4. CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — ORDINANCE CHANGING RATES OF FARE ON STREET RAILROADS.

A city, in granting franchises to two certain street-railroad companies, fixed the rates of fare to be charged, reserving the right to increase or diminish such rates, as it might deem justifiable and expedient. Afterwards, by different ordinances, it granted additional franchises to each company, expiring with the original franchise, to build extensions, lay additional tracks, or to change the motive power. It imposed conditions to each of such additional grants, which were accepted by the respective companies, in the way of requiring street paving and repairing, or the furnishing of increased car service, to which the companies were not before subject. Such ordinances also made changes in the rates of fare by providing that but a single fare, at the rate then charged, should be charged for passage between any two points on either the original lines or their extensions, and by requiring the companies to sell tickets at a reduced rate. As to one of the companies, which, under the ordinance containing the reservation, had the right to, and did, charge two fares for passage over the entire length of its line, a subsequent ordinance granting it the right to lay a double track, and to maintain it during the life of its original franchise, required the carriage of passengers over the entire line for a single fare at the rate then charged, and such company was subsequently granted the right to change its motive power from horses to electricity, which it did, at a large expense. Each of said companies subsequently consolidated with a number of other companies, as to whom no power to change the rates of fare had been reserved by the city, their original lines, to which the reservations in regard to changing rates of fare applied, thus becoming parts of two several consolidated systems, each containing many miles of road, operated together. These consolidations were consented to by the city, the consents containing provisos, accepted by the consolidated companies, requiring transfers to be given, or through cars run, so that a single rate of fare or ticket at the rate then charged should entitle a passenger to ride over the lines of any two of the constituent companies, whereas they were before entitled to charge separate fares over each line. None of such legislation of the city subsequent to that granting the two original franchises mentioned contained any reservation of the right to make future changes in rates of fare. *Held*, that such subsequent legisla-

tion, and its acceptance by the companies, operated as a repeal of the provisions of the original grants reserving the right to change the rates of fare on the original lines of the two companies to which they applied, or constituted new contracts with such companies and their successors, which the city could not impair during the life of their franchises; and that an ordinance passed by the city requiring the consolidated companies to reduce the rates of fare on such original lines, aside from being impracticable in operation, since each of such lines had become a part of a larger system, operated together as a whole, was unconstitutional and void as an impairment of the contracts made by such subsequent ordinances.

5. SAME—MODIFICATION OF GRANT BY CITY — VALIDITY UNDER OHIO STATUTE.

Rev. St. Ohio, § 2502, providing that, after a grant or renewal of a grant is made by a municipal corporation, it shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal, does not prohibit a city making a grant of a franchise to a street-railroad company, in which it reserves the right to change the rates of fare to be charged, from thereafter modifying such contract on sufficient consideration.

These are suits in equity by the Cleveland City Railway Company and the Cleveland Electric Railway Company, respectively, against the city of Cleveland, to enjoin the enforcement of an ordinance reducing rates of fare on portions of complainants' lines, on the ground of its unconstitutionality. Heard on application for preliminary injunction.

The complainants have instituted this suit to seek relief through a decree declaring void certain ordinances passed by the city of Cleveland in October, 1898, known as "Low Fare Ordinances." By the provisions of these two ordinances, the city undertakes to compel each of the two complainants to carry passengers over certain designated portions of the routes operated by them at a cash fare of 4 cents, and to sell tickets good for one passage at the rate of seven tickets for 25 cents. Each of the complainants, in its bill of complaint, contends that the ordinances so requiring a reduction of fare are laws of the state of Ohio, and in impairment of their contract rights, and that the rate of fare sought to be established is so unreasonably low that, if put into practical operation, it would amount to the taking of the complainants' property without due process of law. Upon the filing of the bills, temporary restraining orders were issued, restraining the defendant from putting these ordinances into operation, and subsequently the cases were heard by the court upon an application, in each case, for a temporary injunction; and the cases have been fully and elaborately argued by the respective counsel, both orally and by brief. As respects the Cleveland City Railway Company, the ordinance, the operation of which it is sought to enjoin, requires the company to operate what is known as the "Kinsman Street Line" at the rate of fare therein prescribed; and as to the Cleveland Electric Railway Company the ordinance in question is made applicable to that which is known as the "Euclid Avenue Line," and all extensions thereof. Both of the companies, complainants herein, are operating under various ordinances passed in the common council of the city of Cleveland, prescribing the terms and conditions upon which the various railroad routes may be operated for stated periods of time. Both of the complainant companies, at the date of the passage of the ordinance in question, were operating under such grants from the city, none of which had expired.

A brief statement of the corporate history of each of these complainants, and of the various ordinances under which they were operating their lines of railway, is necessary to understand the precise question involved in this motion. The complainant the Cleveland City Railway Company is a corporation duly organized under the laws of the state of Ohio, having a capital stock of \$8,000,000, of which \$7,600,000 have been issued, and a bonded indebtedness, secured by mortgage upon a portion of its railroad line, of \$2,026,000, payable in 11 years, with 5 per cent. interest, payable semiannually. This company was formed by the consolidation of two existing railway companies in the city of Cleveland,

each of which owned and was operating lines of street railway under ordinances passed by the municipality; and by the terms of such consolidation, and by the statutes of Ohio, became possessed of the rights, franchises, and privileges theretofore possessed by each of the constituent companies. The Woodland Avenue & West Side Street-Railroad Company and the Cleveland City Cable-Railway Company were the constituent companies entering into such consolidation. The said the Woodland Avenue & West Side Street-Railroad Company, one of the constituent companies forming such complainant, was organized in 1885, and was a consolidated company formed by the consolidation of the West Side Street-Railroad Company and the Woodland Avenue Railway Company; and the said the Woodland Avenue Railway Company, which was consolidated, was the successor, by purchase, of the Kinsman Street Railroad Company, having become such about the year 1880. By the terms of the consolidation, in 1885, of the said the Woodland Avenue Railway Company and the West Side Street-Railroad Company, said consolidated company, known as the Woodland Avenue & West Side Street-Railroad Company, became vested with all the rights and privileges of each of said constituent companies. The Cleveland City Cable-Railway Company was the successor and owner, by purchase, of all of the property and franchises of the St. Clair Street Railroad Company and the Superior Street Railroad Company, each of which companies was a corporation under the laws of the state of Ohio, owning and operating lines of street railway in the city of Cleveland under grants from the city. By virtue of the consolidation of the Woodland Avenue & West Side Street-Railroad Company and the said the Cleveland City Cable-Railway Company, in 1893, the complainant company the Cleveland City Railway Company became vested with all of the rights, privileges, and franchises of the said constituent companies above mentioned. In 1885, when the Woodland Avenue & West Side Street-Railroad Company was organized, the constituent companies before such consolidation were independent lines of railway, one operating chiefly upon the west side of the Cuyahoga river, and the other upon the east side, running to the northeasterly portion of the city. Each was acting under independent franchises and contracts with the city of Cleveland. There was no exchange of traffic by way of transfer, and each company was charging a fare of five cents over its line. At the time of this consolidation, the West Side Street-Railroad Company had the right, by ordinance, to continue the operation of its road for 25 years from February, 1883, and to charge a cash fare of five cents for each passenger carried. The Woodland Avenue Railway Company was operating its lines of road under several grants from the city; among others, a grant made in 1879, relating to the operation of cars from Water street, through Superior and Ontario streets and Woodland avenue, to Madison avenue. This grant provided, among other things, that the company should not charge more than five cents cash fare, and in said ordinance was reserved the right to the municipal council to thereafter increase or diminish the rate of fare as it might deem wise and expedient; this being the ordinance known as the "Kinsman Street Ordinance," and under which the defendant claims the right to put into operation the ordinance reducing the fare, set up in the complainant's bill. In 1883, another ordinance was passed, granting the Woodland Avenue Railway Company the right to extend and construct its line of railway upon Woodland avenue from the crossing of the Cleveland & Pittsburgh Railroad Company's tracks to Corwin street; and in this ordinance provision was made for the operation of cars over the entire line, including the line referred to in the ordinance of 1879; and the company agreed that during the continuance of said grant it would charge but one fare of five cents over its entire line, including said extension. In 1885, upon the consolidation forming the Woodland Avenue & West Side Street-Railroad Company, the city council passed an ordinance entitled "An ordinance to fix the terms and conditions upon which the railway tracks of the West Side Street-Railroad Company and the tracks of the Woodland Avenue Railway Company and said companies may be consolidated," and in and by the said ordinance it is provided that: "The said consolidated company to carry passengers through without change of cars, by the running of cars through from the workhouse, on the line of the Woodland Avenue Railway Company, to the point on the West Side Street-Railroad where Gordon avenue crosses Lorain street, and, when practicable, in the judgment of the

council, to do likewise on the branches of the consolidated lines, and that for a single fare from any point to any point on the lines or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents, or twenty-two for one dollar, shall at all times be kept for sale on the cars by the conductors." This ordinance was duly accepted by the Woodland Avenue & West Side Street-Railroad Company, and its successor; the complainant, has complied with the terms of said ordinance, which has not yet expired; and it also appears that the provision so fixing the rate of fare to be charged at five cents had reference to and included the operation of cars upon that portion of Woodland avenue referred to in the ordinance sought to be enjoined in the bill of complaint. In April, 1887, the Woodland Avenue & West Side Street-Railroad Company accepted an ordinance by the city of Cleveland relating to the construction of an additional track upon Franklin avenue, and in this ordinance it is provided that the grant made shall continue and terminate with the grant of the main line of said company on the 10th of February, 1908, and that it is made upon the express condition that no increase of fare shall be charged by said railway company upon any part of its main line, or on said extension, so that but one fare of not to exceed 5 cents shall be charged between any points on said company's main line or extensions, and that said company shall sell tickets at the rate of 11 for 50 cents, or 22 for \$1. This ordinance of 1887 is still in force. The part of the main line referred to, upon which it was so provided that a fare of not to exceed five cents should be charged, is the line of railway formerly known as Kinsman Street, and referred to in the ordinance the operation of which is sought to be enjoined herein. In August, 1887, the city council passed an ordinance, which was duly accepted by the Woodland Avenue & West Side Street-Railroad Company, relating to an extension of its tracks upon Waverly avenue, and this ordinance provided that no increase of fare should be charged by said company on any part of its main line or on said extension, and that but one fare of not to exceed 5 cents should be charged between any points on said company's lines or extensions, and that said company should sell tickets on its cars as follows: 11 tickets for 50 cents, or 22 tickets for \$1. This grant is still in force, and the main line upon which the rate of fare is so prescribed includes the line of railway upon Woodland avenue, referred to in the ordinance of October 17, 1898, set forth in complainants' bill. In 1892 the council passed an ordinance, duly accepted by the Woodland Avenue & West Side Street-Railroad Company, relating to an additional track upon Kinsman street, which ordinance required large expenditures of money by way of paving and repairs of pavements, and in said ordinance it was provided that the grant is made upon the conditions that the company shall charge but one fare between any points on said company's main line and extensions, and sell tickets at the rate of 11 for 50 cents, or 22 for \$1; all rights under the grant to terminate on the 10th of February, 1908. The main line referred to in this ordinance includes the Woodland Avenue Line, in respect to which the council, by the ordinance of October 17, 1898, seeks to prescribe a lower rate of fare.

It appears from an inspection of the various ordinances that in each instance where new rights were granted to the company the city received as well new and valuable considerations by way of increased obligations in respect to paving, or the operation of through cars for the accommodation of the public, or the selling of tickets upon the cars. Prior to May 13, 1893, the Cleveland City Cable-Railway Company owned and operated lines of street railway upon Superior street by cable power, and lines upon St. Clair street by horse power; and the ordinance under which it was so operating authorized it, for a period of years, which has not yet expired, to operate its lines, and upon each of them to charge a cash fare of not to exceed five cents. In May, 1893, at the time of the consolidation forming the Cleveland City Railway Company, the two companies entering into such consolidation addressed a communication to the city council notifying it of their agreement in that respect, and that on June 1, 1893, it was proposed to operate the lines as an entire system, to issue proper transfers, so that a passenger on any line of the Woodland Avenue & West Side Street-Railroad Company could be transferred to and have a continuous passage upon any line of the Cleveland City Cable-Railway Company, and vice versa; that only one fare should be charged; and that it was proposed to also estab-

lish a cross-town line, and charge but one fare for a continuous ride upon any additional lines within the city of Cleveland. Upon the receipt of such communication, the common council, on May 10, 1893, passed a resolution approving the proposed consolidation upon the terms and conditions stated in such communication; and it appears that since the 1st of June, 1893, the Cleveland City Railway Company, the complainant herein, has operated said various lines of street railway, charging a cash fare of five cents for each passenger, and selling tickets good for passage as required by said several ordinances, and with the system of transfers contemplated in said council resolution, and in all respects complied with the conditions of the various ordinances under which it is operating its railway system. Such being the relations established by ordinance between the city of Cleveland and the complainant, on the 17th of October, 1898, the city council passed an ordinance entitled "An ordinance to provide for a diminution of fare under an ordinance granting a renewal of franchises to the Kinsman Street Company, and to reconstruct, maintain, and operate its street railroad in and through certain streets of the city of Cleveland." This ordinance, after reciting the reservation contained in said ordinance of 1879, providing, "The council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient," further recites that "the council now deems a diminution of fare justifiable," and by section 1 of the ordinance provides "that the rate of fare for a single continuous passage over the lines and all extensions thereof operated under the aforesaid grant to the Kinsman Street Railway Company be, and the same is hereby, fixed at four cents, cash fare, over the whole or any part thereof"; and by section 2 the ordinance requires the company operating said line to keep on sale in its cars, when in operation, tickets good for a single continuous passage at the rate of 7 tickets for 25 cents.

The contention of the Cleveland City Railway Company, and upon which it asks an injunction, is that the said ordinance of October 17, 1898, which so requires it to carry upon a portion of its line at a cash fare of 4 cents, and to sell tickets at the rate of 7 for 25 cents, is in violation and contravention of the contract obligation existing between the said company and the city of Cleveland, and impairs its contract rights in this: that whereas, it is entitled, by virtue of the several ordinances hereinbefore set forth, to charge upon all of its said lines a cash fare of 5 cents, the provision of said ordinance requires it to accept a cash fare of 4 cents; and whereas, it is entitled, as respects ticket fare, to sell tickets at the rate of 11 for 50 cents or 22 for \$1, this ordinance requires it to sell tickets at the rate of 7 for 25 cents; and this, the complainant claims, would be an impairment, by law of the state of Ohio, of its contract rights growing out of said ordinance and its acceptance thereof. It is also contended that the practical effect of the ordinance would be to reduce the rate of fare to 4 cents for a cash fare, and $3\frac{4}{7}$ cents for a ticket fare: that experience in the operation of street railways has shown that where there is such a difference in amount between tickets and cash fare, as a matter of convenience and economy at least 70 per cent. of passengers use tickets, so that, if said ordinance be put into operation, the complainant contends it would be obliged to carry about 70 per cent. of its passengers at the rate of $3\frac{4}{7}$ cents, and that about 30 per cent. would pay the cash fare of 4 cents, whereby it claims that its gross receipts would be reduced more than one-fifth, while its operating expenses would remain the same, and that the practical operation of the ordinance would be to diminish its net receipts more than 50 per cent.; and in its bill the complainant gives a comparative statement of gross and net receipts for the year 1897, showing the number of passengers carried, the rate per passenger received under existing ordinances, and what its receipts would have been had the ordinance of October 17, 1898, been put in force upon its entire line; and from this statement it appears that its gross receipts would have been reduced \$221,505.38, or something more than 20 per cent., and that the average rate of fare per passenger carried would have been 3.87 cents, and that, in order to have made the gross receipts equal to those under existing ordinances, it would have been obliged to carry, in 1897, 5,736,590 more passengers than it did in fact carry. It is further contended and set forth in the bill that, had the ordinance in question been in operation in 1897 over the entire line, the company would have suffered a loss in income of \$221,505.38,—more

than 52.5 per cent. of its net income; and for the same period of time, and assuming that 70 per cent. of passengers carried would have used tickets, the loss to the company would have been \$259,971.59,—more than 61 per cent. of its net income. And the complainant contends that the losses which it alleges would result are reached in the statements given without including anything for interest charges, depreciation, nothing for dividends or interest on capital stock, and nothing by way of sinking fund, which it is alleged should be allowed by reason of the shortness of the franchises of the company; and the complainant contends that said reduction of fare would deprive it of the reasonable profits which it is entitled to derive from its property, and constitutes a taking of its property without due process of law, in contravention of the constitution of the United States.

The complainant the Cleveland Electric Railway Company is a corporation duly organized under the laws of the state of Ohio, having a capital stock of \$12,000,000, substantially all of which is issued, and a bonded indebtedness, secured by mortgage upon its property, aggregating about \$3,750,000, and a floating indebtedness of about \$250,000. This company was formed by the consolidation of four existing railway companies in the city of Cleveland, each of which owned and was operating lines of street railway under ordinances passed by the municipality; and, by the terms of such consolidation, and by the statutes of Ohio, became possessed of the rights, franchises, and privileges theretofore possessed by each of the constituent companies. The constituent companies entering into such consolidation were the East Cleveland Railroad Company, the Broadway & Newburgh Street Railroad Company, the Brooklyn Street Railroad Company, and the South Side Street-Railroad Company. The said the East Cleveland Railroad Company was a corporation which had been in existence, and operated lines of street railway in the city of Cleveland, since about the year 1859, and at the time of said consolidation owned and was operating several lines of street railway in said city, namely, its Euclid Avenue Line, extending from the business portion of the city, on Bank street, through Superior street, Euclid avenue, Erie street, Prospect street, Case avenue, and Euclid avenue to the city limits; its Garden Street Line, its Cedar Avenue Line, and its Wade Park Avenue Line. That the aggregate mileage of the lines operated by said company was about 40 miles, and each of said lines had been constructed, and was in operation, under grants from the city of Cleveland, and upon the faith of which the said company had so constructed its lines of railway, and in and by which said grants the city and said company, as authorized by the statutes of Ohio, had agreed as to the terms and conditions and the period of time for the operation by said company of its said lines of street railway. That prior to September 15, 1879, the East Cleveland Railroad Company was operating its main line of railway from the intersection of Superior and Water streets to the easterly limits of the city on Euclid avenue, under various separate grants, some from the city council, some granted by the county commissioners before the territory affected thereby became a part of the city of Cleveland, and still other grants from the authorities of the former village of East Cleveland; and the contract rights of the company for the operation of its road easterly of Willson avenue contained few restrictions, and none respecting the rates of fare to be charged, and extended for a period of nearly 20 years; and at that time, east of Willson avenue, upon Euclid avenue, there was but a single track, and under contracts and agreements then in force between the company and the public authorities it had the right to charge passengers one fare from Water street to Willson avenue, another fare from Willson avenue to Fairmount street, and still another fare from Fairmount street to the city limits; and it was, in fact, at that time charging passengers two fares between Water and Superior streets and the city limits. That, in this situation, the said the East Cleveland Railroad Company and the city entered into a new contract, providing for the renewal of the grant to the said the East Cleveland Railroad Company for the construction, maintenance, and operation of a double-track street railway over a portion of the line then operated by said company from Superior and Water streets, through Superior street, around the Public Square to Euclid avenue; through said avenue to Erie street; thence to Prospect street; thence to Case avenue; thence to Euclid avenue, and along said Euclid avenue to Willson avenue; and said ordinance imposed new con-

ditions as respects paving to be done by said company, removal of snow and ice from the tracks, and other similar provisions; and in and by section 6 of said ordinance it was provided that said company should not charge more than five cents each way for a passenger over the whole or any part of the line therein renewed. That said company might charge a reasonable compensation for carrying packages, and that the council reserved to itself the right to thereafter increase or diminish the rate of fare, as it might deem justifiable or expedient; and under and by the terms of said ordinance, which was to remain in force for the period of 25 years from the 20th day of September, 1879, the said company reconstructed its tracks between Superior and Water streets and Willson avenue, as aforesaid, and thereafter, up to April, 1883, charged, as it was permitted to do by said ordinance, one fare of five cents between Superior and Water streets and Willson avenue, and an additional fare of five cents from Willson avenue eastwardly to the end of its line. That about April 4, 1883, said company entered into a new contract with said city, by ordinance duly passed and accepted by the company, by which, upon certain terms and conditions, it was granted the right to extend and to build an additional track, and operate a double-track line upon Euclid avenue from Willson avenue to Fairmount street; and in said ordinance and grant said company agreed that it would charge but one fare of not more than five cents between the westerly terminus of the company's road upon Superior street and the easterly terminus of its line, and that the rights granted should expire on the 20th day of September, 1904; and in and by said contract it was provided that the council reserved to itself the right to thereafter increase or diminish the rate of fare between the westerly end of said company's line on Superior street and the city limits, as it might deem justifiable and expedient. That upon the making of the last-mentioned contract the relations between the city and the East Cleveland Railroad Company were so far changed that the company had agreed to carry passengers over its lines as far easterly as the city limits for five cents for each passenger, but it had not agreed, and was under no obligation, to run all its cars through, and was, in fact, operating only a portion of its cars as through cars, and was under no obligation to and was not transferring passengers who desired to go east of Willson avenue who had taken passage upon a car which did not go beyond that point. That such arrangement and operation were unsatisfactory, both to the city and to the company, and in March, 1886, a new contract was entered into between the city and the railroad company by ordinance duly passed, and accepted by the railroad company, whereby it became obligated to construct and operate a double-track railroad in Euclid avenue between the easterly line of Fairmount street and the easterly limits of the city, such territory having theretofore been occupied by a single track; thereby making its entire Euclid Avenue Line a double-track street railroad. And in said ordinance it also agreed to pave between the rails of each track, together with the spaces between the rails, and to keep certain portions of the pavement in good repair; each and all of which obligations were in addition to those existing under former contracts between the railroad company and the city. And the complainant claims that in and by said ordinance an entirely new contract and agreement, superseding all contracts prior thereto, was made with the city by the said railroad company with respect to the rates of fare which it should charge over its said line so to be made into a double-track through line from Superior and Water streets to the easterly limits of the city upon Euclid avenue, the agreement between the city and the railroad company with respect to the fare thereafter to be charged being as follows: That said company should operate the whole of said track as a through line, with through cars, and should charge and collect but one fare of not more than five cents for each passenger one way in either direction, between the easterly limits of the city on Euclid avenue and the westerly terminus of said company's tracks at the intersection of Superior and Water streets; and that the company should run through cars over said line between the points last named in either direction, as the public convenience, in the opinion of the common council, by resolution expressed, should require; and that the contract so made should be in force until the 20th day of September, 1904,—which contract, having been so duly expressed by ordinance, and accepted by said the East Cleveland Railroad Company, the complainant the Cleveland Electric Railway Company claims

became a valid contract between the said the East Cleveland Railroad Company and the city of Cleveland, by which said company agreed, in consideration of the grants therein made to it, to make the necessary expenditures contemplated in said ordinance with respect to the reconstruction of its tracks, and assumed and agreed to perform additional obligations in respect to paving, and agreed that it would operate said road in accordance with the terms of said ordinance until the 20th day of September, 1904; and that during such time it would carry passengers at the rate of fare so fixed in said ordinance, to wit, five cents for each passenger one way, in either direction, over said entire line; and in pursuance of said contract, and in reliance thereon, the said company proceeded to in all respects comply with the conditions of said ordinance, and began the operation of a through line of cars in accordance with the terms thereof, and said company, and said complainant, its successor, have ever since said time fully complied with the terms and conditions of said last-mentioned ordinance, and are now complying therewith, although said company thereafter voluntarily began the sale of tickets good for passage at a less rate than it was authorized to charge in said ordinance, to wit, at the rate of 11 tickets for 50 cents. That prior to July, 1888, the line of railway of the said the East Cleveland Railroad Company had been operated by horse power. That at that date such progress had been made in perfecting the system of propelling cars by electric motors that the company was willing to incur the necessary expense of equipping certain of its lines with electricity, and thereupon the said company and said city entered into a still further contract, by ordinance duly passed and accepted, providing for the equipment and operation of said company's Euclid Avenue and Cedar Avenue Lines by electricity, and in said ordinance and contract it was provided that the privilege of constructing the electric system and the operation of said lines thereby was granted to said company in consideration of the improved facilities contemplated, and the large expense necessary to secure the same, and that the right to operate said line after the expenditure of said large sum of money so necessary for its equipment should be and remain in force for the period of 25 years from and after the passage of said ordinance both upon the main line and what is known as the Cedar Avenue Line of said company, and provided that nothing in the ordinance should be construed to authorize any increase of present fare for transportation over any part of said company's lines. And your orator shows and alleges that at the time of the passage of said ordinance and its acceptance by said company the rate of fare therein referred to which was not to be increased was, as hereinbefore set forth, five cents for each and every passenger carried in either direction over said lines, and it was in terms provided in said ordinance that its acceptance should be deemed an agreement with the said company by which it agreed to perform all and singular the matters and things therein agreed by it to be performed. The council were also given permission in and by said contract to require the company thereafter to equip the entire length of its main line and Cedar Avenue Line with electricity; and thereafter, in reliance upon its said contract, and the performance thereof by the city, said company proceeded, at the expense of many hundreds of thousands of dollars, to equip its said lines with electricity in pursuance of the terms of said ordinance. That thereafter the said the East Cleveland Railroad Company entered into another contract with the city of Cleveland, by ordinance passed and accepted, by which it was given authority to construct and operate the line known as the "Wade Park Avenue Line," the company agreeing, in consideration thereof, to do certain additional paving, and to submit to various other requirements as in said ordinance expressed, and with respect to the rate of fare to be charged by said company, said ordinance and contract provided that no increase of fare should be charged by said company on any part of its main line or said extension, and that one fare, not to exceed five cents, or one of said company's tickets, should entitle a passenger to transportation over the main line and extension from the intersection of Lake and Water streets to the easterly limits of the city. That, in compliance with the terms of said ordinance and contract, said East Cleveland Company constructed and placed in operation the said Wade Park Avenue Line at great expense, and since said time said line has been operated at the rates of fare therein fixed, and in all respects the conditions of said ordinance complied with. That prior to May, 1893, the said the East Cleveland Railroad

Company, the Broadway & Newburgh Street Railroad Company, the Brooklyn Street Railroad Company and the South Side Street-Railroad Company were engaged in the operation of their respective lines of road in various and different parts of the city, and, as authorized in various contract grants under which they had constructed their said lines of railway and were operating the same, each and all of said constituent companies were charging a cash fare of five cents, and that their right so to do was fixed by the terms of their respective contracts and agreements with the city; and complainant alleges that there was not, at any time, as respects any one of said constituent companies, power in the common council of the city to in any manner compel said companies, or any one of them, during the existence of their respective grants, to reduce the cash fare to be charged by the said companies, or either one of them, below a cash fare of five cents. That each of said constituent companies operated its line as an independent line. That no system of transfers (except between the South Side and Brooklyn lines) from the line of one of said roads to the lines of others was in force, so that a passenger, having occasion to use more than one of said lines, was obliged to pay two fares of five cents each; and that each and all of the grants under which said companies were so operating under the rights aforesaid prior to the 29th day of May, 1893, are still in force and effect. That about April 11, 1893, the said constituent companies entered into an agreement of consolidation, in conformity with the statutes of Ohio, and formed and organized the complainant the Cleveland Electric Railway Company as a consolidated company, by virtue of which consolidation the complainant the Cleveland Electric Railway Company at once became possessed of and vested with all and singular the property, rights, franchises, and privileges of each and all of said constituent companies; and such consolidation being effected, and complainants intending to operate said lines as one entire system, and to give to the public in the city the privilege of riding over said system by a continuous passage for one fare, the complainant applied to the common council of the city of Cleveland for its consent and approval of the terms of said consolidation so far as they related to the maintenance and operation of said various lines and rates of fare which should be charged by said complainant, and upon May 29, 1893, said city council duly adopted a resolution consenting to said consolidation, and providing, among other things, as follows: "That only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by any of said constituent companies and any line of any other of said constituent companies within the limits of the city of Cleveland; and passengers on any such lines paying one fare shall be entitled, without additional or extra charge, to be transferred to any other of said lines, and having one continuous ride thereon for said single fare." Said resolution further provided that the Cleveland Electric Railway Company should file with the city clerk a written acceptance of the terms of said resolution within 10 days from the time of its adoption, which written acceptance was duly filed, as required by the terms of said resolution, on the date of its passage, May 29, 1893; and the complainant has, ever since the adoption of said resolution, continued to operate said various lines of railway, and to charge only the same cash fare of five cents for each passenger, in strict compliance with each of the different contracts which each of said constituent companies had with the city, and which are still in full force. And the complainant the Cleveland Electric Railway Company adopted and put in force the system of transfers contemplated in said council resolutions, and has, although not required so to do by the grants and contracts of the East Cleveland Railroad Company, kept on sale, and accepted for passage, tickets sold at the rate of 11 for 50 cents or 22 for \$1. That no one of the grants or contracts aforesaid under which said constituent companies which formed the complainant were authorized to operate their various lines of street railway and to charge a cash fare of five cents for each passenger carried thereon, has expired, but all of said grants are in full force and effect. That, in December, 1893, the complainant duly accepted an ordinance of the city authorizing it to extend its double-track railway on Prospect street from Erie street to Ontario street, in which ordinance it was provided that the complainant, with respect to all lines of railway which it was operating, should comply with the terms and conditions of said resolution of the city council passed May 29, 1893, approving said terms of consolidation,

and that it should, upon each of said lines, comply with the conditions of said last-mentioned ordinance; that said grant so made has not yet expired, and that no one of the grants under which complainant is operating its lines of street railway expire before the year 1910.

Such being the relations established by ordinance between the city of Cleveland and the complainant the Cleveland Electric Railway Company, on the 17th day of October, 1898, the city council passed an ordinance entitled "An ordinance to provide for diminution of the rate of fare under section 6 of an ordinance passed September 15, 1879, entitled, 'An ordinance granting a renewal of franchise to the East Cleveland Railroad Company to reconstruct, maintain, and operate its street railroad in and through certain streets of the city of Cleveland.'" This ordinance, after reciting the reservation contained in said ordinance of 1879, providing, "The council, however, reserves to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient," further recites that the "council does now deem it justifiable and expedient to diminish the rate of fare," and by section 1 of the ordinance provides: "That the rate of fare for a single continuous passage over the lines and all extensions thereof operated under the aforesaid grant to the said East Cleveland Railroad Company be, and is hereby, fixed at four cents cash fare over the whole or any part thereof;" and by section 2 the ordinance requires the company operating such line to keep on sale on its cars, when in operation, tickets good for a single continuous passage at the rate of 7 tickets for 25 cents.

The complainant the Cleveland Electric Railway Company makes substantially the same contention with respect to said ordinance last mentioned being in contravention of its contract obligations with the city of Cleveland with respect to cash fares and ticket fares as provided therein, and impairment of contract rights, and also with respect to the practical effect of the ordinance if put in operation, as to diminishing receipts, etc., as claimed by the complainant the Cleveland City Railway Company, hereinbefore referred to, except as to the comparative statement of gross receipts given in the bill of the Cleveland Electric Railway Company for the years 1896 and 1897, from which it appears that its gross receipts would have been reduced, in 1897, \$334,890.67, or something more than 20 per cent., and that the average rate of fare per passenger would have been 3.80 cents, and that, in order to have made the gross receipts equal to those under existing ordinances, it would have been obliged to carry, in 1897, 3,812,912 more passengers than it did in fact carry. It further contends and sets forth in its bill that, had the ordinance in question been in operation in 1897 over the entire line, the company would have suffered a loss of income of \$380,346.18,—more than 64 per cent. of its net income,—and the complainant contends that the losses which it alleges would result are reached in the statements given without including anything for interest charges, depreciation, nothing for dividends or interest on the capital stock, and nothing by way of sinking fund, which it alleges should be allowed by reason of the shortness of the franchises of the company; and the complainant contends that said reduction of fare would deprive it of the reasonable profits which it is entitled to derive from its property, and constitute a taking of its property without due process of law, in contravention of the constitution of the United States.

Squire, Sanders & Dempsey, for complainants.

Miner G. Norton and Ford, Boyd & Crowl, for respondents.

RICKS, District Judge (after stating the facts). The constitution of Ohio has empowered the legislature to confer upon the city of Cleveland the authority to operate lines of railway through its streets. Acting under this delegated power, as expressed in the Revised Statutes (section 2501 et seq., and section 3437 et seq.), the city council, from time to time, has made grants to the street railroads, conferring privileges upon them, and at the same time prescribing the terms and conditions under which such lines should be located and operated. Among the powers so vested in the city was the right

to prescribe the rate of fare to be collected during the life of each grant. The city, acting under this general authority so conferred, passed ordinances at different times pertaining to the street railways, which make a printed volume, and are in evidence before the court. These ordinances, granting sometimes original and sometimes additional authority, were accepted by the street-railway companies; and these acceptances, on the one side, and grants made with conditions, on the other, became a contract between the parties, which could not be annulled or amended, without the consent of both parties. *Railroad Co. v. Smith*, 29 Ohio St. 292; *Cincinnati & S. Ry. Co. v. Village of Carthage*, 36 Ohio St. 634; *City of Columbus v. Columbus St. R. Co.*, 45 Ohio St. 104, 12 N. E. 651; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653; *Chicago v. Sheldon*, 9 Wall. 50; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273. These ordinances, so molded into contracts under the legislative power hereinbefore referred to, are, in effect, laws of the state of Ohio, and therefore are within the inhibition of the fourteenth amendment to the constitution of the United States, which is directed quite as pointedly to the legislative power of the state or municipality as to the executive or judicial; so that the obligations of contracts made by legislation are protected by the federal constitution, which prohibits a state from passing any law impairing the obligations of contracts, or the taking of property without due process of law. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 562, 17 Sup. Ct. 653. This court has jurisdiction to afford the relief prayed for in these bills, and has authority to declare invalid the ordinances now sought to be enforced, if, as contended by the complainants, the ordinances involved do impair existing contract rights, or, in practical operation, deprive the complainants, respectively, of property, without due process of law. In *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 562, 17 Sup. Ct. 655, the court say:

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." "Conceding that the legislature of the state alone had the right to make such a grant, it may, as was observed in *Wright v. Nagle*, 101 U. S. 792-794, exercise authority by direct legislation, or by agency duly established, having power for that purpose. The grant, when made, binds the public, and is, directly or indirectly, the act of the state. The easement is a legislative grant, whether made directly by the legislature itself or by any one of its properly constituted instrumentalities."

See, also, *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529; *Weston v. City Council of Charleston*, 2 Pet. 461; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273.

That a bill in equity seeking a judicial decree declaring an ordinance which impairs the contract rights of the complainant, or takes from him or it property without due process of law, is a proper remedy, has been specifically determined by the supreme court. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 460, 10 Sup. Ct. 462, 702; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418. As the various ordinances in force when the council passed the so-called "Low Fare Ordinances," in October, 1898, prescribed the rate

of fare which the companies might charge during the life of each grant, the city possessed no power to modify such grant as respects the rate of fare, unless such power of modification was reserved in the ordinance making the grant. The statutes of Ohio confer power upon municipalities to determine the conditions of the grant at the time it is made, including fixing the rates of fare to be charged, but no power to thereafter prescribe rates of fare. Where the grant itself fixes the rate of fare, a reserved right of regulation does not authorize a municipality, after the rate of fare has been so fixed, to modify or change it during the life of the grant. *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. 39.

It is held by the superior court of Cincinnati in *Smith v. Cincinnati*:

"A general ordinance providing for the construction and operation of a street railway within the city limits, which provided that on the acceptance by the existing companies of the terms of the ordinance it shall thereupon be operative and binding as a contract between the city and the company so accepting the same, and that the street railroad shall be guided, governed, and regulated by the following conditions, and such lawful and reasonable restrictions as the council may thereafter pass, does not reserve to the council the right to abridge or destroy any of the contract rights of the company, but only to make and enforce proper and reasonable regulations as to the operation or construction of the routes."

It is apparent that whether the ordinances of October 17, 1898, are valid and enforceable against the respective complainants depends, in the first instance, upon the solution of the question whether the reservations in the ordinances of 1879 authorized the action taken by the council in passing these "Low Fare Ordinances" in October, 1898. If, subsequent to the passage of these ordinances of 1879, no other grants had been made prescribing rates of fare upon the lines referred to in the ordinances of 1879, the only question presented would be whether the reserved right is now being exercised in a reasonable manner. It appears, however, that numerous other ordinances have been passed, and accepted by each of the complainant companies, relating to the same subject-matter, viz. the rate of fare to be charged upon the same lines of railway referred to in the ordinance of 1879. It therefore becomes necessary to inquire how far, if at all, the contract rights of the parties have been changed by these subsequent ordinances. The general principles to be followed in such an examination are well settled. In *U. S. v. Tynen*, 11 Wall. 92, the rule is stated as follows:

"When there are two acts on the same subject, the rule is to give effect to both, if possible, but, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and, even where two acts are not, in express terms, repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

See, also *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369; *U. S. v. Claffin*, 97 U. S. 546.

And again, where parties, having entered into a written contract, thereafter make a second contract relating to the same subject, to the extent that the provisions of the second contract are incon-

sistent with those of the first the last contract, and not the first, measures the obligations of the parties. In 5 Lawson, Rights, Rem. & Prac. §§ 2569, 2570, the rule is stated as follows:

"One written contract, complete in itself, will be conclusively presumed to supersede another one made prior thereto in relation to the same subject matter. The rescission may be implied in some cases. Thus, if an agreement be made between the same parties containing the same matter, in which the terms of the latter are inconsistent with those of the former, so that they cannot subsist together, the latter will be construed to discharge the former."

See, also, *Chrisman v. Hodges*, 75 Mo. 413; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *McDonough v. Kane*, 75 Ind. 181; *Howard v. Railroad Co.*, 1 Gill, 311.

With these principles in mind, we proceed to inquire, as respects the Cleveland City Railway Company, whether the common council of Cleveland, in October, 1898, was authorized, under then existing contracts between it and the said company, to take action under the reservation in the ordinance to the Kinsman Street Railroad Company of 1879, and reduce fares, as was attempted to be done by the ordinance of which complaint is made in the bill. The ordinance by virtue of which this reserved right to reduce fares is claimed was passed August 25, 1879, and entitled "An ordinance granting a renewal of franchise to the Kinsman Street Railroad Company to reconstruct, maintain and operate its street railroad in and through certain streets of the city of Cleveland," and it authorized the Kinsman Street Railroad Company to construct, maintain, and operate a double-track street railroad from Water street to Madison avenue upon Kinsman street (now Woodland avenue), and by section 7 of this ordinance it was provided as follows:

"Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient."

This ordinance, then, was a grant to the Kinsman Street Railroad Company, and related to the operation by such company and its successors from Water street to Madison avenue on Kinsman street, the name of the latter street having been subsequently changed to Woodland avenue. It appears in evidence that the successor of the Kinsman Street Railroad Company was the Woodland Avenue Railway Company, and that from about 1880 to 1885 the Woodland Avenue Railway Company owned and operated this so-called "Kinsman Street Line." After the Woodland Avenue Railway Company acquired such line, to wit, in 1883, an ordinance was passed by the council, and duly accepted by the company, by which the company was authorized to extend its tracks upon Woodland avenue upon certain terms and conditions expressed in the ordinance; and in said ordinance it was provided that its existing railway and this extension should thereafter be operated as an entire line, and that but one fare of five cents over its entire line, including said extension, should be charged. This ordinance of 1883 relates to the operation of the company's street railroad as well over the line referred to in the Kinsman Company

ordinance of 1879, and contains no reservation of the right to thereafter increase or diminish the rate of fare. In 1885 the Woodland Avenue Railway Company and the West Side Street-Railroad Company consolidated. At the time of such consolidation the West Side Street-Railroad Company was operating a line of railroad chiefly upon the west side of the river, under a grant from the city of Cleveland expiring 25 years from July, 1883, and under the terms of the grant was authorized to charge a cash fare of five cents; the city having reserved no right to change such rate of fare during the period of the grant. The effect of the consolidation was to establish a new main line extending from the southeasterly to the westerly portion of the city, and with reference to such consolidation the common council, on February 16, 1885, passed an ordinance entitled:

"An ordinance to fix the terms and conditions upon which the railway tracks of the West Side Street-Railroad Company and the tracks of the Woodland Avenue Railway Company, and said companies may be consolidated.

"Section 1. Be it ordained by the city council of the city of Cleveland that the consent of the city is hereby given to the consolidation of the West Side Street-Railroad Company and the Woodland Avenue Railway Company, upon the following conditions: The said consolidated company to carry passengers through, without change of cars, by running of the cars through from the workhouse, on the line of the Woodland Avenue Railway Company, to a point on the West Side Street-Railroad Company where Gordon avenue crosses Lorain street, and, when practicable in the judgment of the council, to do likewise on the branches of the consolidated lines; and that, for a single fare from any point to any point on the lines or branches of the consolidated road, no greater charge than five cents shall be collected, and that tickets, at the rate of eleven for fifty cents, or twenty-two for one dollar, shall at all times be kept for sale on cars by conductors."

This ordinance, as appears in evidence, was duly accepted by the consolidated company, the Woodland Avenue & West Side Street-Railroad Company, and it is to be observed that it had reference to and included the operation of cars as part of a through line upon that portion of Woodland avenue which is referred to in the grant to the Kinsman Street Railroad Company of 1879, and amounts to an agreement on the part of the Woodland Avenue & West Side Street-Railroad Company that it will thereafter carry passengers over such entire route at a cash fare of 5 cents, and ticket fare by tickets sold at the rate of 11 for 50 cents, or 22 for \$1. It further appears that in April, 1887, the Woodland Avenue & West Side Street-Railroad Company accepted an ordinance passed by the city council relating to an additional track upon Franklin avenue, and that in such ordinance it is provided that the grant therein made should continue and terminate with the grant on the main line of said company, on the 10th day of February, 1908, and that the grant was made upon the express condition, that no increase of fare should be charged by said railway company on any part of its main line, or on such extension; so that but one fare, not to exceed 5 cents, should be charged between any points on said company's main line or extension, and that said company should sell tickets at the rate of 11 for 50 cents or 22 for \$1. This grant, by its terms, does not expire until the 10th day of February, 1908, and it requires the company to carry passengers at a cash fare of five cents during that period, over its entire

main line, as well as its extension; and it also appears that part of the main line over which it was so required and agreed to carry at the rate of five cents cash fare was the line of railway operated on Woodland avenue (formerly Kinsman street) under the grant made to the Kinsman Street Railroad Company in 1879. Again, in August, 1887, an ordinance was passed, and accepted by the Woodland Avenue & West Side Street-Railroad Company, relating to the further extension of its tracks on Kentucky street, and in this ordinance it is provided that the grant shall expire with the grant of the main line on February 10, 1908, and that it is made upon the condition, agreed to by the company, that no increase of fare shall be charged by said company on any part of its main line or extensions, and that but one fare, not to exceed 5 cents, should be charged between any point and any other point on said company's main line or extensions, and that tickets should be sold at 11 for 50 cents or 22 for \$1. This grant has not yet expired, and the main line, in respect to which the company so agrees to operate at a cash fare of five cents, includes the line of railway operated under the grant to the Kinsman Street Railroad Company in 1879. On June 20, 1892, the Woodland Avenue & West Side Street-Railroad Company accepted a further ordinance passed by the council, relating to an additional track upon Kinsman street, which ordinance imposed various additional obligations with respect to paving and repairing, and involved the expenditure of a considerable sum of money on the part of the company; and in this ordinance it is provided that it is granted upon the condition that the company shall charge but one fare between any points on said company's main line and extensions, and sell tickets at the rate of 11 for 50 cents or 22 for \$1; and that the grant shall terminate with the grant of the company's main line on February 10, 1908. This ordinance is in full force, and is an agreement upon the part of the company to carry at the rate of fare stated, good for passage over its entire main line and extensions, including, as part of its main line, the line upon Woodland avenue (formerly Kinsman street), operated under the original grant to the Kinsman Street Railroad Company, in 1879. It also appears from an inspection of the ordinances that in each instance in which new grants were made to these companies, new and valuable considerations passed to the city for the making of the same by way of increased requirements for paving, and additional accommodations in the operation of cars. It appears in the bill and evidence that the complainant the Cleveland City Railway Company was formed on May 13, 1893, by a consolidation of the Woodland Avenue & West Side Street-Railroad Company and the Cleveland City Cable-Railway Company. The last-named company at that time owned and operated lines of street railway upon Superior street by cable power, and upon St. Clair street by horse power, and was operating under grants of the city of Cleveland for a period of years which has not yet expired; and the grants under which said cable company was operating authorized it and its successors, throughout the entire period of said grants, to charge a cash fare of five cents, there being in none of such grants any reservation of any right on the part of the city council to increase

or diminish the rate of fare to be charged; and the company, at the time of the consolidation, was operating its road and charging a cash fare of five cents, as authorized in the ordinances of the city. Under the consolidation it was proposed to operate all the lines of the two constituent companies as an entire system, to operate through cars thereon, and permit passengers, for one fare of five cents, to ride from one end of said line so consolidated to the other; and, such being the purpose of the consolidation, on May 13, 1893, a communication was addressed to the common council of the city of Cleveland, as follows:

"To the Honorable Council of the City of Cleveland, Ohio: The Woodland Avenue & West Side Street-Railroad Company and the Cleveland City Cable-Railway Company have agreed to consolidate their two lines into the Cleveland City Railway Company; the consolidation to take effect June 1st, 1893. It is proposed, on June 1st, 1893, to immediately issue proper transfers, without extra charge, so that passengers on any line of the Woodland Avenue & West Side Street-Railroad Company may be transferred to and have a continuous passage upon any line of the Cleveland City Cable-Railway Company within the limits of the city of Cleveland, and also so that passengers upon any line of the Cleveland City Cable-Railway Company may be transferred to and have a continuous ride upon any line of the Woodland Avenue & West Side Street-Railroad Company within the city of Cleveland; only one fare to be charged for such ride. And, as soon as the necessary improvements can be made, additional cross-town lines will be run, and only one fare charged for a continuous ride upon any additional lines within the city of Cleveland."

On May 15, 1893, the common council of the city passed a resolution approving and consenting to the consolidation of the companies and the operation of cars upon the terms stated in said communication. It appears in evidence that since the consolidation forming the said complainant company the Cleveland City Railway Company it has continued the operation of its various lines of street railway, as proposed in said communication; has continued to charge the same cash fare of 5 cents for each passenger; has put in force the system of transfers contemplated in the council resolution; and has kept on sale tickets at the rate of 11 for 50 cents or 22 for \$1. It also appears that no one of the grants under which the constituent companies which formed said complainant were authorized to operate their cars on their various lines of railway at a cash fare of 5 cents, and to sell tickets at the rate of 11 for 50 cents, has expired, but that each and all of said ordinances are in full force, and that none of said grants expire prior to the year 1908. This being the situation, can the city successfully contend that the reservation in the ordinance of 1879 relating to the Kinsman Street Railroad Company is now operative as respects the complainant the Cleveland City Railway Company? Prior to 1885, the West Side Street-Railroad Company was operating upon the west side of the Cuyahoga river. There was no interchange of traffic by transfer between it and the Woodland Avenue Railway Company, and passengers were obliged to pay a cash fare upon each road. The West Side Company was operating under a grant running for 25 years from February, 1883, entitling it to charge a cash fare of five cents. The consolidation of the Woodland Avenue and West Side Companies was made upon the condition that a

new through line of street railroad should be established, so that for a single fare passengers should be carried from any point to any point on the lines or branches of the consolidated company. Upon the taking effect of this consolidation, the relations of the two companies to the city were so far changed that, whereas the companies before had operated independent lines of railroad, and charged separate fares, a new through line was established, and a rate of fare fixed upon the entire line of five cents. The right to so charge five cents, and to carry at ticket fare at the rate specified, of course involved the right to charge such fare for the whole or any portion of the distance traveled on the line. It was competent for the companies and the city to at that time agree with respect to the terms and conditions, including the rate of fare, upon which this through line should be operated. The parties did make such contract, and one of the terms of the contract related to the rate of fare to be charged over the entire line; and part of the line with respect to which the rate of fare was so fixed in 1885 was the same line referred to in the Kinsman Street-Railroad Company ordinance of 1879; that is to say, the city and the railway companies, in 1885, contracted with respect to the same subject-matter referred to in the ordinance to the Kinsman Street-Railroad Company in 1879. This ordinance of 1879 at the time related solely to the rate of fare upon Kinsman street, operated as an independent line. The ordinance of 1885 is a contract with respect to the same subject-matter, but establishes a rate of fare which should apply to the Kinsman Street Line, not as an independent line, but as part and parcel of a direct through line from the southeasterly to the westerly part of the city. It is to be observed that no reservation is contained in this ordinance of any right to increase or diminish the rate of fare therein fixed, and the right to operate under this ordinance of 1885 was in full force in October, 1898. It must follow that no power existed in the council, in 1898, to change the rate of fare which had been so established by agreement between the parties. Again, it is apparent that the existence of any such reservation is inconsistent with the right which is expressly granted by the ordinance of 1885. The consolidated company certainly acquired the right to carry to the end of the term at five cents over the entire line or any portion thereof. This right could not co-exist with a right in the council to reduce the rate of fare during the period, as respects a portion of the line. By the contention of the city the right to reduce could now only be made applicable to the Kinsman Street Line and its extension. The city, however, contracted in 1885 that the company might carry over the Kinsman Street Line, as part of the through line, at a cash fare of five cents; from which contract it necessarily follows that the entire contract relations of the company and the city, as respects the rate of fare to be charged on the Kinsman Street Line, were merged in the contract of 1885, and the subsequent ordinances by which the Kinsman Street Line ceased to be independent, and became part and parcel of a through line, upon which a rate of fare for the full period of the grant was established. By the subsequent ordinances.

of 1887 and 1892, running to the Woodland Avenue and West Side Companies, it is, as respects each of them, as before pointed out, expressly provided that their conditions, as respects fare, shall be applicable to the entire main line of the company, that the rate of fare shall continue to be five cents until the expiration of the several grants, and that the grants do not expire until the 10th day of February, 1908. Again, in determining the contract rights of the complainant company, regard must also be had to its rights under the grants to the Cleveland City Cable-Railway Company, which the present company acquired by the consolidation of 1893. The cable company had the right to operate, at a cash fare of five cents, its independent lines of railway. By virtue of the consolidation, its various lines became part of a great through system, operated by the consolidated company, whereby the public acquired the right of a continuous passage over the entire line for one fare of 5 cents, or ticket fare at the rate of 11 tickets for 50 cents or 22 for \$1. The consolidated company, by virtue of such consolidation, acquired all the rights which had before pertained to the constituent companies with respect to the rates of fare which it was lawful to charge, except so far as it had voluntarily modified the same by entering into the consolidation; and it then became the duty of the company, and in the performance of such duty it acquired a corresponding right to carry over its entire line, or any portion thereof, at a cash fare of five cents. A portion of the entire system which this company is now operating under these several grants from the city was formerly the line of the Kinsman Street Railroad Company, and the reservations under which the city now claims the right to reduce rates of fare upon the portion of the line which was formerly the Kinsman Street Line was made with reference to, and can only have reference to, the operation of the Kinsman Street Line as an independent line. Now the situation has so far changed that, by operation of law, and by express contract with the city of Cleveland, this original Kinsman Street Line has become part and parcel of a through line, and, as respects the rates of fare which may be charged upon such through line, the city and the railway company have entered into various contracts expressly fixing the rates of fare to be charged over the through line, or any part thereof.

If the ordinances, as respects rates of fare, which we have been examining, passed since 1879, are to be construed as statutes, it follows that, having been passed subsequent to the ordinance of 1879 relating to the Kinsman Street Railroad Company and relating to the same subject-matter, they are so far inconsistent with the ordinance of 1879 as to operate as a repeal thereof. If we treat these subsequent ordinances simply as contracts, it is apparent that, having entered into a contract in 1879, the city has subsequently entered into various other contracts relating to the same subject, and that these later contracts are so far inconsistent with the provisions of the original ordinance as that the rights of the parties must now be measured by their latest contract, and not by the original agreement. Again, the inconvenience, if not the

absolute impracticability, of enforcing the obligations of both the original ordinance of 1879 and the subsequent ordinances, in and of itself must well-nigh force the conclusion that the rights of the parties must be gathered from these later, rather than from the original, ordinance. The complainant company confessedly has the right by contract to carry over its entire line, or any portion thereof, at a cash fare of five cents, and this it may do until its present grants expire in the year 1908; and what the city proposes, by the ordinances of 1898, is to compel the company, as respects a portion of this line, to carry at a cash fare of four cents. The right to carry at five cents over the whole line, or any portion thereof, is inconsistent with the obligation to carry for less than five cents over some portion of the through line. It is apparent that the relations between the city of Cleveland and the complainant, as the successor of the various companies out of which it has been formed, have been so far changed by subsequent ordinances and contracts and consolidation, that the reservation contained in the ordinance of 1879 relating to the Kinsman Street Railroad Company, and authorizing the council to thereafter increase or diminish the rate of fare upon such line, is not and cannot now be made operative, legally, as against the complainant company, the Cleveland City Railway Company. By reason of the various ordinances and contracts which the complainant company and its predecessors have entered into with the city of Cleveland since the ordinance of 1879, the various railroad companies assumed different and much larger obligations in the carrying of passengers than were imposed upon the Kinsman Street Railroad Company by the ordinance of 1879. In almost every instance, the company agreed to carry passengers further; and at the time of the consolidation of the Woodland Avenue and West Side Companies the service which the railway company agreed to give to the citizens desiring to ride as passengers, it may fairly be said, was doubled, and the city and its citizens received from the railway company large and valuable concessions, which concessions formed a part of the consideration for the passage of the ordinances and the making of the contracts. No other conclusion can be reached than that the relations between the city of Cleveland and the complainant, as the successor of the various companies out of which it is formed, have been so far changed by the various contracts entered into since 1879 that the city is estopped from claiming that the reservation contained in the ordinance of 1879 can now be used to either increase or diminish the rate of fare upon a small portion of the line of the Cleveland City Railway Company.

As respects the complainant the Cleveland Electric Railway Company, a very similar question is presented by the ordinances before the court. The city contends for the validity of the "Low Fare Ordinance," passed, as respects this last-named complainant, by virtue of an ordinance passed in 1879, granting a renewal of franchise to the East Cleveland Railroad Company. By this ordinance, set forth in the bill, the East Cleveland Railroad Company and its successors were authorized to reconstruct, maintain, and operate

a double-track street railroad from Superior street easterly through designated streets, including Euclid avenue, to Willson avenue; and by section 6 of said ordinance it was provided:

"Said company shall not charge more than five cents fare each way for one passenger over the whole or any part of the line herein renewed, but said company may charge a reasonable compensation for carrying packages. The council, however, reserves the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient."

It appears by the allegations of the bill and in proof that prior to the 15th day of September, 1879, the East Cleveland Railroad Company was operating a line of railway from the intersection of Superior and Water streets to the easterly limits of the city, on Euclid avenue, under various grants, some of which emanated from the city council, others from the county commissioners, and others from the authorities of the village of East Cleveland prior to its annexation to the city. At that time there was but a single track east of Willson avenue upon Euclid avenue, and the company, under its grants, had the right to charge passengers one fare from Water street to Willson avenue, another from Willson avenue to Fairmount street, and still another from Fairmount street east; and was, in fact, charging two fares of five cents each, each way between Water street and the city limits. This was the situation when the council passed the ordinance of September 15, 1879, containing the reservation with respect to fare, under which the city claims the right to pass and enforce the ordinance of October 17, 1898. After the passage of this ordinance, the company continued the operation of its line thereunder up to April 4, 1883, and, as it was permitted to do, charged one fare between Water street and Willson avenue, and an additional fare of five cents from Willson avenue easterly to the end of its line. On April 4, 1883, the council passed an ordinance, which was accepted by the company, granting it the right to build and operate an additional track on Euclid avenue, between Willson avenue and the easterly line of Fairmount street, making a double-track line. This ordinance contained a provision and reservation, as respects fare, in similar terms to that of the ordinance of 1879. Under this ordinance of 1883 the company agreed to carry passengers over its line as far east as the city limits for five cents. It did not make any agreement to run through cars, and for the next three years it did in fact only run a portion of its cars through. It was under no obligation to give transfers at Willson avenue, and was in fact not giving such transfers. It is alleged in the bill, and in proof by affidavit, that this arrangement and operation of the cars was unsatisfactory, both to the company and to its patrons, and in March, 1886 (see Rev. Ord. p. 826), the council passed an ordinance entitled "An ordinance granting to the East Cleveland Railroad Company the right to extend and operate its double-track street railroad on Euclid avenue between the easterly line of Fairmount street and the easterly limits of the city." By section 3 of this ordinance the company was required to pave 14 feet,—an obligation which did not pertain to its then existing contract with the city; and, by section 4 of

the ordinance, the following provision is made, as respects the rate of fare to be charged by the East Cleveland Company over its entire line, which included the line referred to in the ordinances of 1879 and 1883:

"The rights as herein granted and conferred are upon the express condition, however, that said company shall charge and collect but one fare of not more than five cents for each passenger one way in either direction, between the easterly limits of the said city on Euclid avenue and the westerly terminus of said company's tracks at the intersection of Superior and Water streets; and upon the further condition that the said company shall run through cars over said line between said points last named in each direction, as the public convenience and the opinion of the common council, by resolution expressed, may require."

Section 5 of this same ordinance provides:

"The rights herein granted to lay and operate a double-track street railroad on Euclid avenue between Fairmount street and the easterly limits of the city shall cease and determine on the 20th day of September, A. D. 1904, as provided for said company's tracks on Euclid avenue west of Fairmount street."

It is apparent from an inspection of this ordinance of 1886, in connection with admitted circumstances surrounding its passage, that the council was then fixing and agreeing upon a rate of fare to be charged upon the entire line of the East Cleveland Railroad Company, and during the entire life of the franchise, which did not expire until 1904; and nowhere in this ordinance is contained any reservation in the city council to thereafter change the rate of fare therein prescribed. It also appears in the making of this contract that the city received additional consideration, namely, the obligation of the company to pave an additional space upon the street, and the requirement for the operation of through cars. In 1883 the reservation contained in the ordinance of 1879 had been repeated, in substance, in the ordinance of that date, but in 1886, the council, for the first time, legislates or contracts upon the subject of fares to be charged in connection with the operation of through cars and a double-track street railroad, and it entirely omits the reservation contained in the former ordinances. This ordinance of 1886 was a contract, still in full force and effect. It in express terms prescribed the rate of fare which the company shall charge in the operation of its line upon Euclid avenue, and in express terms provides that the conditions and obligations of such ordinance shall remain in force until the year 1904; and it makes this obligation to so operate through cars and maintain a double-track road, and to charge but five cents fare over the entire line, continue as long as, and terminate with, the ordinance of 1879; and this ordinance of 1879, so referred to, is the ordinance in which is contained the reservation upon which the city bases its contention as to the validity of the reduction of fare attempted to be made in October, 1898. It is perfectly apparent that it could not have been in the minds of the parties contracting that the reservation of the right to regulate fare in the ordinance of 1879 could be operative after the express contract in relation to fare for the entire period of the grant, as made by the ordinance of 1886.

Again, the council having, in the ordinance of 1879, reserved the right to thereafter increase or diminish the rate of fare, did, in 1886,

in the making of this contract, fix the rate of fare at five cents, to extend from the passage of the ordinance up to the expiration of the grant made in 1879; so that it may perhaps be fairly said that the ordinance of 1886 was an exercise of the reserved right of regulation contained in the ordinance of 1879. But, whether it be treated as an exercise of such right, or as the entering into of a new contract, it is plain that, after the passage and acceptance of the ordinance of 1886, there no longer remains in the city council a right to increase or diminish the rate of fare to be charged upon that line until the expiration of the grant of 1886, to wit, the year 1904. Again, in 1888, an ordinance was passed granting the East Cleveland Railroad Company the right to construct and operate its road by electricity on Euclid and Cedar avenues. In this ordinance, it is recited:

"Whereas, there is a desire on the part of the people residing in the easterly portion of the city for a more convenient and rapid mode of transit, and that an electric system be substituted for animal power for the movement of cars: therefore, the East Cleveland Railroad Company is hereby granted permission," etc.

And in section 6 of the ordinance it is provided:

"Nothing herein shall be so construed as to authorize any increase of present fare for transportation over any portion of said company's line."

It appears in evidence that the company, having accepted this ordinance, at the expense of a very large amount of money, changed its construction as contemplated, and continued, after electricity was put in, to operate without any increase of fare. It is apparent that the "present fare" referred to in the ordinance of 1888 must have had reference to the fare which the company was then charging, and as fixed in the ordinance of 1886, namely, a cash fare of five cents. In consideration of the company's so equipping its line with electricity, and so agreeing to carry at "present fare," this same ordinance granted an extension of franchise for 25 years from July 13, 1888. By virtue of this ordinance, read in connection with the ordinance of 1886, the company acquired thereby the right to operate its line for a period of 25 years from that date, at the then present rate of fare referred to in the ordinance, namely, a cash fare of five cents. In 1889, an ordinance was passed, granting the East Cleveland Railroad Company the right to construct what is known as the "Wade Park Avenue Line," and, by section 4 of this ordinance, it is provided:

"Permission is granted upon the express condition that no increase of fare shall be charged by said company on any part of its main line or said extension, and but one fare, not exceeding five cents, or one of said company's tickets, shall entitle a passenger to transportation over the main line and extension from the intersection of Lake and Water streets to the easterly limits of the city, or from the easterly limits of the city to the intersection of Lake and Water streets."

This provision as to fare covers a portion of the Euclid Avenue Line, with respect to which it is claimed by the city that a reserved right exists to regulate fares under the ordinance of 1879; but the council, as in the ordinance of 1886, specifies the fare to be five cents, and, upon this Wade Park Avenue Line, from Superior and Water streets to Case avenue, there could be no longer any right to reduce

fare, as the extension is made upon the condition that the company will thereafter carry over the entire Wade Park Avenue Line at a cash fare of five cents or a railroad company's ticket.

Prior to June 1, 1893, the Broadway & Newburgh Street Railroad Company, the Brooklyn Street Railroad Company and the South Side Street-Railroad Company were corporations operating independent lines of railway in the city of Cleveland, each of them operating under contracts or grants from the city, and charging, as authorized in the ordinances permitting their operation, a cash fare of five cents. As to no one of these companies was there any right remaining in the city council to increase or diminish the rate of fare during the period of the several grants. These companies, about June 1, 1893, consolidated with the East Cleveland Railroad Company, forming the complainant the Cleveland Electric Railway Company. The city council consented to the terms of such consolidation under the following terms and conditions:

"Only one fare shall be charged for a continuous ride on or over any line of railway formerly owned by said constituent companies, and any line of any other of the said constituent companies within the limits of the city of Cleveland; and passengers on any of such lines paying one fare shall be entitled, without additional or extra charge, to be transferred to any other of said lines, and have a continuous ride thereon, for said single fare."

But it is evident that the one fare here mentioned must have reference to the present fare then charged by the constituent companies, namely, a fare of five cents. It thus appears that, by virtue of the ordinance of 1886 the East Cleveland Railroad Company was authorized to operate its line and cars to the end of its term at a cash fare of five cents; that each of the constituent companies which formed the present complainant the Cleveland Electric Railway Company was also authorized, for a period of time which has not yet expired, to charge a cash fare of five cents; that these different lines have been merged by consolidation; and that, under the consolidation, the system is being operated as an entirety. The portion of the Euclid Avenue Line to which the reservation of the ordinance of 1879 had reference, as an independent line, has long since ceased to be such, and the relations of the consolidated company (the complainant) and the city under these various grants are so fixed as that to admit the reserved power of regulation in the ordinance of 1879 to be now operative would be to impair the obligations of the several subsequent contracts in which the rate of fare is definitely fixed without reservation. Also, as pointed out in the discussion of the question as to the other complainant, as a matter of practical railroad operation, it is difficult to see how the conferred rights of the parties could be worked out if effect is given to the alleged reserved power in the ordinance of 1879.

It is contended by counsel for the city that certain of the provisions as to rates of fare, claimed to constitute a new contract since the passage of the ordinance of 1879, are invalid, because in violation of section 2502 of the Revised Statutes, providing that, after a grant or renewal of a grant is made, the municipal corporation shall not, during the term of such grant or renewal, release the gran-

tee from any obligation or liability imposed by the terms of such grant or renewal. It is questionable whether the right reserved to the city council to thereafter increase or diminish fare can fairly be said to be either an obligation or a liability of the railroad company within the meaning of this prohibition of the statutes; but, expressing no opinion on that subject, it is not true that the provisions of the section prohibit the city, after making an agreement or grant or renewal of a grant containing sundry provisions as to the rates of fare, from thereafter, upon sufficient consideration, modifying such contract. This has been expressly held in the case of *Clement v. City of Cincinnati*, 16 Wkly. Law Bul. 355, and affirmed by the supreme court of the state in 19 Wkly. Law Bul. 74. The court there held:

"The modification of a contract between the city and the owner of a street-railroad route, made in good faith for the better accommodation of the public, is not void by virtue of section 2502 of the Revised Statutes, and the release of the grantee of such route from an obligation, although in consideration of more rapid transit, involving greater expense and higher rate of fare, is permitted."

See, also, *Woodson v. Murdock*, 22 Wall. 351; *City of Cincinnati v. Cincinnati St. Ry. Co.*, 31 Wkly. Law Bul. 308; *Id.*, 2 Ohio N. P. 298; also *State v. East Cleveland R. Co.*, 6 Ohio Cir. Ct. R. 318, affirmed by supreme court in 27 Wkly. Law Bul. 64. For nearly 20 years, as the result of municipal legislation, sometimes hostile, sometimes friendly, the rights and privileges of the public and the different street-railroad companies of this city have been gradually molded into a well-defined code of street-railway laws, every step of which has been stubbornly contended for by the respective parties to these suits. Conceding to each party all the rights and privileges won by this agitation, the court is convinced, after a thorough and painstaking investigation of all the ordinances, grants, and evidence, that the complainants are entitled to the relief for which they pray in their bills of complaint, granting them a temporary injunction. The court thinks it must be clear to every fair-minded person, from the findings of fact filed with this opinion, that to permit the ordinances of October, 1898, to be put into operation by the municipal authorities would clearly impair the present contract rights of the complainants, for which no adequate remedy exists at law.

The second contention of the complainants is that the ordinances in question prescribe a rate of fare so unreasonably low as to deprive the complainants of their property without due process of law. In support of this contention, a large volume of testimony in the shape of affidavits has been filed by the defendant and the complainants. On the part of the complainants these affidavits are offered to establish their contention that, taking into consideration the value of their railway systems, cost of construction, maintenance, and operation, they could not carry passengers at the reduced rate proposed without loss, and that this loss would be so great as that, in time, it would deprive them of their property without due process of law. The court has examined these affidavits sufficiently to see that it would involve a laborious and expert accounting to decide this contention; and, having reached a conclusion on the first contention of the complainants, that the ordinances are invalid for the

reasons hereinbefore stated, it is not necessary, for the purposes of this motion, to make any further examination of that claim.

It is, however, due the complainants to say that their testimony makes out a *prima facie* case, within the ruling announced in *Smyth v. Ames*, where the supreme court held:

"A state enactment or regulation made under the authority of a state enactment, establishing a rate for the transportation of persons or property by a railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment to the constitution of the United States."

A preliminary injunction will issue, to remain in force until the final hearing of the cause, or until the further order of the court. Counsel will proceed to take their testimony for the final hearing, and the 90 days allowed by equity rule 69 will be apportioned between the parties.

FAY et al. v. CITY OF SPRINGFIELD et al.

(Circuit Court, S. D. Missouri, W. D. May 9, 1899.)

1. CONSTITUTIONAL LAW—PUBLIC IMPROVEMENTS—ASSESSMENTS—FRONT-FOOT RULE.

The statute of Missouri (sections 1495, 1496, Rev. St. 1889) authorizing the apportionment of the costs of repaving a street in cities of the third class on blocks and lots abutting thereon according to the front foot, without regard to the question of fact whether or not the given parcel of land is benefited thereby to the extent of the assessment, and without affording the property owner an opportunity to question the existence of such benefit, is in contravention of the fourteenth amendment to the federal constitution, and is therefore void.

2. SAME—PECULIAR BENEFITS—HEARING.

The only theory of law under which the cost of such street improvements can be imposed as a special tax on the abutting property rather than as a burden upon the entire municipal community, being the fact that the local property is peculiarly benefited thereby, statutes or ordinances which arbitrarily assume that such local property is benefited in the proportion of the frontage thereof are invalid, unless the opportunity is afforded, at some period in the progress of assessment and the enforcement thereof, to be heard upon the question of fact as to whether or not the benefit is equal to the burden imposed, and as the supreme court of the state holds that, notwithstanding no notice or hearing is provided therefor when the tax is imposed by the city council, the owner when sued for the enforcement of the special tax cannot be heard to defend upon the ground that his property was not in fact benefited, nor upon the question as to whether the apportionment of the costs is equal among the several lot owners, the statute is violative of the fourteenth amendment of the federal constitution, and the whole tax may be enjoined. Following *Village of Norwood v. Baker*, 19 Sup. Ct. 187, 172 U. S. 269.

(Syllabus by the Court.)

James Baker, for complainants.

R. S. Goode, Barbour & Daniels, and A. A. Johnson, for defendants.

PHILIPS, District Judge. This is a bill in equity to enjoin the enforcement and collection of special tax bills assessed against lots fronting on Commercial street in the city of Springfield, Mo. The

complainants are owners of certain of the lots; and the bill alleges, in substance, that the city of Springfield, which is a city of the third class, under the statutes of the state of Missouri, passed a resolution directing the repavement of said street from the center of Boonville street to the center of Benton avenue, embracing a number of blocks fronting on said street, and that it made a contract for said repaving with the defendant A. A. Myrick; and for the payment of the cost of this work the city provided by ordinance as follows:

"That there is hereby levied and assessed a special tax against the lots and pieces of ground hereinafter described to pay for the construction of a brick pavement of Commercial street from the center of Boonville street to the center of Benton avenue, as provided by resolution No. 370, approved June 9, 1898. The assessments herein charged being apportioned among the several lots and pieces of ground made liable therefor by the block, according to the front foot thereof, as follows."

The ordinance then set out a description of the lots thus assessed by the front foot, among which are the lots owned by the complainants severally. The aggregate amount of this work is \$12,657, and tax certificates upon said assessment were issued to said Myrick by the city council against each of the owners of lots abutting on said street within the limits specified in said ordinance in proportion to the frontage of the lots. The bill alleges that the city assumes and claims that the statute under which it was incorporated confers upon it authority to so levy and collect said taxes, and all other taxes for local improvements heretofore levied by it based upon the number of front feet abutting on such improvement, without limit as to the amount thereof, and without reference as to the value of the property, or the betterment, if any, conferred upon the owner of the property by the improvements, and that the same is not in conflict with the constitution of the United States or of the state of Missouri. The bill alleges that while the city, in assessing said taxes, conformed to the provisions of the law under which it attempted to act, yet said act is in conflict with the constitution of the United States, especially the fifth and fourteenth amendments thereof. It is also averred that a part of the lots so taxed are well improved and of much greater value than others which have no improvement and are of but little comparative value. There are other averments contained in the bill which are not material to be recited. The bill prays for a decree declaring the act of the legislature under which the proceedings were had to be inoperative, for the reason that it is in conflict with the constitution of the United States and the amendments thereto, and that the tax so assessed thereunder be declared void, and the collection thereof perpetually enjoined. The bill is brought in behalf of the complainants and all other persons similarly affected by the attempted exercise of the power claimed. The cause is heard on an application for a temporary injunction. The defendants have filed an answer to the bill, but not under oath.

I am unable to perceive why this case is not controlled by the ruling of the supreme court in *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187. The provision of the Ohio statute, on which that case depended, was similar, in legal effect, to the statute of

Missouri and the ordinance of the city of Springfield, under which the assessments were made. The Ohio statute provided that, where an improvement of an existing street should be ordered and made, the expense thereof, when not assessed as a general tax to be paid by the municipality generally, "shall be assessed by the council on the abutting and such adjacent and contiguous and other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made." The case decided by the supreme court, *supra*, was that of an assessment based upon the last clause above quoted, by the front foot of the property bounding and abutting upon the improvement. The Missouri statute under which this special tax was imposed (subsection 3, § 1495, Rev. St. Mo. 1889) provides that:

"For paving, macadamizing, curbing and guttering all streets, avenues and alleys, and repairing same, and for doing all excavating and grading necessary for same, after said streets, avenues and alleys have first been brought to grade, * * * the assessment shall be made for each block separately, on all lots and pieces of ground on either side of such street or avenue, the distance improved or to be improved, or on lots or pieces of ground abutting on such alley, in proportion to the front foot."

Section 1496 then declares that:

"The assessments made in pursuance of the second and third clauses of the second subdivision of the preceding section shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax bill shall issue therefor, and be paid in the manner provided by ordinance. Said special tax may bear interest after thirty days from the date of issue and presentation of same at the rate of ten per cent. per annum; and every such special tax bill shall be a lien against the lot of ground described in the same until the same is paid."

While it is true that the Ohio statute differs from the Missouri statute, in that, in addition to the mode of assessment by the front foot, it gave to the council the power to apportion the cost of such improvement upon the abutting lot owners in proportion to the benefits resulting from the improvement, or according to the value of the property assessed, yet the city of Norwood did not see fit to pursue either of the last two methods. How this difference in the two statutes is to help the defendants is not apparent. It only shows that it was in the mind of the legislature of Ohio that the matter of apportionment of such burden could be predicated upon the basis of relative benefits bestowed upon the abutting property, or according to the relative value thereof; whereas the Missouri statute contains no such provision whatever respecting betterments, or the relative value of the property touched. On the contrary, the Missouri statute provides absolutely, independent of any consideration of benefits conferred upon the lot owner by the street improvement, and independent of any consideration of relative value of the property assessed, "that the assessment shall be made for each block separately on all lots and pieces of ground on either side of such street, the distance

improved or to be improved, or on the lots or pieces of ground abutting on such alley, in proportion to the front foot." The Ohio statute further provided, in case an apportionment of the costs was directed on the basis of benefits, a method in advance of such assessment for ascertaining the benefits and apportioning the same. Section 2277, Rev. St. Ohio. But, as persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment, no method whatever is provided therefor; and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments, as a basis for the apportionment, was not contemplated or provided for. After passing the resolution that the work be done, the first section of the ordinance "levied an assessment and special tax against the lots; * * * the amounts herein charged being apportioned among the several lots and pieces of ground made liable therefor by the block, according to the front foot thereof." It is to be conceded that the courts of this state, while admitting that the only permissible theory under the fundamental law upon which a special tax for street improvements can be assessed against the property of the individual member of the municipal community is on the ground of special benefit conferred thereby not common to the whole community, yet they have maintained that this requirement is fully met by arbitrarily apportioning the cost of the improvement according to the front foot throughout the extent of the street. Without reviewing the cases in general, this has practically been recognized in a perfunctory way. This doctrine culminated in an opinion by Judge Wagner in *City of St. Louis v. Clemens*, 49 Mo. 552. As the opinion shows, the court first ruled that, regardless of the completion of the contract along the whole line of the street to be improved, any one lot might be assessed for the cost of the work done on its immediate front, no matter if, instead of benefiting the lot, the work done practically ruined its value; thus fitly illustrating how intolerable the rule that would arbitrarily subject the private property of the citizen to the burden of public improvement when separated from the basal proposition of benefits bestowed equal to the burden imposed. Judge Wagner, when confronted with this dilemma, receded, and said:

"The property must bear its just burden to the whole work according to its frontage. Any other construction would be unequal and unjust, and contrary to the theory of supposed benefits which support and uphold these laws. Grading in front of a given piece of property may be a damage instead of a benefit, and it will not be presumed that the property holder should be obliged to pay for the whole work that causes his damage. The assessment should be made in the proportion which the whole frontage of any particular lot bears to the entire work."

After thus recognizing the foundation of the rule of special assessments, it seems to my mind to be irreconcilably contradictory to say that the requirement is fully met by an apportionment based solely upon the frontage of the lots on the street, without any regard whatever to the fact of whether or not the particular lot is benefited at all by the work done throughout the length of the street improved, and without any regard to the fact of whether or not the benefit bestowed is equal, as between all the lots fronting on

the street. It is to be observed that the learned judge had just recognized the demand of justice that the particular lot should only bear its just proportion, and therefore an assessment which should be made for the cost of the work done in the immediate front of the lot might be ruinous rather than beneficial to it. This being unquestionably correct, exactly how this condition of the particular lot thus inconvenienced or left by the improvement could be changed into a benefit by completing the extension of the street throughout the distance covered by the contract is incomprehensible, as also why gross inequality might not continue to exist among the lots assessed after the completion of the work. The utmost that can be urged in favor of the front-foot rule, as applied to the case at bar, is, as has been suggested by counsel, that it is the policy of the state legislature on this subject, which rests for its support upon the bald assumption that reasonable equality is attained by this method; that is to say, if the legislature should declare that the cost of opening and paving streets in cities of the third class shall be assessed upon one block most centrally situated along the line of the street, the act should stand, because it is the declared legislative policy of the state, and because, in the judgment of the legislature, the method reasonably approaches equality and justice. Statutes in this and other states, which provide that the cost of such improvement shall be assessed where the lots touch, according to their value, furnish more nearly a rule of equality, for they are based upon the underlying principle of the revenue laws of the state, which require every citizen to contribute towards the burdens of government according to the assessed value of his property, as that bears some reasonable relation to the quantum of protection or benefit his property receives. At all events, it is less instinct with inequality and injustice than the front-foot rule, which utterly ignores the relative benefits received by the several lots called upon to contribute.

The discussion in *Barnes v. Dyer*, 56 Vt. 469, cited in *Village of Norwood Case*, is quite pertinent to this contention of defendants. Under the act of the legislature under review in that case, the city council was authorized to assess the owners of abutting property for a street improvement "so much of the expense thereof as they shall deem just and equitable." The statute further provided for—what the Missouri statute does not—notice, hearing, and appeal. The constitutionality of this act was successfully attacked by the property owner sought to be taxed under it. The court held that the language "as they shall deem just and equitable" fixed no definite standard by which the rights of the taxpayer were to be protected, as it was impossible from the terms employed to know upon what theory the council proceeded in determining what was equitable and just, whether it was in view of benefits bestowed, or upon the value of the land, or personal convenience to the owner, or of his ability to pay, or all combined. The court, after referring to Judge Dillon's discussion of this question, said:

"The act in question makes no express allusion to the assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet,

as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land especially benefited."

Further on the court said:

"The cases which have established the rule that the statute authorizing an assessment must fix the legal standard to which it shall be made to conform have not turned on the phraseology of constitutional provisions. It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so, there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection, courts have held that legislative enactments must set up a standard, fix a rule, to be conformed to as a guide in all cases,—a uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications to different individuals of the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppression."

A like ruling was made on a like statute in *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568, cited by Mr. Justice Harlan. How much more so should it be held that the Missouri statute is obnoxious to the fundamental right of private property when it not only directs that the apportionment of such special tax shall be according to the front foot, but does not even limit the discretion of the governing council in making the assessment to any consideration of its equity or justice? Who can tell in this case by what consideration the council of Springfield distributed the cost of this work according to the front foot? Did they consider the relative benefits of each lot, or the value thereof, or the convenience of the owner, or his ability to pay, or all combined? Following the same thought, Mr. Justice Harlan (172 U. S. 281, 19 Sup. Ct. 191) said:

"It will not escape observation that, if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required in the first instance to open the street at his own cost without compensation in respect of the land taken for the street; for by opening the street at his own cost he might have at least saved the expense attending formal proceedings of condemnation."

It is argued here in support of this assessment, as was done in *Village of Norwood Case*, that the court ought not to interfere by injunction, because the complainants did not show nor offer to show by proof that the amount of the assessment upon their property was in excess of the special benefits accruing to it by reason of the opening of the street; and the bill of complaint in this case is vigorously assailed because it does not in terms so aver. To this the court replied:

"This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the specific benefits accruing to the abutting property, a decree might properly have been made, enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of

special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

It is to be conceded to the contention of defendants' counsel that if, notwithstanding the statute in question makes no provision either before or at the time or after the assessment of the special tax for a hearing or contest by the lot owner as to whether or not his property is benefited by the improvement as charged against his lot, yet, if when sued on the tax bill he has the right to defend thereto on the ground that his property received no benefit, and can in this manner have this right adjudicated, then the statute is not unconstitutional as to this assessment, as he would thus have his day in court to contest its validity in this respect. Because of some confusion in the language of the judge who wrote the opinion in the particular case, this question is not free from some embarrassment, and to its consideration I have given careful attention, as I have no disposition to produce any conflict of opinion with the supreme court of the state touching so vital and important a question as this case presents, especially where its construction of the state statute is binding on the federal court.

In *City of St. Louis v. Richeson*, 76 Mo. 470, it would seem, on a casual reading, as if the court had sustained this contention of counsel; but, read in the light of the real question involved in that case, the decision does not go to the extent claimed for it. That was a condemnation proceeding, authorized by the charter to be instituted before one of the circuit courts of St. Louis, directing, upon the filing of a petition, that a summons should issue, giving the defendant 10 days' notice of the hearing of the petition. It further provided that, upon the court being satisfied that due notice had been given, it should appoint commissioners to assess damages which the owners of land may severally sustain by reason of such appropriation. The fifth section of the charter made it the duty of the commissioners to ascertain the actual value of the land proposed to be taken, without reference to the projected improvement and the actual damage done to the property thereby, and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owners of the property especially benefited by the improvement, in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement. It is further provided that the amounts to be paid by the owners of property especially benefited, as ascertained by the commissioners, should be a lien on the property so charged. The act further provided that the report of the commissioners might be reviewed by the circuit court on exceptions filed, whereupon the court should make such order therein as right and justice might require, and might order a new appraisement upon good cause shown; that the hearing of such exceptions should be summary, etc. It further

provided that tax bills should be issued therefor, and after the expiration of 60 days the unpaid bills should be turned over to the city counselor for collection by suit in the name of the city. To one of such suits the owner of a parcel of land appeared and answered, setting up that he had had no notice of said proceedings resulting in the taxation of his property at any time during its pendency, and claimed that the assessment and judgment were in contravention of the fifth amendment to the federal constitution. The court sustained a demurrer to this answer. A majority of the supreme court sustained this action of the circuit court, for the reason that the defendant, when sued upon the tax bill, might maintain, "by way of answer, any good and valid defense he might have, or which he could have presented to the original proceedings in the circuit court for the condemnation of said property and the assessment of said benefits, if he had been made a party thereto and had notice thereof. But the answer actually made by the defendant was that he was not a party to, and had no notice of, said original proceedings in the circuit court, etc. It may be conceded that this answer is true, and yet, if our construction of the charter and ordinance is correct, this answer, in the language of the demurrer, does not state facts sufficient to constitute a defense to this action. It may be true that he was not a party to said original proceeding during its pendency, and had had no notice thereof; yet that fact is wholly immaterial, if he is a party thereto, duly notified, and can be heard in his defense herein. In this particular we think the defendant in his answer misconstrued the charter, ordinance, and proceedings thereunder, and mistook his rights and remedy in the premises. The demurrer to the answer as filed, therefore, was rightfully sustained." It is to be observed in the first place that the fifth section of the charter in question provided, first, "for the payment of such values and damages, to assess against the city the amount of benefit to the public generally, and the balance against the owners of all property which shall be especially benefited by the proposed improvement, in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement." That is to say, the one feature which most distinguishes that charter from the statute in question is that the commissioners were authorized to apportion the balance to the private lot owner as he should be benefited by the improvement. Under this charter, therefore, his lot could not be subjected to a tax greater than the benefit received from the improvement; whereas, under the statute in question, the cost of the improvement is to be apportioned according to the front foot, without regard to the amount of benefit the owner receives therefrom. In other words, the right of the property owner under the St. Louis charter not to be subjected to a greater burden for the cost of the improvement than the benefit he received therefrom was preserved in the very law which subjected him to the tax. And inasmuch as the statute which conferred upon the circuit court the power to proceed to judgment in the case demanded that the property owner should have notice and a hearing thereon, with the ex-

press direction that if the circuit court, as a court of general jurisdiction, is of opinion that the assessment was unduly apportioned, it "shall make such order therein as right and justice may require, and may order a new appraisalment," it made the assessment imposed upon the defendant subject to this right of review and readjustment by the court, as "justice may require." And therefore the court held that, if the circuit court proceeded to judgment of condemnation and assessment of benefits without notice to the defendant, this right was not wholly gone, but he might, when sued for the enforcement of the tax, make such defense thereto as he could have made in the first instance in the circuit court. But no such provision is found in the statute in question. On the contrary, the power conferred on the city council is imperative, and without discretion, to apportion the cost of the improvement of the whole street upon the abutting lot owners "in proportion to the front foot." This is emphasized by the provisions of section 1498 of this statute, which provides that the city council shall have power, by resolution, to declare that the work or improvement is "necessary to be done," and after providing for the publication of such resolution for two weeks, unless a majority of the resident owners of property liable to taxation therefor file a protest against such improvement, "then the council shall have power to cause such improvement to be made, and to contract therefor, and to levy a tax as herein provided." So that, if it could be held that under this statute the defendant when sued upon the tax bill could make defense thereto, such defense could, in the very nature of things, be no greater than he could have made to the assessment if notified thereof during the pendency of the proceedings with the right to a hearing; and the court, by the statute itself which would be the source of its power, could do nothing more than to see in the matter of benefits that the proportion assessed against the lot was not greater than the frontage thereof. A moment's consideration of this aspect of the statute in question will demonstrate the fact that an attempt by the trial court in a suit for the enforcement of a tax bill to try and determine the question of benefit to the defendant's lot would thwart the whole scheme of this statute for the apportionment of such special assessment. The tax being a statutory lien, under the state practice the suit would be an action at law, in which either party would be entitled to demand a jury. Suppose in such trial the jury should find that the particular lot was unduly assessed by at least one-half more than the benefit received; as the other lot owners would not be parties thereto, there could be no ascertainment binding on them as to how much they should have been assessed; nor would the trial court have power under this statute, as in the case of the St. Louis charter, to direct a readjustment of the assessment on the lots. Likewise, in separate suits against the lot owners, varying results might be reached by the jury, the sum of which would be a dislocation and disarrangement of the whole assessment, defeating the declared purpose and language of the statute, which demands that the apportionment shall be by the front foot, and by no other means. The

contractor could not go back to the city council and have new certificates issued which could bind any lot owner to a proportion greater than that established in the judicial proceeding. As the claim of the contractor is not an obligation of the municipality, how would he be paid for his work? The situation thus presented is quite different from that class of cases where the taxpayer defends against the suit on the ground that the statute or the ordinance which authorized the imposition of the tax has not been complied with, or that the work done by the contractor is not done in conformity to the contract, and therefore the contractor, in justice and good conscience, is not entitled to collect the amount expressed in the certificate. He loses in such case to the extent of his default. In other words, he loses nothing, because he has not earned his demand under the statute and under the contract. Not so in a case like this, where no question is made that the contractor has not in all respects performed his contract, and the value of the work is equal to the sum of the certificates which have been issued to him in strict conformity to the statute on the "front-foot rule." I furthermore assert that the supreme court of this state since the decision in the Richeson Case, *supra*, has expressly decided that in a suit on such tax bill, where the assessment has been apportioned on the front-foot rule, the taxpayer cannot defend on the ground that the particular lot was not in fact benefited. In *Farrar v. City of St. Louis*, 80 Mo. 379, the statute in question directed that when the work "is completed the president of the board of public improvements shall compute the cost thereof respectively in the proportion that the linear feet of each lot fronting or bordering on such improvement bears to the total number of linear feet of all the property chargeable with the special tax, and shall make out and certify to the comptroller, on behalf of the contractor, bills of such cost and assessment accordingly as required by law." Among the defenses interposed in that case was the following:

"That the ordinance makes no provision for ascertaining the benefits to the public; but assesses the whole cost thereof equally upon each linear foot fronting on said avenue."

Judge Norton, after reviewing the rulings of the supreme court of the state touching this question, said:

"Having shown that the charter of the city confers upon it power to pave and reconstruct its streets, and to assess the cost of the work on the adjoining property, without binding it to any method of apportioning the cost, but leaving the municipal authorities free to adopt any method not forbidden by the constitution or general laws of the state, it follows that they might adopt any method in apportioning the cost which the legislature could adopt."

Further on he said:

"The liability of lots fronting on the street, the paving of which is authorized to be charged with the cost of the work according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved of the necessity of examining authorities cited by counsel for plaintiff, condemning what is familiarly known as 'the front-foot rule.' While irregularities arising in the enforcement of the rule in consequence of irregularities in the situation and depth of lots may afford a reason for an appeal to the legislative power of the state for their rectification, they would not justify the courts in invading the domain of the legislature."

And as further incontestable proof that in the mind of the supreme court where the legislature has arbitrarily fixed as the basis of the assessment the mere frontage of property, without regard to its value or extent of its improvement, no inquiry is permissible by way of defense to such assessment when made by the front foot, he asserts by way of quotation, on page 395, that:

"It is not in the power of the courts to enforce any fancied scheme of equality seeming to them more just than the one adopted by the legislature. The latter department of the government is wisely intrusted with the entire control of this subject, and, if practical injustice is done, the remedy is with the people." Again: "It is not whether the tax will produce perfect equality of burdens, nor whether the power may not be abused. We know too well that under any system of taxation these things may and do happen. They are evils not within the powers of the courts to remedy. It is for the legislature to guard against them."

This case was followed by that of *Rutherford v. Hamilton*, 97 Mo. 543, 11 S. W. 249, in which the defense was sought to be made that the act was unconstitutional, "because the cost of the sewer was apportioned by the city engineer against the property fronting on the improvement in proportion to the frontage of each lot, without considering the amount of actual benefits conferred by the sewer on each lot owner." And it was held not only that the front-foot rule obtained in the state, but, in effect, that such an assessment was conclusive on the property owner as to the amount of benefit received. Again in *Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683, it was held that "the fact that the street did not benefit but damage the property sought to be charged with the tax bill is no defense to an action on the latter." As further proof that this is the opinion of the supreme court, in *City of Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471, Chief Justice Gantt (123 Mo. 562, 27 S. W. 475) said:

"The power, under section 1495, Rev. St. 1889, is in the municipality to determine the necessity of the improvement, subject to the protest of a majority of the resident adjoining owners, and to assess it on all lots and pieces of ground abutting on the improvement according to the front foot thereof. The owner without a building is taxed in the same proportion as one who owns a valuable building, or, mayhap, a palatial residence."

Language could not more forcibly emphasize the fact, not only that the front-foot rule is arbitrary, regardless of the respective benefits to the property touched, but that it admits of no contention that the party assessed is not benefited at all. But it is suggested that Judge Gantt in the later case of *Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279, held that this mode of assessment was not conclusive on the property owner, and that he might make defense of no benefit to a suit on the tax bill. If this were so, it certainly would not be creditable to the consistency of the supreme court of the state, and would be a remarkable achievement of tergiversation. The assessment in that case was made, under the general statute (sections 1404-1447, c. 30, Rev. St. 1889), by a city of the second class, which provided that the assessment should be made on the basis of the "value of all the property to be charged with the cost thereof, exclusive of the improvements thereon, by the

city assessor, which assessment shall be delivered to the city engineer. * * * The city engineer shall compute the cost thereof and apportion the same among the several lots or parcels of property * * * according to the value thereof fixed by the city assessor aforesaid; and charge each lot or parcel of property with its proper share of such cost." The apportionment was not according to the front foot, but it was on the basis of the assessed value of the property to be charged therewith, and each lot or parcel of property was to be charged "with its proper share of such cost." The statute further provided "that nothing in this statute shall be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned is not done in a good and workmanlike manner; and that if any party shall set up by way of defense that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit tendered to the contractor, or other holder of the bill, the full value of the work done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for the costs shall be rendered against the plaintiff. The sole ground of defense in that case was that the tax was in contravention of the state and federal constitutions, "in that it sought to take defendant's property without due process of law, in that it sought to create a lien on his property and compel him to pay a local assessment without an opportunity to be heard on the matter." No question was presented in that case by the pleadings asking for any reconsideration of the question theretofore settled by the supreme court that in such suit the party could not defend on the ground of no benefits received, or authorizing the court to pass upon such question. Therefore the court simply held that the statute in that case was constitutional, and that the city "had the power to impose on the property owners the burden of the grading of the street, and this it has done by the charter, and it was competent for the legislature to empower the city to make the contract for grading. No notice was required to be given the defendant of the passage of the ordinance or the letting of the contract. * * * The only defense to this action is the unconstitutionality of the charter provisions of cities of the second class, and not the amount or correctness of the tax bill." Instead, therefore, of this ruling sustaining the contention of defendants' counsel, the express language of the judge is that the amount or correctness of the tax bill is not matter of defense. The offer, therefore, of defendants on this preliminary hearing to show by affidavits that in the opinion of affiants one of the lots in question was as much benefited by the improvement as another, and that the lots, independent of the improvements thereon, are of equal value, is no answer to the abuse which the statute invites. The inherent vice of the statute lies in the unbridled discretion conferred by it upon the municipal council, and the impossibility thereunder of judicially ascertaining what was in the mind of each member of the board in making the apportionment. As

said by Mr. Justice Peckham in *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 318, 17 Sup. Ct. 550:

"The only proper way to construe a legislative act is from the language used in the act, and upon proper occasion by a resort to a history of the times when it was passed," and, further, that "it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates."

This rule is always imperative where the language of the statute is plain and unambiguous. *Sedg. St. & Const. Law*, 194-251. In such case the statute must stand for a reason, and the courts are not at liberty to look outside of it for some specious meaning or import that may impart validity to it when assailed for its glaring violation of a constitutional right of the citizen. The chief justice in *Bogert v. City of Elizabeth*, *supra*, pertinently observed:

"This order [ordinance here] is so plain and definite that it is impossible by construction to contract it within constitutional bounds. There is not a hint in the clause suggestive of the idea that the land on the line of the street is not to be burdened beyond the degree to which it is especially benefited."

In the very nature of the power imposing this special tax upon the abutting property there must be some method of ascertainment, and some time of determining, the question of fact as to whether or not one lot is subjected to an undue burden compared to that apportioned to the other lots alike situated. The whole burden of such tax cannot be placed upon a single lot on the ground that the whole is not greater than the betterment of such lot, unless the other lots on the street derive no benefit therefrom. The burden should be distributed ratably among the several lots in the relative proportion of the benefits received by them. This is so just and reasonable as to hardly require the support of authority. *Dill. Mun. Corp. § 671*, in discussing this rule says:

"The decided tendency of later decisions is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality." And further on: "That the special benefits actually received by each parcel of contributing property was [is] the only principle upon which such assessments can justly rest."

In *Tide-Water Co. v. Coster*, 18 N. J. Eq. 519, the court said:

"The rule must, at least, be one which it is legally possible may be just and equitable as between the parties assessed."

To the same effect in *Bogert v. City of Elizabeth*, *supra*, the court said:

"The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement."

And this was held to be fundamentally wrong.

Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the state constitution exacting equal taxation, but has "its foundation in those elementary principles of equity and justice which lie at the root of the social compact" (*In re Canal Street*, 11 Wend. 154-156), and he can therefore invoke for its security and protection the federal constitution,

which inhibits not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the state the power to "deny within its jurisdiction the equal protection of the laws." Following what I conceive to be the ruling of the supreme court in the Village of Norwood Case, *supra*, the temporary injunction asked for is granted.

BRINKERHOFF v. BRUMFIELD, County Treasurer.

AULTMAN & TAYLOR CO. v. SAME.

(Circuit Court, N. D. Ohio, E. D. May 19, 1899.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DISQUALIFICATION BY INTEREST.

Rev. St. Ohio, § 2781, providing for an examination by the auditor as to property withheld from the tax list by the taxpayer, makes taxes found withheld delinquent from the time certified to the treasurer, and enforceable by distraint. Rev. St. Ohio, § 1071, allows the auditor a commission of 4 per cent. on all taxes so added to the tax duplicate. *Held* that, the functions of the auditor being judicial in their nature, his pecuniary interest renders proceedings conducted by him not due process of law within Const. Amend. art. 14.¹

2. FEDERAL COURTS—EQUITABLE REMEDIES UNDER STATE LAWS—RESTRAINING COLLECTION OF TAX.

A remedy by injunction against the collection of an illegal tax, expressly provided by a state statute, may be applied by a federal court of equity in the state, notwithstanding the statute also provides for an action at law to recover back the tax when paid. *Cummings v. Bank*, 101 U. S. 153, followed.

Wm. A. Lynch, Harter & Krichbaum, Bell & Brinkerhoff, Cummings & McBride, and Bricker & Workman, for complainants.

Brucker & Cummins, Douglas & Mengert, and J. B. Jones, for respondent.

RICKS, District Judge. These two bills are filed against Charles Brumfield, treasurer of Richland county, Ohio, and, as they involve acts relating to both cases, we treat them together whenever it is necessary to refer to them in connection with the bills. These bills seek to enjoin the respondent, who is treasurer of Richland county, Ohio, from enforcing the collection of \$228,899.79 of taxes and penalties from the Aultman & Taylor Company, and \$162,918 of taxes and penalties from George Brinkerhoff, administrator of the estate of Michael D. Harter, deceased; and the aggregate, with interest claimed, amounts to nearly \$500,000, which sums, the bills aver, stand illegally charged against the complainants on account of the taxes alleged to have been unlawfully and fraudulently withheld from the tax duplicate of the said county by the Aultman & Taylor Company and by George Brinkerhoff, administrator of the estate of Michael D. Harter, deceased, for the years 1893, 1894, 1895, 1896, 1897, and 1898. The Aultman & Taylor Company, in its bill, alleges that for said years

¹ As to due process of law in revenue proceedings, see note to *Read v. Dinges*, 8 C. C. A. 398.

it made full and complete returns of all its taxable property required to be listed, and that it had so far progressed in liquidating its affairs that, in 1897 and 1898, after deducting the sum of its legal bona fide debts from its taxable assets, there remained no credits, as defined by section 2730 of the Revised Statutes of Ohio, or other personal property, for it to return that was subject to taxation; that it made in said years, respectively, full and complete reports to the auditor of Richland county, Ohio, of such facts, with full written explanation of its property matters as affected by the taxing laws; that it never, at any time from 1893 to 1898, made any false return of its property for taxation; that it never evaded making a proper return, and that its return was never, at any time, fraudulent or evasive, but full and complete, as required by law. The complainant George Brinkerhoff, administrator, alleges that his decedent, Michael D. Harter, in 1893 made a correct return of his property for taxation; that he then lived in Richland county, Ohio; that in the years 1894, 1895, and 1896 the said Michael D. Harter, decedent, was not a citizen or resident of the state of Ohio, but was in said years, and up to the time of his death, on February 22, 1896, a resident of the state of Pennsylvania; that he owned no personal property subject to taxation in Richland county during said years which the laws of Ohio required him to return for taxation; that for the years 1897 and 1898 the complainant, as administrator, held and controlled no property subject to taxation under the laws of Ohio for which returns should have been made. The bills of complaint further allege that for each of said years 1893 to 1898, inclusive, the auditor of Richland county, wrongfully claiming that said complainants had made false returns of their personal property for taxation, and claiming to act under the authority of sections 2781 and 2782 of the Revised Statutes of Ohio, placed upon the tax duplicate, and certified for collection against said complainants to the said Charles Brumfield, treasurer, taxes and penalties as follows:

Against the Aultman & Taylor Company:

For 1893, principal,	\$1,264,500 00,	tax,	\$35,785 35
" 1894, "	1,264,500 00,	"	35,532 45
" 1895, "	1,264,500 00,	"	35,785 35
" 1896, "	1,264,500 00,	"	36,544 05
" 1897, "	1,264,500 00,	"	37,049 85
" 1898, "	1,264,500 00,	"	37,302 75

Against George Brinkerhoff, administrator:

For 1893, principal,	\$ 900,000 00,	tax,	\$25,470 00
" 1894, "	900,000 00,	"	25,290 00
" 1895, "	900,000 00,	"	25,470 00
" 1896, "	900,000 00,	"	26,110 00
" 1897, "	900,000 00,	"	26,370 00
" 1898, "	900,000 00,	"	26,550 00

The said sums included a penalty of 50 per cent. of the original amount claimed, which penalty was an infliction imposed by the auditor, and the said sums for each year, multiplied by the rate of taxation for each year, provided the basis and means by which said auditor arrived at the taxes claimed. The bills further aver that the said taxes and penalties now stand charged for collection on the

face of the tax duplicates, and appear as debts, respectively, against the Aultman & Taylor Company and the estate of Michael D. Harter, deceased, to be collected by action or distraint; and that the said respondent, on the 1st day of February, 1899, began an action against each of said complainants in the court of common pleas of said county. The said bills of complaint aver that a federal question is presented, inasmuch as that the proceedings above narrated, if permitted to be carried out to their logical result, would deprive the complainants of their property without due process of law, and would be in contravention of the constitution of the United States.

The first contention presented by the issues is whether the notice, as given to the complainants, was such as was contemplated by the laws of Ohio. The facts show that the complainants were notified by the auditor to appear in his office to explain why certain property was not reported for taxation, and why certain personal property was withheld from the tax duplicate. Said hearing had been carried on, several witnesses had been examined, and it was then understood by the parties that further proceedings would be resumed after due notice was given. The allegations of the bills are (and the facts stated in the affidavits confirm these allegations) that immediately after the last adjournment the complainants were told that they would be notified if any further proceedings took place, and an opportunity would be given them to present any matters they might choose to place before the authorities before they disposed of this important question. Immediately after this assurance had been given, without waiting to give them additional notice, the respondent proceeded at once by suit against the complainants in the court of common pleas of Richland county. This suit was to recover the large amounts heretofore stated. It is contended on behalf of the complainants that such notices as they had were not sufficient to give them an opportunity to be fully heard, and that the proceedings had under such imperfect notices were not such as contemplated by the constitution of the United States, and were not due process of law. This court had occasion to examine these statutes very fully in the case of *Meyers v. Shields*, reported in 61 Fed. 713. In view of the opinion of the court on the second contention to be considered, it will not be necessary to consider any further the sufficiency of this notice. The facts, as they appear from the affidavits, tend to show that the officers charged with the collection of these taxes did not deal fairly with the complainants in their notices and proceedings before the auditor, and evidently intended to take advantage of them in prematurely instituting suits against them. It is but fair to state that the claim on the part of the county officers is that they were advised that the complainants were about to apply for an injunction, and that therefore these suits were instituted. Whether these notices were sufficient or not, we can proceed to the consideration of the second contention presented by the bills. The statutes of Ohio contemplate that after an examination such as the auditor held in these cases that officer was to make a report of the nature of the personal property he found to be withheld by the taxpayer from the tax list and from his report to the assessor, and from such facts

and examination to name the amount which he claimed was due to the state and county. Such report from the auditor was to be transcribed in a book prepared for that purpose in the auditor's office, and the auditor was to certify the same to the treasurer; and from that moment they became delinquent taxes and penalties, for which the treasurer might bring suit, coupled with the power of distraint to enforce the collection of the alleged delinquent taxes. The tribunal thus created by the laws of Ohio for the purpose of sitting in judgment upon delinquent taxpayers is, by reason of its composition and the powers vested in it, one of the most remarkable semi-judicial bodies known to the jurisprudence of any country. For instance: In the Aultman & Taylor Company case the tax and penalty demanded amounts, in round numbers, to \$228,000; the auditor's commission for collecting this sum, 4 per cent., would be \$9,120; the treasurer's commission, 5 per cent., would be \$10,260; the inquisitor's portion, 20 per cent., would be \$45,600; the total fees to the auditor, treasurer, and inquisitor, if they succeeded in enforcing their judicial decree or judgment against the Aultman & Taylor Company, would amount to \$64,980. In the Brinkerhoff, administrator, case, the tax and penalty asked from the estate of Michael D. Harter is \$162,000; the auditor's commission would be \$6,480; the treasurer's commission, \$8,100; the inquisitor's share, 20 per cent., \$32,400; total for auditor, treasurer, and inquisitor in this case, \$46,980. Summarizing the above figures, the fees of the auditor, treasurer, and tax inquisitor, if they succeeded in enforcing the collection of the amount of taxes stated from these two complainants, would be as follows: Auditor, \$15,600; treasurer, \$18,360; inquisitor, \$78,000,—total, \$111,960. In other words, we have here a court, constituted by the laws of Ohio, who are to sit in judgment upon the cases of these two complainants; and, in case they decide in favor of the state and against the complainants, their aggregate commission would be \$111,960, and, if they decide the case in favor of the taxpayer and against the county and state, they would be without any compensation for their services.

In the case of *Meyers v. Shields*, heretofore cited, this court had occasion to consider the question as to whether the auditor, vested with these powers, was acting in a judicial capacity, and in that opinion the decisions of the supreme court of Ohio were cited in the cases of *Gager v. Prout*, 48 Ohio St. 110, 26 N. E. 1013, and *State v. Crites*, 48 Ohio St. 460, 26 N. E. 105. In such case the court, in referring to the auditor's proceedings, said:

"The respondent was acting in a quasi judicial capacity. He had assumed jurisdiction, and entered upon the investigation. The law imposed upon him the duty of hearing and weighing evidence and rendering a decision upon it. This necessarily involved the exercise of judicial discretion."

In the same opinion this court said:

"Having thus shown the judicial character of the duties which the auditor performs in the proceedings which have just been reviewed, how does the law say his direct pecuniary interest in the judgment he renders affects the validity of his proceedings? In *Pearce v. Atwood*, 13 Mass. 324, Chief Justice Parker said: 'It is very certain that by the principles of natural justice and of the common law no man can lawfully sit as a judge in a case in which he

may have a pecuniary interest. Any interest, however small, has been held to render a judge incompetent.' Lord Campbell said, in *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759: 'It is of the last importance that the maxim that no man is to be a judge in his own case should be held sacred, and that it is not to be confined to a cause in which he is a party, but applies to any cause in which he has an interest. We have again and again set aside proceedings because an individual who had an interest took part in the decision.' If one of the judges of a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred without the disqualified judge. The legislative voice has spoken in equally positive inhibitions against interested persons acting as judges, appraisers, road viewers, or commissioners. In Ohio statutory provisions are in force allowing a change of venue of the suit upon the mere affidavit of the parties of prejudice, bias, or interest."

In the *Meyers Case* the court continued its examination of the decisions of other courts, and found abundant authority for holding that a tribunal authorized to render arbitrary and summary judgments against citizens having so large a moneyed interest in the decrees and judgments to be rendered by them, was not such a judicial tribunal as contemplated by the constitution of the United States, and that the auditor, who was directly interested in the proceeds collected under the assessment, could not be said to be depriving the litigants before him of their property by due process of law. In view of the very lengthy opinion filed in the case of *Meyers v. Shields*, in which nearly all the law questions now presented were fully considered, I do not feel called upon, in the brief time I have to prepare an opinion in this case, to review the authorities, and state my opinion as to the law. It is sufficient to say that, so far as the claim that the bills in equity in these cases ought not to be entertained because the complainants have a complete and adequate remedy at law is concerned, the supreme court has removed every doubt on that point by its opinion in the case of *Cummings v. Bank*, 101 U. S. 153, and also by the opinion of Judge Taft, in the United States circuit court of appeals for the Sixth circuit, in *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498. If the statutes of Ohio did not specially provide that a taxpayer against whom illegal taxes had been assessed might secure relief against the collection of the same by a bill in equity and an injunction, the jurisdiction of this court might be in doubt. In view of the urgency under which this opinion is prepared, I can only say that the court adopts and reaffirms the conclusions and opinions announced in the case of *Meyers v. Shields*. This case has stood on the docket for five years, and the principles announced in it have been affirmed in several of the circuit and district courts of the United States, and until reversed it is authority to which the court can properly refer. A preliminary injunction will be allowed, in lieu of the restraining order heretofore entered, and the parties may prepare the case for final hearing on an application for a permanent injunction. An order will be entered dividing the 90 days as prescribed by the sixty-ninth rule in equity, so that the parties may have the case ready for hearing on its merits at the fall term.

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The Attorney General and Joseph H. Call, Sp. Asst. U. S. Atty. Wm. Singer, Jr., Page, McCutchen & Eells, and Wm. H. H. Hart, for defendants.

ROSS, Circuit Judge. The complainant instituted three suits in this court, numbered, respectively, 587, 662, and 675, the object of which was the determination of the title to those odd-numbered sections of land within the 20 and 30 mile limits of the grant made by the United States to the Southern Pacific Railroad Company by the act of congress of March 3, 1871, which are also within 20 miles of the general route of the Texas Pacific Railroad Company, as indicated by its map thereof filed in the office of the secretary of the interior, or within 30 miles of the asserted definite location of the Texas Pacific Railroad from Yuma, on the Colorado river, by way of San Gorgonio Pass, to San Diego, Cal.; to cancel such patents as had theretofore been issued therefor by the government to the Southern Pacific Railroad Company under the grant of March 3, 1871; and to quiet the complainant's title to all of the lands referred to. In each of the suits, issue was joined by the defendants, and certain testimony taken therein. At that stage of the proceedings the court, upon the stipulation of the respective parties, made an order consolidating the suits, with leave to the complainant to file an amended and supplemental bill (the parties stipulating that the testimony theretofore taken should, so far as applicable, be used in the consolidated case), and with leave to the respective parties to give such further evidence as they might elect. Thereafter, and on May 26, 1896, the complainant filed its amended and supplemental bill, upon which issue was joined by the defendants thereto, and additional evidence introduced by the respective parties. The complainant thereafter dismissed the suit in so far as concerned all of the lands mentioned for which patents had theretofore been issued by the government, except about 5,000 acres, which the Southern Pacific Railroad Company contracted to sell and convey to the defendant Colorado River Irrigation Company. So that the case, as submitted, involves those 5,000 acres, and all of the unpatented odd-numbered sections of land embraced within the primary and indemnity limits of the Southern Pacific Company's grant of March 3, 1871, that are also within 20 miles of the general route of the Texas Pacific Company, as indicated by its map thereof filed in the general land office, or within 30 miles of the asserted definite location of the Texas Pacific Railroad from Yuma, by way of San Gorgonio Pass, to San Diego.

The grant to the Southern Pacific Company was made by section 23 of the act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." 16 Stat. 573. The act provided for the incorporation of the Texas Pacific Railroad Company, and authorized and empowered it to "lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, state of Texas; thence by the most direct and eligible route, to be determined by

said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the state of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the Bay of San Diego, in the state of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude." By section 9 of the act, congress, for the purpose of aiding in the construction of the railroad and telegraph line thus authorized, granted to the Texas Pacific Railroad Company, its successors and assigns, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and 10 alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." The act further provided that in case any of the said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by the company, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. It also declared that "if, in the too near approach of said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest the line of said railroad, may be selected as above provided," with other provisions not necessary to be stated. By section 12 of the act, it was provided that whenever the Texas Pacific Company shall complete the first and each succeeding section of 20 consecutive miles of the railroad authorized, and put the same in running order as a first-class road in all its appointments, it shall be the duty of the secretary of the interior to cause patents to be issued, conveying to the company the number of sections of land opposite to and coterminous with such completed road to which it shall be entitled for each section so completed. By section 12 it was also provided that the Texas Pacific Company, within two years after the passage of the act, should designate the general route of its said road, as near as may be, and shall file a map of the same in the department of the interior, and that when that map is so filed the secretary of the interior, immediately thereafter, shall cause the lands within 40 miles on each side of said designated route within the territories, and 20 miles within the state of California, to be withdrawn from pre-emption, private entry, and sale. Section 23 of the same act is as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company, of California is hereby authorized (subject to the laws of California), to construct a line of railroad from a point at or near the Tehachepa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27th, 1866; provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

The act of July 27, 1866, is the act by which congress created the Atlantic & Pacific Railroad Company, with authority to construct and maintain a line of railroad and telegraph from a point at or near Springfield, Mo., to the western boundary line of that state; thence by the most eligible railroad route, to be determined by the company, to the Canadian river; thence to Albuquerque, on the river Del Norte; thence by way of Agua Frio, or other suitable pass, to the head waters of the Colorado Chiquito; thence along the thirty-fifth parallel of latitude, as near as might be suitable for a road route, to the Colorado river, at such point as might be selected by the company for crossing, and "thence by the most practicable and eligible route to the Pacific,"—in aid of the construction of which road congress granted to the Atlantic & Pacific Company every odd-numbered section of public land, not mineral, to the amount of 20 alternate sections per mile on each side of such line as the company might adopt through any territory of the United States, and 10 alternate sections per mile on each side of the line through any state, to which the United States had full title, and not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office. 14 Stat. 292. By the eighteenth section of the act of July 27, 1866, the Southern Pacific Railroad Company was authorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of this state as it deemed most suitable for a railroad line to San Francisco; and to have a uniform gauge and rate of fare with that road, and in consideration thereof, to aid in its construction, "shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations as to time and manner, with the Atlantic & Pacific Railroad herein provided for." On the 2d day of March, 1872, congress passed an act supplementary to that of March 3, 1871, by which the name of the Texas Pacific Railroad Company was changed to "The Texas & Pacific Railway Company," and which, after providing for the issuance, and filing and recording in the department of the interior, of certain bonds and mortgages by that company, and providing that the road should be constructed with iron or steel rails manufactured from American ore, except such as may have been contracted for before consolidation by any railroad company which may be purchased by or consolidated with the grantee company, declared, in section 5 thereof, that the Texas

& Pacific Railway Company should commence the construction of its road at or near Marshall, Tex., and should proceed with its construction on the line authorized by the original act, and so prosecute the same as to have at least 100 consecutive miles of railroad from Marshall, Tex., completed and in running order within two years thereafter, and so continue to construct, each year thereafter, a sufficient number of miles, not less than 100, to secure the completion of the whole line within 10 years after the passage of the supplemental act, with a further provision that the company should "commence the construction of said road from San Diego eastward within one year from the passage of this act, and construct not less than 10 miles before the expiration of the second year, and after the second year not less than 25 miles per annum in continuous line thereafter between San Diego and the Colorado river until the junction is formed with the line from the east at the latter point, or east thereof; and upon failure to so complete it, congress may adopt such measures as it may deem necessary and proper to secure its speedy completion." 17 Stat. 59. On February 28, 1885, an act of congress was approved declaring forfeited all of the lands granted to the Texas & Pacific Company, and the whole thereof "restored to the public domain and made subject to disposal under the general laws of the United States as though said grant had never been made." 23 Stat. 337.

From this brief review of the congressional legislation upon the subject, it will be seen that the grant to the Southern Pacific Railroad Company of March 3, 1871, in aid of the road it was thereby authorized to construct, was of such lands within the designated limits to which the United States had full title, and which were not reserved, sold, granted, or otherwise appropriated, and as were free from pre-emption or other claims or rights at the time the line of its road should be designated by a plat thereof filed in the office of the commissioner of the general land office. That grant, as has also been seen, was accompanied with the further provision that it should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." We are therefore to inquire whether the Atlantic & Pacific or any other railroad company had acquired any present or prospective right to any of the lands in suit, and, if so, to which of said lands, and, further, whether any of the lands in suit, and, if so, which of them, were reserved to the United States, or to which any other right or claim had attached, at the time of the filing in the general land office by the Southern Pacific Railroad Company of its map of the definite location of the road authorized to be built by it by section 23 of the act of March 3, 1871.

As the grants to the Southern Pacific and the Texas Pacific Railroad Companies were made by the same act and of the same date, the usual rule would give to each company one-half of such lands as fell within both grants. But the present case is taken out of the ordinary rule, as was expressly decided by the supreme court in the case of *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 616, 13 Sup. Ct. 163, 164, by the proviso annexed to the grant to the Southern

Pacific Company, respecting which proviso the supreme court, in the case last cited, said:

"It cannot be supposed that this proviso was meaningless, and that congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right."

Proceeding in the case cited, the supreme court said:

"What were the prospective rights of the Atlantic & Pacific Company? Of course, it could not be known at the time of the passage of the latter act exactly where the lands of the two companies would be located, and where the point of crossing would be. Neither could it then be known that there would be any deficiency in the granted lands at the point of crossing, or that, if such deficiency existed, it would require all the indemnity lands to make good the loss. It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. That right of selection was a prospective right, and, if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless; obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of the right of selection. The only way in which force can be given to this proviso is to hold that the indemnity lands of the Atlantic & Pacific were exempted from the grant to the Southern Pacific; for, if not exempted, the former company's prospective right of selection would be to that extent impaired."

The court was here speaking of the conflicting claims of the Southern Pacific and Atlantic & Pacific Railroad Companies, but as the proviso to the Southern Pacific grant also includes the "present or prospective" rights of "any other railroad company," it is obvious that the decision of the supreme court in the case cited is equally applicable to the conflicting claims of the Southern Pacific and Texas & Pacific Companies, and that, under that decision, any lands to which the Texas & Pacific Company had a present or prospective right at the time of the filing in the general land office by the Southern Pacific Company of its map of the definite location of the road it was authorized to build by section 23 of the act of March 3, 1871, were excluded from the grant thereby made. And as whatever rights the Texas & Pacific Company ever acquired to any of the lands in question continued to exist until the act of forfeiture passed by congress February 28, 1885, and as long before that time the Southern Pacific Company had built the road it was authorized to construct, and filed in the general land office maps showing its definite location, it follows that if at the latter date the lands in suit, or any of them, were for any reason reserved, or were lands to which the Texas & Pacific Company had acquired a present or prospective right, such lands did not pass to the Southern Pacific Company under its grant.

The case shows that the Texas & Pacific Railroad Company filed

in the office of the secretary of the interior a map of the general route of its road on the 15th day of October, 1871, which map was accepted and approved by the secretary of the interior, and that thereupon an executive order was made, withdrawing, for the benefit of that company, all of the public lands in California, designated by odd numbers, falling within 20 miles on either side of that line of its road. To all of such public lands the Texas & Pacific Company certainly had a "prospective," if not a "present," right, under the decision of the supreme court in *U. S. v. Colton Marble & Lime Co.*, supra. This 20-mile limit from the line of the general route of the Texas & Pacific Company, however, includes but a small part of the lands in controversy. The main contention in the case relates to those lands within the primary and indemnity limits of what the complainant contends was the definite location of the line of route of the Texas & Pacific Company, extending from Yuma, by way of the San Geronio Pass, to San Diego. On the part of the defendants it is insisted that the Texas & Pacific Company never had the right to locate or build any road from Yuma to San Diego by way of the San Geronio Pass, and that, if it ever had such right, it never in fact definitely located any such road.

That the Texas & Pacific Company never built the road authorized by congress is conceded. It was for that reason that congress, on the 28th day of February, 1885, declared forfeited the grant it had theretofore made in behalf of that company. Recurring to the act of March 3, 1871, it is seen that the road the Texas & Pacific Company was authorized to build, and in aid of which that company's grant was made, was a road extending from Marshall, Tex., by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Colorado river at or near the southeastern boundary of the state of California; thence by the most direct and eligible route to ship's channel in the Bay of San Diego, Cal., "pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude." It is thus seen that congress left it to the Texas & Pacific Company to determine the most direct and eligible route between Marshall, Tex., and a point at or near El Paso, and that it also left to that company the determination of the most direct and eligible route from the latter point, through New Mexico and Arizona, to a point on the Colorado river at or near the southeastern boundary of the state of California; but from this latter point congress saw proper to limit the discretionary power of the Texas & Pacific Company, and itself declared that, from the point the Texas & Pacific Company should locate on the Colorado river, the road should be extended by the most direct and eligible route to ship's channel in the Bay of San Diego, "pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude." And in the supplementary act of March 2, 1872, congress, as has been seen, not only provided for the speedy commencement of the road at Marshall, Tex., and for its continuous

prosecution and construction from that point "on the line authorized by the original act," but also provided that the company should "commence the construction of said road from San Diego eastward, within one year from the passage of this act, and construct not less than 10 miles before the expiration of the second year, and after the second year not less than 25 miles per annum in continuous line thereafter between San Diego and the Colorado river, until the junction is formed with the line from the east at the latter point, or east thereof; and upon failure to so complete it, congress may adopt such measures as it may deem necessary and proper to secure its speedy completion."

In 1872 and 1873 the Texas & Pacific Company surveyed various lines between the Colorado river and the bay of San Diego. At that time Gen. G. M. Dodge was chief engineer of the company, and J. A. Evans and Joseph U. Crawford were two of its division engineers. The result of those surveys was embodied by the chief engineer in a report made by him to the president of the company on the 12th day of March, 1873. That report is, in part, as follows:

"Office of the Chief Engineer.

"Marshall, Texas, March 12th, 1873.

"Hon. Thomas A. Scott, President—Dear Sir: I have the honor to submit a preliminary report upon the surveys on the California Division between San Diego & Colorado river, with a view of determining the route for adoption over that division. The full report of all the surveys, with maps, profiles, &c., will be made up by Mr. Evans hereafter; but, from data forwarded to me by him, I am able to place before the board sufficient information for them to determine upon the general route from San Diego east.

"The lines examined are as follows: The direct line from San Diego to Ft. Yuma, known as the 'Otay Valley Line,' 203¹¹/₁₀₀ miles long. The San Geronio Pass lines, numbered 1 to 4, marked 'Main Line,' and 'A, B, C, D,' on maps. No. 1. Main line, 313 miles long. No. 2. The coast line, via Temecula creek to the main line; thence by main line to the pass,—308⁷³/₁₀₀ miles. No. 3. The coast line to Temecula; thence the main line to La Laguna; thence up the San Jacinto river & San Bernardino,—302 miles. No. 4. The coast line; thence Temecula creek; thence line D direct to San Geronio Pass,—270 miles. Warner's Pass line was not examined; our reconnaissance of it showing that it was impracticable, as compared with other lines.

"The prominent features of each line are:

"First, direct line crosses a barren, uninviting country, hanging to steep and perpendicular slopes, stubborn to overcome, and crossing valleys & ravines hundreds of feet high, passing the summit of the Sierra Nevadas at Walker's Summit, thence down Carissa Cañon to the desert, and thence to the Colorado at Fort Yuma. As an evidence of the character of the Carissa Cañon on the direct line, 7¹/₂ miles of that work is estimated to cost \$240,000 per mile. The Carissa Cañon is reported as very heavy work; the crossing of the streams & ravines requiring nearly 7,000,000 feet of timber and 600 feet Howe truss bridging, which must be built, as earth excavation cannot be found to fill the chasms. It also has eleven tunnels in eleven miles. It has 57¹⁸/₁₀₀ miles from 80 to 116 ft. maximum grade, and 11⁶¹/₁₀₀ miles of 116 ft. grade. The ascent and descent to this line is 9,032 feet. After reaching the desert, lines cross the sand hills, composed of shifting sand, often changing miles in a single season. It is considered that if we take this route we will have to avoid these hills, either by the south, which would take us into Mexico, or by the north, which would increase the distance some 18 miles. The distance upon the line as surveyed is 203¹¹/₁₀₀ miles. Locally, this is the line that is most desired by the people of San Diego. It is the shortest line on the surface, and would have the least mileage to operate. It strikes the Bay of San Diego direct from the east, and would be the shortest line across the continent; but, equated and reduced to level grade, and compared with San Geronio Pass lines, it is

the longest line from Fort Yuma to San Diego. The estimates upon it have been made as closely as practicable, considering the nature of the country. It is impossible, upon such grade, to cover all contingencies, but estimates have been made as grades show on profile. Mr. Evans thinks that his estimate covers the cost of the line. Upon the location of this line, it is my opinion, if we are forced to keep clear of the sand hills, the distance will be increased to 220 miles. In competition with this line we have the lines known as the 'San Gorgonio Pass Lines,' two of which are distinct lines to San Gorgonio Pass; the others being parts of each of those lines. They are known as the 'Main Line' and 'Coast Line.' From San Gorgonio Pass to Fort Yuma all are a common line.

"No. 1. The main line commences at San Diego; follows a short distance up the San Diego river; thence across the drainage of the country to Temecula creek; thence by Temecula & La Laguna to the Rio de Santa Ana, and up that stream to the San Bernardino Valley; thence to San Gorgonio Pass. This is the longest of all the San Gorgonio Pass lines, & has the greatest ascent and descent, obtaining it in crossing the drainage from San Diego to Temecula, and will not, as a whole, come into comparison with some of the other lines. That portion of it from Temecula to the Santa Ana river, and thence by San Bernardino and San Gorgonio Pass, including a connection with Los Angeles, gives us the best connection north. This line is 313 miles long.

"No. 4. The next line, known as the 'Coast Line,' and numbered 4, follows the coast from San Diego to the mouth of Temecula creek; thence up Temecula Creek to Temecula; thence, by line D, direct to San Gorgonio Pass. This line is the shortest of the San Gorgonio Pass Lines, and, as I calculate the cost, is the cheapest, though Mr. Evans makes the construction of it, proper, cost a little more than line 3. This line is the proper line to adopt from San Diego to Temecula, provided the San Gorgonio Pass route is taken. From Temecula to the San Gorgonio Pass we have examined 4 lines, and the examination reduces us to the choice of two. This direct coast line has an elevation and depression of 8,133 feet; has $28\frac{44}{100}$ miles maximum grade 80 to 105 feet. It is least in curvature, and, in a solely engineering point of view, is the best of all the lines examined. When equated to a level grade, it is 50 miles shorter than Otay Valley direct line.

"No. 3 line is the same as the coast line to Temecula; thence runs by La Laguna; thence by San Jacinto river, by line B to Riverside & San Bernardino; thence San Gorgonio Pass, — $32\frac{22}{100}$ miles. The great difficulty of overcoming the country between La Laguna and the San Jacinto, and up that river, throws it out of the comparison. It is mentioned here for the purpose of showing that we have thoroughly examined that country.

"Line No. 2 is the same as the coast line to Temecula; thence the same as the main line to San Gorgonio Pass, passing the La Laguna to the Rio de Santa Ana through San Bernardino to the pass. By examining the tables of cost, grades, & distances, you will see that the decision upon the lines lies between this line and line D and the direct line by the Otay Valley. If we aim for a connection with Los Angeles, this line will give it to us better than line D. If we regard Los Angeles and Temecula as fixed points, the distances would compare as follows:

Temecula to the pass, line D.....	40 miles
Los Angeles to San Bernardino.....	54 "
San Bernardino to pass.....	18 "

Total 112 miles

"This is with a view of taking the produce of Los Angeles to San Diego, and it would run from Los Angeles to San Bernardino; then to San Gorgonio Pass; thence down line D to San Diego.

From Temecula to Los Angeles via main line.....	74 M
Temecula to Temecula Pass.....	44 "

Total 118

—making it six miles longer. To overcome this six miles, we make the elevation to San Gorgonio Pass on this line but once, while on line D it is made

twice. It would have to be done on both lines, provided the intersections were made at the summit instead of at Temecula. I submit tables of grades & of the cost of the lines, as obtained from the estimates of Mr. Evans."

Embodied in this report were estimates of Division Engineer Evans showing the cost of the line by way of Otay Valley to be \$12,441,706.97, and the cost of the line by way of San Gorgonio Pass to be \$6,441,706.97.

This report of the chief engineer having been by the president of the company submitted to its board of directors, that board on April 4, 1873, adopted this resolution:

"On motion it was resolved that the line by San Gorgonio Pass, known as 'Number 4,' be, and the same is hereby, adopted as the route from San Diego, with such modifications as in the judgment of the president may be to the best interests of the company."

In May, 1874, Gen. Dodge, as chief engineer, in a report to the company, thus described the line of road from Yuma to San Diego:

"Beginning at Fort Yuma: From there the line runs in a northwesterly direction, passing to the north of the sand hills and across the Salt Lake district of the Colorado desert of California, over which our line for 45 miles is below sea level; the lowest point being 290 feet below tide water. In crossing this, the line passes on the north margin of the Salt Lake of the Colorado desert. Leaving the mud volcanoes about five miles to the south, and the Dos Palms stage station about the same distance to the north, we reach the Cabazon Valley, 113 miles from Ft. Yuma; thence on nearly the same course, 50 miles, to the summit of San Gorgonio Pass, running $1\frac{1}{4}$ miles south of White Water stage station, and one mile south of Devontine's ranch; reaching the summit $2\frac{1}{2}$ miles south of Edgar's ranch. This pass is 2,621 feet above tide water, and its small elevation must be considered remarkable, as it lies between the San Bernardino and San Jacinto Mountains, the highest peaks of the range. Leaving San Gorgonio Pass, our course is southwest, passing down one of the tributaries of the San Jacinto, which is known as the 'Potrero' (or 'Pocket') 'of the San Jacinto,' to the San Jacinto Plains and Temecula Plains (these plains lie between the main range and the Santa Ana range), and down the Temecula Plains to the head of Temecula Cañon, and down the cañon where the Temecula breaks through the Santa Ana range, 10 miles to the open valley, striking the coast near the Santa Margarita ranches, about 40 miles north of San Diego; then south and down the coast on the western slope of the Soledad Mountains, crossing the Soledad, San Luis Rey, San Dieguito, the ravine of the La Jolla, skirting False Bay; then to the shore of San Diego Bay, and along the shore of the bay to the depot grounds of the Texas Pacific Railway below the Pacific Steamship Company's wharf. Distance from the Pima villages on the Gila river, 444.4 miles."

It is this line that the complainant claims is the line of definite location of the Texas & Pacific Company. Assuming, for the present, that the line thus described was definitely located, we proceed to inquire whether it was the line authorized to be built by the Texas & Pacific Company by the acts of congress in question.

It is not denied that the Otay line, referred to in the report of the chief engineer of the Texas & Pacific Company made on the 12th day of March, 1873, is the direct line between Yuma and San Diego, and approximately corresponds with the map of general route filed by that company in the office of the secretary of the interior. It pursues, too, "as near as may be," the thirty-second parallel of north latitude, approaching within a few miles the boundary line between the United States and Mexico. The line of route described by the

chief engineer of the company in his report of May, 1874, and contended on the part of the complainant to be the line definitely located by the company, starts at Yuma, and runs in a northwesterly direction, 163 miles, to the summit of San Gorgonio Pass (about the thirty-fourth parallel of north latitude), and runs thence southwesterly to the Pacific Coast, and thence south 40 miles down the coast to the Bay of San Diego. It is thus seen that this line, so far from pursuing, as near as may be, the thirty-second parallel of north latitude from Yuma to San Diego, and running eastward from San Diego, as congress explicitly declared it should do, runs north from San Diego a distance of 40 miles, and thence northeasterly until it practically reaches the thirty-fourth parallel of north latitude. Not only so, but from San Gorgonio Pass to Yuma it practically parallels the other road which the very same act of congress provided should connect, at or near the Colorado river, with the Texas & Pacific road authorized to be built. It seems entirely clear to me that the Texas & Pacific Company was not authorized to locate or build any such road. It was not the road contemplated by congress. It was not the road indicated upon the map of general route filed by that company in the office of the secretary of the interior, which map, so far as appears, was the only map that company ever did file in the general land office indicating any line between Yuma and San Diego. Congress, as the acts in question plainly show, provided for two railroads west of the Colorado river, and provided for their junction at or near that river,—one, the Texas & Pacific, to extend from that point of junction westward, by the most direct and eligible route, pursuing, as near as may be, the thirty-second parallel of north latitude to ship's channel, in the Bay of San Diego; and the other, the Southern Pacific, to connect therewith at or near the Colorado river, and to build from that point, by way of Los Angeles (necessarily through the San Gorgonio Pass), to a point at or near the Tehachepi Pass; the declared purpose being to thereby connect the Texas & Pacific Railroad with the city of San Francisco. In this respect the act under consideration is much like the Northern Pacific act of July 2, 1864 (13 Stat. 365). By that act the Northern Pacific Railroad Company was incorporated, with authority to construct and to maintain a continuous railroad and telegraph line—

"Beginning at a point on Lake Superior in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus."

In aid of that line certain lands were by the act granted to the Northern Pacific Company. By a joint resolution of congress approved April 10, 1869, it was provided that—

"The Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the territory of Washington; said extension being subject to all of the conditions and

provisions, and said company, in respect thereto, being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof; provided, that said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: and provided further, that at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter, until the whole of said extension shall be completed." 16 Stat. 57.

On the 4th day of May, 1870, congress, for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon, granted to the Oregon Central Railroad Company, a corporation of Oregon, then engaged in constructing said road, and to their successors and assigns, a right of way, etc., and also certain lands, which company accepted the grant, and on the 31st of January, 1872, filed its map of definite location of a proposed line of road from Astoria to Castor creek, near Forest Grove. On the 31st day of May, 1870, congress passed a joint resolution providing—

"That the Northern Pacific Railroad Company be, and hereby is, authorized * * * to locate and construct, under the provisions, and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any state or territory in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within 10 miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864. And that 25 miles of said main line between its western terminus and the city of Portland in the state of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." 16 Stat. 378.

In the case of *U. S. v. Northern Pac. R. Co.*, 152 U. S. 284, 292, 14 Sup. Ct. 598, 601, the question arose whether the act of July 2, 1864, contained a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraph line from Portland to Puget Sound.

The court said:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States north of the forty-fifth degree of latitude, it is clear that congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line at some suitable place not more than

three hundred miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 13, 11 Sup. Ct. 389, 393, 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.' "

Not only do I think that the Texas & Pacific Company was not authorized to locate or build any road through the San Geronimo Pass, but I am also of opinion that the evidence in the case falls far short of showing that it ever did in fact definitely locate any such line. It is not enough that the chief engineer of the road said in his report made to the company in May, 1874, that "the route of the road has been definitely fixed"; nor is it enough that the company, in its annual report made to the secretary of the interior under oath, for the year ending June 30, 1874, contained "a description of the line of route surveyed and fixed upon for construction." That annual report, like others of a similar character referred to in the record, was made under and pursuant to the provisions of section 13 of the granting act of March 3, 1871, which declares—

"That the president of the company shall annually, upon the first day of July, make a report and file it with the secretary of the interior, which report shall be under oath, respecting the financial situation of the company, the amount of money received and expended, and the number of miles of road constructed each year; and, further, the names and residences of the stockholders, of the directors, and of all other officers of the company; the amount of stock subscribed, the amount thereof actually paid in, a description of the lines of road surveyed and fixed upon for construction, the amount received from passenger, and for freight, respectively, on the road; a statement of the expenses of said road, and its fixtures, and a statement of the indebtedness of said company, and the various kinds thereof."

The statement of an officer of a road that there has been a definite location of the line of the road authorized to be constructed does not establish the fact, in the absence of a statute attributing such effect to such a statement. In this case there is no such statute. Whether or not the line was definitely located is a question of fact to be determined from the evidence. It is not pretended that any map was ever filed by the Texas & Pacific Company in the general land office showing any such definite location. The line contended for on the part of the complainant was undoubtedly surveyed in the field and staked upon the ground; but there is not only no sufficient evidence of its adoption by the Texas & Pacific Company as its line of definite location (which term necessarily imports that it had passed beyond the power of the company to alter it in any respect), but the very resolution relied upon by the government as an adoption of the line as one of definite location upon its face shows that

it was subject to change by the company; for it, in terms, adopts it "with such modifications as in the judgment of the president may be to the best interests of the company."

And there is an abundance of other evidence going to show that the route of the Texas Pacific road never was definitely fixed. The surveys in the field by way of San Gorgonio Pass were made by Joseph U. Crawford, those by way of the Otay Valley (the direct line) by Engineer Reno, and those by way of Julian and Warner's Pass by Engineer Wood. Crawford's deposition was given in this suit in November, 1897, and in it he states that he made his surveys in the autumn of 1872; that he surveyed the line from Yuma to the summit of the San Gorgonio Pass, and from that summit down the San Jacinto, across the Temecula Plains to the cañon of that name, and thence down the coast to the Bay of San Diego, and "chained and staked it in order to obtain the topography, and in order to construct a profile and make a close estimate"; that, according to his recollection, he drove stakes every 200 feet on the desert, and every 100 feet on the grade; that he thereafter prepared "maps of different scales, and did all the necessary office work in order to get up a proper and reliable estimate," and turned them over to his superior officer, Maj. Evans, who had charge in California of all three of the surveying parties, and to whom Crawford, Reno, and Wood all reported the results of their surveys. The survey made by Crawford of the line now claimed on the part of the complainant to be that of definite location, it will be observed, was made in the fall of 1872,—the year preceding that in which the board of directors of the Texas Pacific Company adopted the route recommended by the chief engineer, "with such modifications as, in the judgment of the president, may be to the best interests of the company." That resolution was passed April 4, 1873. It is not claimed that there was any subsequent survey in the field of a route by way of San Gorgonio Pass. These facts are of themselves enough to show that the route by way of San Gorgonio Pass was never definitely fixed, which term, as has been said, imports that it is no longer subject to change by the company making it. The report made to the board of directors of the company by the chief engineer, upon which the above resolution was passed, was based upon the report to him of Maj. Davis, of February 3, 1873, with respect to the availability of the different routes through the mountains between Yuma and the Bay of San Diego. Being asked whether, from his knowledge of the topography and grades, that report was substantially correct, the witness Crawford answered:

"I don't think they had developed a practicable line, on what we called a 'direct line,' from San Diego to Fort Yuma along the southern boundary. Q. At that time, you mean? A. At that time, or even since. Q. Well, what do you say as to the estimates of Major Evans in that report as to measuring grades and altitudes against distances? A. I think that Major Evans' report, wherein he advised the adoption of the line by San Gorgonio Pass as being commercially the shorter line, and best for the company, was correct."

The witness Crawford further testifies that about the year 1877 he was asked by Mr. Bond, vice president of the Texas & Pacific

Company, to go to San Diego and try to reduce the quantities upon the direct line surveyed by Reno. "I went there," said the witness, "and reconnoitered the ground, organized a surveying party, and was in the field for two or three months,—as long as they would pay anything; and, as a result, I reported a very heavy reduction upon Reno's quantities upon the western slope of the Sierras upon the direct line. Frank Bond then communicated with General Dodge, and General Dodge sent Evans back to California to see me, and to see wherein this reduction could have been made, and whether he would acknowledge that I had improved upon the Reno survey, and I understood— I have not seen Evans' report to Bond and General Dodge, but I understand he acknowledged that I made a heavy reduction. On the strength of that, the people of San Diego appointed me, with David Felsenheld, as a committee; and I went to Washington in the winter of '77-'78, and appeared before the committee on the Pacific Railroad, and did all I could to get the direct line constructed. At that time, if my memory serves me, the Southern Pacific had constructed through San Geronio Pass." Certainly this very clearly shows that as late as 1877 the route of the Texas & Pacific Company had not been definitely fixed. The same fact is clearly shown by the following extract taken from the address of Mr. John C. Brown on February 22, 1876, before the committee of congress on the Texas and Pacific railroads; he being at the time vice president of the Texas & Pacific Company:

"I wish to state, in reply to Mr. Huntington, when he says that Colonel Scott two years ago declared that the road could not be constructed over the direct route from Yuma to San Diego, that we have since that time had skillful and intelligent engineers to go over that country, and they have explored cañons and passes not before examined by our engineers, and revised the former line; and they report that the direct line is entirely practicable, and that it can be built at much less cost than similar work done on the Southern Pacific or Central Pacific roads. We have a profile of the route, and the report of the engineer, and know certainly that we can build from Fort Yuma through to San Diego at a cost of less than \$36,000 a mile on the average. There are 30 miles of this route which will be very expensive; some of it may cost \$250,000 to \$300,000 per mile; but the average will not exceed \$36,000 per mile."

These facts, and others of a similar nature appearing in the record, make it perfectly clear that there never was any definite location of the Texas Pacific Railroad, and, as a consequence, that none of the lands in suit, covered by the grant of March 3, 1871, to the Southern Pacific Company, are excluded therefrom by reason of any definite location of the Texas & Pacific Company. That the piece of land claimed by the defendant Crawford was not subject to settlement by him in 1887 is shown by the case in this court of *Railroad Co. v. Groeck* (the opinion in which was filed April 3, 1899) 93 Fed. 707. That the lands patented to the defendant railroad company, and by it contracted to be sold and conveyed to the defendant Colorado River Irrigation Company, are protected by the confirmatory act of congress of March 2, 1896 (29 Stat. 42), supplementing that of March 3, 1887 (24 Stat. 556), is shown by the decisions of this court in the cases of *U. S. v. Southern Pac. R. Co.*, 86 Fed. 962, and *Id.*, 88 Fed. 832. That the defendant trustees of the Southern Pacific Company

have no greater rights in respect to the lands in suit than has that company is also shown by the decision in *U. S. v. Southern Pac. R. Co.*, 86 Fed. 962, and cases there cited. A decree will be entered in accordance with the views above expressed.

RICHARDSON v. LOUISVILLE BANKING CO. OF LOUISVILLE, KY.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1899.)

No. 813.

1. BANKS AS CORRESPONDENTS—COLLECTIONS—CONTRACTS.

In response to letters soliciting an account and making an offer of services for the care of business in its neighborhood, a bank wrote, "If we understand your proposition, you agree that you will take from us all items on [neighboring states], crediting our account with the total of our letter on receipt at par, and remitting New York at par the year round on our balance in excess of \$10,000." The correspondent was directed to advise of collections by the collection number of the remitting bank, so that they could be checked without difficulty. Each letter of advice contained the passage: "I inclose for collection and Please advise collection by number, and return immediately if not honored." The list of items frequently directed protests, which directions were followed, and immediately on such protest the amount of such item and protest fees were charged back to remitting bank. Some items were charged with the note "Held," probably meaning held for future direction. Of many of the items the remitting bank was the mere mandatary for collection. *Held*, that the contract was one for collection of the items forwarded, and not of purchase, and the forwarding bank was entitled to all items not collected before suspension of the collecting bank, and afterwards collected by sub-agents, and traced to the possession of the receiver appointed to wind it up.

2. NATIONAL BANKS—COLLECTIONS—IDENTITY OF FUNDS.

Where it is not shown that a certain collection made by a receiver of an insolvent national bank was forwarded by a correspondent of the bank, nor included in the list of items sent, it is not sufficiently traced; and this though the receiver testified that the item was collected for the forwarding bank.

3. NATIONAL BANKS—RECEIVERS—PAYMENT OF INTEREST.

An order directing payment of interest by the receiver of a national bank from date of judicial demand is erroneous, as funds coming into the hands of a receiver are turned over to the comptroller, and could not earn interest, and any payment of interest would necessarily be taken from some other trust fund; and this particularly where the involved circumstances of the case made it impossible to pay over the amount without investigation and an accounting.

4. RECEIVERS—DECREE—UNDUE LIMITATIONS.

A decree which commands the receiver of an insolvent national bank to pay over a large sum of money within 10 days, where, as a matter of fact, and in accordance with law, the funds are in the custody of the comptroller of the currency, unduly limits the time for satisfying the decree, and might result in the receiver being in contempt for not paying over moneys which are not within his control.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

On the 5th of March, 1895, the American National Bank made a written proposal to the Louisville Banking Company as follows:

"Gentlemen: As we have not the pleasure of an account from you, and being in a position to serve you to our mutual advantage, we beg leave to offer

you our best services for the care of any business you have in this section, assuring you of our very best attention to your interest. If you will carry an average balance with us of \$10,000, we will take your items on Louisiana, Mississippi, Georgia, Alabama, and Texas, crediting your account with total of your letter on receipt at par, remitting New York as directed at the same rate the year round. On balance in excess of \$10,000 we will allow 3% per annum interest. Awaiting the favor of your views on the above, we are,

"Yours, very truly,

W. W. Girault, Cashier."

The following correspondence ensued:

"March 7, 1895.

"W. W. Girault, Esq., Cashier American National Bank, New Orleans, La.—Dear Sir: Your favor of the 5th inst. is received, and contents carefully noted. In reply, we beg to say that for some years past our Louisiana business has been handled for us by the Union National of your city. The Union National has treated us with great liberality, but we have never enjoyed the advantages which I understand your proposition to offer us. We would not wish to maintain a balance in New Orleans upon an interest basis, but, if we understand your proposition, you agree that you will take from us all items on the states of Louisiana, Mississippi, Georgia, Alabama, and Texas, crediting our account with the total of our letter on receipt at par, and remitting New York at par the year round on our balance in excess of \$10,000. If we understand from this that you would remit our balance daily direct to our New York correspondent, advising us of the amount remitted, in excess of \$10,000 to be maintained in your hands, it is a proposition which we are ready to seriously consider. If this is the proposition, therefore, you mean to submit to us, will you be kind enough to state it to us in distinct terms, and whether, if we enter into such an agreement, we may consider it in the nature of a contract to be binding for not less than one year. We would not care to disturb the very pleasant relations we have now existing, if for any cause they were liable to be disturbed after a short trial of your proposition might be put into effect. Of course, there are some points in all the states you name where we have reciprocal relations, and which we will continue to handle as we do now, but your proposition would be very useful to us, and would enable us to concentrate a great deal of zigzag channels.

"Yours, truly,

John H. Leathers, Cashier."

"American National Bank.

"New Orleans, March 9th, 1895.

"John H. Leathers, Esq., Cashier, Louisville, Ky.—Dear Sir: Replying to your esteemed favor of the 7th inst., our proposition of the 5th inst. is intended to cover the period of one year, and, if mutually satisfactory at the end of that time, will be happy to extend again. On balance in excess of \$10,000, we will allow you 3% per annum interest; but, if you do not care to carry a balance above that amount, we will make daily remittance of your balance over \$10,000 direct to your New York correspondent, and advise you. We have extended you a very liberal par list, and I am sure can transact any business that you might be pleased to intrust to us in a manner that will meet with your entire satisfaction. Hoping to hear from you favorably, we are,

"W. W. Girault, Cashier."

"March 11, 1895.

"W. W. Girault, Esq., Cashier American National Bank, New Orleans, La.—Dear Sir: Your favor of the 9th is received, and contents fully noted. In reply, I beg to say that we accept the proposition so contained in the 5th inst., and to cover the period of one year from this date, to be continued at the end of that time if mutually satisfactory. We commence sending you to-day on the basis as proposed. We will thank you to remit your balance daily, at least for the present, in excess of ten thousand dollars, which amount we are to carry with you, to the Hanover National Bank of New York; advising us daily of the amount remitted. We will ask you to be good enough to instruct the proper department in your bank to carefully advise our collections by our number, that

we may have no difficulty in checking them properly. The service you propose to render is certainly a very liberal one, and we trust that you will be able to do so with profit and pleasure to yourselves; and we very cheerfully agree to maintain the balance of \$10,000 in your hands, in view of the service you offer us. Trusting that the arrangement may be mutually profitable, pleasant, and satisfactory, we are,

John H. Leathers, Cashier."

The two banks did business under the contract included in the foregoing correspondence, without any change or modification, for the period of one year, during which time the Louisville Banking Company forwarded items invariably with the following direction:

"American National Bank, New Orleans, La.—Dear Sir: I inclose for collection and Please advise collections by number, and return immediately if not honored."

On receipt of which the American National Bank gave credit on its books to the Louisville Banking Company for the total sum of the items forwarded, and remitted daily the balance on its books to the credit of the Louisville Banking Company in excess of \$10,000.

In the month of March, 1896, the two banks modified their contract, as shown by the following correspondence:

American National Bank.

"New Orleans, La., March 14, 1896

"John H. Leathers, Esq., Cashier Louisville Banking Company, Louisville, Ky.—Gentlemen: Replying to your favor 12th inst. We regret exceedingly that our proposition of the 9th inst. does not meet your views, in the matter of continuing your account. We appreciate the business you send us very highly indeed, and are unwilling to have it diverted to other channels; but many of the points you send us cost us exchange now, and we thought a weekly remittance of your entire balance at a fair rate would be satisfactory. At any rate, we want you to stay with us, and are willing to continue on the old basis, except, instead of remitting daily we will remit weekly at par. Hoping this will settle the matter to your satisfaction, we remain,

"Yours, truly,

W. W. Girault, Vice President."

"Mar. 16/96.

"W. W. Girault, Vice President American National Bank, New Orleans, La.—Dear Sir: Your favor of the 14th just received, and contents noted, and the proposition you now submit is entirely satisfactory. We do not desire ourselves to make any change in our New Orleans account, but you understand, of course, we have to make the very best arrangements we can, because, as we have said before, competition in the banking business has thrown the doors wide open, and we have been compelled in self-defense to make the best arrangements we can. Under the same arrangement as last year; you remitting our balance at par once a week instead of daily, all in excess of \$10,000, which average balance we are to maintain in your hands, and we to have the option of sending you as we have been doing. We might suggest this to you, which we will be very glad to do, and may be of some service to you: We will use for you in whole or in part exchange on Louisville, Cincinnati, Chicago, and St. Louis, and you can use exchange on these points in place of New York whenever it may be convenient for you to do so; and probably at times this arrangement may be of advantage to you. We wish to say furthermore that, where we have dealings with a bank, we want to have them not only mutually profitable, but pleasant at the same time; and we will be ready at all times to help you in any territory we may be able to handle for you, possibly on better terms than you may now enjoy. We recognize the fact that you are doing a great deal for us in the territory you propose to handle for us. At the same time, we hope that with an average balance of \$10,000 in your hands, and our offer to give you the option of remitting us our balance above that amount in the various cities named above, once a week, that it will compensate you. We trust that it will be agreeable to you to have it understood that this new arrangement shall continue in force for one year. We ask this because we like to feel

settled in our arrangements with corresponding banks, and not feel that any day we may receive notice of its discontinuance. You can make any time in the week you please. We should be glad, however, to have the day you will remit definitely fixed.

"Yours, truly,

John H. Leathers, Cashier."

"American National Bank."

"New Orleans, La., March 18, 1896.

"John H. Leathers, Esq., Cashier Louisville Banking Company, Louisville, Ky.—Dear Sir: Yours of the 16th inst. to hand, and it is with pleasure that we note that we are still to be favored with your account. This new arrangement, entered into 16th, we are willing to continue for one year from that date. We note that it suits you just as well to receive our check on certain cities on New York, and this will [be] quite a convenience to us, and we are quite sure the business between us will be mutually satisfactory. Monday is the day we have selected to remit your excess balance, and, unless you prefer some other day, we will make Monday the day.

"Yours, truly,

W. W. Girault, Vice President."

"March 30, 1896.

"W. W. Girault, Esq., Vice President American National Bank, New Orleans, La.—Dear Sir: Your favor of the 18th just received, and contents noted, and all right. The day you have selected to remit our excess balance is perfectly satisfactory. We untie [unite] with you in the hope that, with the modifications made in the old contract, our future relations will be mutually profitable and pleasant.

"Yours, truly,

John H. Leathers, Cashier."

The two banks continued to do business under the modified contract from March, 1896, to the date of the suspension of the American National Bank, which bank closed its doors at 3 p. m. August 5, 1896, and never afterwards opened them for business. It announced its suspension by posting a notice thereof on the doors early in the morning of the following day, August 6, 1896. The same day, by direction of the comptroller of the currency, Edward I. Johnson, bank examiner, took possession of the books, assets, and property found in the bank. Subsequently the appellant, as receiver, took possession of the bank's property; receiving all sums that the bank examiner had collected in the interim. At the time the American National Bank closed its doors, it had received from the Louisville Banking Company various items in remittances of recent date, all of which had been credited on the books of the American National Bank to the Louisville Banking Company, but which items had not been collected by the bank and the proceeds thereof mixed with its funds. Many of these items were afterwards collected by the examiner and other collection agencies, and came to the hands of the receiver. The present suit is one to charge the receiver, as the trustee of the Louisville Banking Company, for all the items transmitted by the said bank to the American National Bank, which items at the date of the suspension of the American National Bank had not been collected by the said bank, but which were afterwards collected by the receiver; the same never having been mixed in, or become part of, the funds of the American National Bank, and now subject to full identification. The court below recognized the equity of the Louisville Banking Company's demands, and, after lengthy investigation, and hearing of much evidence, rendered a decree, as shown by the amended record, as follows:

"This cause came on to be heard on the pleadings, exhibits, and evidence adduced, and was argued by counsel, whereupon, and on consideration thereof, the court being satisfied that the relation of principal and agent existed between the complainant and the American National Bank of New Orleans; that said American National Bank was hopelessly insolvent, and that to the knowledge of the managing officers, the president and cashier, of said bank, on or before July 1, 1896; that said American National Bank was guilty of fraud in accepting the collections of complainant transmitted in said complainant's letters of July 25, 27, 28, 29, 30, and 31, and August 1 and 3, 1896; that complainant has traced the items for the collections therein set forth to the hands of the

defendant, the receiver; and that the same have come into the possession of the said receiver, as follows, to wit:

Items on points out of New Orleans sent for collection in complainant's letter of August 3, 1896, collected by the examiner in charge, through the Louisiana National Bank, amounting to.....	\$ 4,558 96
Items remitted from sundry banks to examiner after failure...	1,584 59
Items in complainant's letter of July 31st, August 1st, and 3d, on New Orleans, collected through the examiner, and turned over to the defendant as receiver, including a United States treasury draft for \$55, amounting to.....	986 63
Items collected by the bank examiner and said receiver through W. L. Moody & Co., amounting to.....	1,324 89
Items collected by the bank examiner and said receiver through the Farley National Bank of Montgomery, Ala., amount to..	1,827 53
Items collected by the bank examiner and receiver through the Fourth National Bank of Atlanta, Ga., amounting to.....	1,045 97

All of which came into the hands of the receiver, amounting in the aggregate to the sum of..... \$11,328 57

—And that said amount of \$11,328.57 constituted and is a trust fund in the hands of the defendant receiver as trustee for the complainant, and that the complainant is entitled to be paid the same, with interest, out of the funds which came into the hands of the defendant as such receiver: It is therefore ordered, adjudged, and decreed that the complainant have and recover from the defendant, F. L. Richardson, receiver of the American National Bank of New Orleans, the sum of \$11,328.57, with interest at five per cent. per annum from the date of the filing of the bill of complaint herein, together with all costs, which is decreed to be paid within ten days by priority over all unsecured creditors; that for the balance of complainant's claim, to wit, \$26,967.86, complainant be, and is hereby, recognized as a general creditor, entitled to participate pro rata with the depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets, and it is ordered, adjudged, and decreed that said defendant receiver pay to complainant such pro rata thereof as has been or may be paid to other unsecured creditors of said American National Bank."

F. N. Butler, for appellant.

E. M. Hudson, John D. Rouse, and Wm. Grant, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts, the opinion of the court was delivered by PARDEE, Circuit Judge.

The main contention on this appeal relates to the construction of the correspondence passing between the two banks in 1895. The appellant, receiver of the American National Bank, contends that under the contract, as shown by the correspondence, whenever an item was remitted by the Louisville Banking Company to the American National Bank, and by that bank received and credited to the account of the Louisville Banking Company, said item then and there became the property, by purchase, of the American National Bank, and that the resultant relation between that bank and the Louisville Banking Company was solely that of debtor and creditor. On the other hand, the contention is that the correspondence was with the view to collections of commercial paper, and the arrangements made provided only for the collection of such items as

should be remitted by the Louisville Banking Company to the American National Bank, and that when the American National Bank became insolvent and closed its doors the mandate for collection was withdrawn, and the Louisville Banking Company became entitled to the return of all the items which had not been collected by the American National Bank. It is to be noticed that the first letter, written by the American National Bank, was inviting an account, and making an offer of services for the care of any business that the Louisville Banking Company might have in the New Orleans section. It is very far indeed from a proposition to purchase from the Louisville Banking Company all such items of checks and commercial paper as the said banking company might have in that locality. That the Louisville Banking Company had in mind solely the matter of collecting such items as it might have in the New Orleans locality fully appears from its letter of March 11, 1895, which, among other things, contains this passage: "We will ask you to be good enough to instruct the proper department in your bank to carefully advise our collections by our number, that we may have no difficulty in checking them properly." The arrangement for business provided for in the letters is entirely consistent with the theory that the provisions related wholly to a matter of collection, and it is inconsistent with any theory that it was a matter of sale and purchase which was in contemplation of the parties. The course of business between the two banks also shows clearly that the arrangement between the parties was understood to be one for collection solely. Each letter of advice forwarded by the Louisville Banking Company contained this passage: "I inclose for collection and Please advise collections by number, and return immediately if not honored." The list of items as forwarded frequently contained instructions with regard to the protest, or waiver of the same, of specific items; and the books of the American National Bank show that, immediately on protest of any item, the item itself and the protest fee were charged back to the Louisville Banking Company; and in some instances items were charged back with the simple note "Held," probably meaning "held for further direction." Another fact to be noticed in this connection is that for a large portion, if not all, of the items forwarded, the Louisville Banking Company was not the owner of the same for sale, or with power to sell, but was the mere mandatary for collection. Counsel for the appellant bases his entire argument upon the language used by the Louisville Banking Company in its letter of March 7, 1897, as follows:

"We would not wish to maintain a balance in New Orleans upon an interest basis, but, if we understand your proposition, you agree that you will take from us all items on the states of Louisiana, Mississippi, Georgia, Alabama, and Texas, crediting our account with the total of our letter on receipt at par, and remitting New York at par the year round on our balance in excess of \$10,000."

—And argues therefrom that the American National Bank was compelled to take at par all the checks, notes, and drafts on persons or corporations in Louisiana, Mississippi, Georgia, Alabama, and Texas that the Louisville Banking Company should send, and that the American National Bank was obliged to pay the Louisville Bank-

ing Company for said checks, etc., on receipt of said items, and says that:

"If an agreement on the part of the American National Bank to take the checks, notes, and drafts in controversy from the Louisville Banking Company at par, and to pay the full face value thereof to the New York correspondent of the Louisville Banking Company, on receipt of said items, or within one week thereafter, is not a contract of sale, which passed the title of those items to the American National Bank, we fail to appreciate what constitutes a contract of sale. One of the parties agrees to sell a thing for a fixed price, and the other promises to buy the thing at the price agreed upon, or to pay for it upon delivery, or within a week from that time. All the essential elements of a contract of sale are thus contained in said agreement, while the conditions of a contract of agency are wanting."

We do not think that any such effect can be given to the clause referred to, and the promise and agreement to take all such items, crediting the account and forwarding at par, cannot be understood as contracting that the taking was by purchase; but the whole tone and purport of the letter are rather to the effect that the word "take," in that connection, meant to handle, collect, look after. "Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself, even though the depositor has been allowed to check against the deposit before the paper is collected; and the depositor can recover the check or other paper, if it is still in the possession of the depository." *Morse, Banks* (3d Ed.) § 586; *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647. See *Newm. Bank Dep.* p. 211, § 209. See, also, *Balbach v. Frelinghuysen*, 15 Fed. 675. As we construe the contract between the parties to be one relating to the collection, and not the purchase, of the items forwarded, the case is controlled by *Bank v. Armstrong*, 148 U. S. 50, 58, 13 Sup. Ct. 533. See, also, *Evansville Bank v. German-American Nat. Bank*, 155 U. S. 564, 15 Sup. Ct. 221. And the complainant below was entitled to a decree for all items not collected by the American National Bank before suspension, and afterwards collected by subagents, and traced to the possession of the receiver.

The appellant also contends that many of the items allowed for in the decree appealed from have not been sufficiently traced to identify the amounts as coming to the hands of the receiver. In regard to this we have made as full an examination as the importance of the case warranted, and find that the objections to none of the items allowed are well founded, except in regard to certain checks which were collected by Attorney Denegre on the 6th of August, aggregating \$931.63, which were put in a separate envelope, and were turned over by Denegre to Examiner Johnson, and by Johnson handed intact to the receiver. In the testimony of Johnson, one item on the Louisiana National Bank of \$135 was collected for account of complainant, while the evidence does not show that any such item was ever forwarded by the Louisville Banking Company, and it is not mentioned in any list of items forwarded by the Louisville Banking Company to the American National Bank. We think that this item is not sufficiently traced, and it should not have been included in the decree of the court below.

The decree of the court below allows interest against the receiver from judicial demand. We are of opinion that this was erroneous. The funds collected, coming into the hands of the receiver, turned over to the comptroller, could not earn interest, and any interest to be paid thereon would be necessarily taken from some other trust fund. The involved circumstances surrounding the case made it improper, if not impossible, for the receiver to pay over the amount for which he is charged as trustee without an investigation and an accounting; and we think he was in no fault, but rather in the fulfillment of his official duties, in refusing to recognize complainant's demands until they were judicially determined. As a general rule in equity, trustees are not required to pay interest unless they are in fault in the management of the trust fund, or have so used the trust fund as to earn interest.

An objection is made to the form of the decree rendered in the court below, in that it commands the receiver to pay over to the complainant a certain large sum of money within 10 days, when, as a matter of fact, and in accordance with law, the receiver is not in personal custody of the funds in question, but the same are in the hands of the comptroller of the currency. The effect of the decree, as rendered, might be that the receiver would be in contempt for not paying over moneys which are not within his control. See *Merrill v. Bank*, 41 U. S. App. 529, 21 C. C. A. 282, and 75 Fed. 148.

Admitting these last-mentioned objections, the decree of the court below should be reversed, and the cause remanded, with instructions to enter a decree as follows: It is ordered, adjudged, and decreed that the complainant, the Louisville Banking Company, do have and recover from the defendant, Frank L. Richardson, receiver of the American National Bank, the sum of \$11,193.59, which said receiver is ordered to pay, out of the funds which have come to his hands as receiver, within 30 days from the signing of this decree, and by priority over all unsecured creditors of the American National Bank, or that he do within said delay certify the same to the comptroller of the currency, with a copy of this decree; and it is further ordered and decreed that for the balance of complainant's claim, to wit, the sum of \$27,102.86, the said banking company be, and is hereby, recognized as a general creditor, entitled to participate pro rata with the depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets; and it is ordered and decreed that the said defendant receiver pay to said Louisville Banking Company such pro rata thereon as has been or may be paid to other unsecured creditors of said American National Bank, or do certify the same to the comptroller to govern his action in the premises. And it is so ordered.

RICHARDSON v. CONTINENTAL NAT. BANK OF MEMPHIS, TENN.

(Circuit Court of Appeals, Fifth Circuit. May 16, 1899.)

No. 811.

BANKS AS CORRESPONDENTS—COLLECTIONS—CONTRACTS.

An agreement between two banks, by which one agrees to "handle" the items of exchange and commercial paper of the other within a certain territory, crediting the amount of such items to the account of the other on receipt, and under which the sending bank transmits such items as collections, indorsed payable to "any national or state bank," with directions to protest and return if unpaid, is an agreement for the making of collections only, and not of purchase and sale of the paper, and does not create the relation of debtor and creditor between the two banks as to items received and credited, but uncollected, at the time of the failure of the receiving bank; and any such items, or their proceeds, which can be identified as having come into the hands of its receiver, may be recovered by the sending bank.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The object of this suit is to recover the proceeds of a large number of checks, drafts, notes, etc.,—generally denominated "items of exchange,"—transmitted between July 31 and August 4, 1896, inclusive, by the appellee, complainant, to the American National Bank for collection. These proceeds, it is averred, were collected after the failure of the insolvent bank, and came into the hands of the receiver, the appellant. This is not a suit claiming any preference on the general assets of the insolvent bank, but simply for recovery of the proceeds of certain items of exchange remitted to said bank, collected after its failure, and turned over to the receiver later, the ownership of which is asserted in this proceeding by the complainant below, appellee here. On August 5, 1896, the American National Bank closed its doors at 3 p. m., and never opened them again for business. The following day, by direction of the comptroller of the currency, Edward I. Johnson, bank examiner, took possession of the books, assets, and property found in the bank. Subsequently the appellant qualified as receiver and took possession of the bank's property. The only arrangement ever entered into by the complainant and the American National Bank, relative to the course of business between them, is embodied in and based upon the following two telegrams and complainant's letter, all dated July 31, 1896, to wit:

Telegram.

"Memphis, July 31, 1896.

"To American National Bank, New Orleans, La.: Have mislaid your recent letter. Please write us best terms handle our N. O., La., and So. Miss. business. May decide give you our business immediately.

"O. F. M. Niles, President."

Telegram.

"New Orleans, La., July 31, 1896.

"Continental National Bank, Memphis, Tenn.: Telegram received. Will credit cash items on points named, also Texas, at par on receipt. Start the account. We will please you.
American National Bank."

Letter.

"Memphis, Tenn., July 31, 1896.

"American National Bank, New Orleans, La.—Gentlemen: I wired you this morning in regard to handling our account, and have received your wire, which is satisfactory. We will commence sending you our business to-day, and hope you will be able to handle it satisfactorily, and that you will find the account a profitable one. We are obliged to send you a somewhat large item on Baton Rouge, but this will be an exceptional one, at least in amount, and I believe

you will find our account a valuable one for your bank. We will endeavor to keep balances with you sufficient to justify any small expense in the collection of some interior items. Hoping that the arrangement we are entering into will prove mutually advantageous, and with best wishes, believe me,

"Yours, very truly,

C. F. M. Niles, President."

It is true that the American National Bank wrote a letter on the same date, July 31, 1896, proposing, in effect, a modification of the telegraphic terms; but that letter, at all events, was never acted on by complainant, and it is extremely doubtful whether it ever reached Memphis in time to be considered before the failure of the bank. Accordingly, complainant commenced the same day to transmit to the American National Bank its items of exchange for collection, amounting to \$5,020.88, and this was continued by further remittances of items for collection on August 1st, 3d, and 4th, the 2d of August falling on a Sunday. All letters containing remittances were headed as follows:

"Protest, unless otherwise instructed, and return at once. We enclose for collection and credit
returns.

"Yours, respectfully,

H. L. Armstrong, Cashier."

All the items contained in these letters were indorsed by a rubber stamp, as follows:

"Pay to the order of
"Any National or State Bank.

"[Date here.]

"Continental National Bank,
"H. L. Armstrong, Cashier."

This indorsement was for the purpose of vesting the said American National Bank with the necessary authority to receive and collect the same. The items transmitted in these four several letters by complainant apparently reached the bank on August 1, 3, 4, and 5, 1896, respectively, and were by the note clerk, conformably to the usages of that bank, credited to complainant on the books of the bank. Most of the items embraced in the first three letters, drawn on or payable by parties in New Orleans, were collected by the bank. Those items in the first two letters, payable at other points,—out of town items,—were sent by the bank to other banks for collection. All of the out of town items in the last two letters, of date August 3 and 4, 1896, were retained separate by the bank, and passed into the hands of the bank examiner, who took charge of the insolvent bank on August 6, 1896, and collected them through the medium of the Louisiana National Bank of New Orleans, for his account as examiner in charge. Some of the city items in these two letters were kept separate from the funds of the bank, and placed in the hands of the bank's attorney, Mr. George Denègre, on the morning of August 6, 1896 (before the bank examiner took charge), who collected the same, placed the proceeds in sealed envelopes, and indorsed thereon the amounts and the names of the parties for whose account he had so collected them. These identical proceeds, so collected by Mr. Denègre, were by him turned over, in those envelopes intact, to the examiner in charge, who delivered them to the receiver. All of the out of town items, transmitted in the first two of complainant's letters were sent by the bank, before its announced failure, to other banks, its correspondents, for collection; and they were by them collected after the failure of the bank, or if, in some few cases, they were collected before the failure, the proceeds were not forwarded to the bank by its subagents prior to the failure. Such collections were remitted to the examiner in charge, mainly, and by him paid over to the receiver, or they were, in a few instances, sent to the receiver directly.

On August 5, 1896, the board of directors of the bank met and adopted the following resolution:

"Special meeting at 8:30 p. m., Wednesday, August 5, 1896. A quorum of directors met at 7:30 p. m. this day. Present: Messrs. Gardes, Keiffer, Renaud, and Dumas. Mr. Gardes stated what had taken place during the day, and that the deposits received during the day had been set aside. The directors approved of this action, and instructed the president to hold the said deposits

separate and apart from the banking funds, and to examine carefully the condition of the bank, and report at a meeting to be held at 8:30 a. m., August 6. Duly moved, seconded, and adopted. H. Gardes, President."

The answer admits that the bank was hopelessly insolvent on August 5, 1896, but declares that defendant is not fully advised as to knowledge by the managing officers of the financial condition of the bank previously.

On hearing in the circuit court, as shown by the amended record, the following judgment was rendered:

"This cause came on to be heard on the pleadings, exhibits, and evidence adduced, and was argued by counsel. Whereupon, on consideration thereof, the court being satisfied that the relation of principal and agent existed between the complainant and the American National Bank of New Orleans; that said American National Bank was hopelessly insolvent, and that to the knowledge of the managing officers, the president, and cashier of said bank, on or before July 1, 1896; that said American National Bank was guilty of fraud in accepting the collections of the complainant, transmitted in complainant's letters of July 31 and August 1, 3, and 4, 1896; that complainant has traced the items of collections therein set forth to the hands of the defendant, the receiver, as aforesaid; that the same had come into the possession of said receiver as follows, to wit:

Items in Exhibit B, annexed to the bill of complaint, aggregating the sum of.....	\$3,100 87
Items in Exhibit D of the bill, amounting to.....	462 81
Items in Exhibit F, amounting to.....	4,359 11
Items in Exhibit F, collected through W. L. Moody & Co., of Galveston, Tex., amounting to.....	326 47
	<hr/>
	\$8,249 26

—All of which came into the hands of the receiver, aggregating the sum total of \$8,249.26, constituted and is a trust fund in the hand of said receiver as trustee, for the complainant; and that complainant is entitled to be paid the same, with interest, out of the funds which came into the hands of the defendant as such receiver. It is therefore ordered, adjudged, and decreed that the complainant have and recover from the defendant, F. L. Richardson, receiver of the American National Bank of New Orleans, the sum of \$8,249.26, with interest at 5 per cent. per annum from the date of the filing of the bill of complaint herein, together with all costs, which is decreed to be paid within 10 days, by priority over all unsecured creditors; and that for the balance of the complainant's claim, to wit, \$5,692.61, complainant be, and is hereby, recognized as a general creditor, and entitled to participate pro rata with depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets. And it is ordered, adjudged, and decreed that said defendant, receiver as aforesaid, pay to complainant such pro rata thereof as has been or may be paid to other unsecured creditors of said American National Bank.

"February 15, 1899.

[Signed] Aleck Boorman, Judge."

r N. Butler, for appellant.

E. M. Hudson, John D. Rouse, and Wm. Grant, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts, the opinion of the court was delivered by PARDEE, Circuit Judge.

The questions presented on this appeal are identical with those presented in the case of Richardson v. Banking Co. (just decided) 94 Fed. 442. On the facts as recited there is still less reason in claiming that under the contract between the parties the American National Bank purchased the items forwarded, and that the relation of debtor and creditor ensued as soon as the items were credited on

the books of the American National Bank. The correspondence between the parties was plainly and directly about collections only, and the course of business between the parties, so far as it was proved, prior to the failure of the bank, shows the full understanding of the parties that the business to be transacted was that of collection merely. All the items going to make up the sum of \$8,249.26 are fully proven to have been collected subsequently to the failure of the American National Bank, and there is no dispute that the respective amounts thereof came to the hands of the receiver, and were sufficiently identified to show on what claims and for whose account they were collected. The objections as to the allowance of interest and the form of the judgment are allowed, for the reasons given in *Richardson v. Banking Co.*, just decided. There has been much unnecessary trouble to the judges of this court, and probably to the judges in the circuit court, from the neglect of the parties to follow the usual rule in such cases, and have the accounting done contradictorily before a master.

The decree of the circuit court should be reversed, and the cause remanded, with instructions to enter a decree as follows: It is ordered, adjudged, and decreed that the complainant, the Continental National Bank of Memphis, do have and recover from the defendant, Frank L. Richardson, receiver of the American National Bank, the sum of \$8,249.26, which said receiver is ordered to pay, out of the funds which have come to his hands as receiver, within 30 days from the signing of this decree, and by priority over all unsecured creditors of the American National Bank, or that he do within said delay certify the same to the comptroller of the currency, with a copy of this decree; and it is further ordered and decreed that for the balance of complainant's claim, to wit, the sum of \$5,692.61, the said Continental National Bank of Memphis be, and is hereby, recognized as a general creditor, entitled to participate pro rata with the depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets; and it is ordered and decreed that the said defendant receiver pay to said Continental National Bank of Memphis, Tenn., such pro rata thereon as has been or may be paid to other unsecured creditors of said American National Bank, or do certify the same to the comptroller, to govern his action in the premises.

And it is so ordered.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al

(Circuit Court, E. D. Wisconsin, April 19, 1899.)

No. 489.

1. INTEREST—RATE ON BONDS AFTER MATURITY—EFFECT OF DECLARING DEBT DUE FOR DEFAULT IN PAYING INTEREST.

An election to declare railroad bonds due before they would otherwise mature, under a clause of the mortgage securing them, because of default in the payment of interest coupons, has no other effect than to render the principal presently collectible; and the provision of the bonds fixing the rate of interest thereon during the entire term for which they were to run continues in force until decree; but, as to interest coupons which have matured by their own terms, in the absence of any provision of the contract fixing the rate of interest after maturity, the legal rate will govern.

2. CONCLUSIVENESS OF DECREE—IMPEACHMENT IN SUPPLEMENTAL PROCEEDINGS.

A decree in a suit to foreclose a railroad mortgage, which at the instance of the trustee in the mortgage determines the amount due on the mortgage debt, including interest accrued on the bonds and the matured coupons, renders the amount of such interest res judicata as to all bondholders represented by the trustee, and all others who are or may thereafter become parties to the suit, and the correctness of the decree in that respect cannot be questioned in supplemental proceedings brought thereunder.

On Exceptions of Northern Pacific Railway Company to Report of the Master as to Interest on Bonds.

Sullivan & Cromwell, for exceptant.

JENKINS, Circuit Judge. The question to be determined arises upon exceptions to the report of the special master filed September 20, 1898. The Northern Pacific Railway Company, the purchaser of the Northern Pacific Railroad under the decree of foreclosure, filed its claim with the special master under the sequestration proceedings for payment of the amount due for principal and interest upon the consolidated bonds of the Northern Pacific Railroad Company owned by claimant. The amount of the principal of these bonds held by the claimant is \$44,923,000. The exceptions present the question of the rate of interest which should be allowed upon the principal of the bonds and upon the interest coupons after their respective dates of maturity. The special master cast the interest at the rate of 5 per cent. per annum; the claimant insists that it should be cast at the rate of 6 per cent. per annum; and this is the contention. The difference in the amount of interest, computed at the two rates mentioned, is \$1,664,382; so that the question, although one of no great difficulty, is of moment to the claimant.

The bonds in question bear date December 2, 1889, and are respectively payable on the 1st day of December, 1989, "and interest thereon in the meantime at the rate of five per cent. per annum, * * * semiannually, on the first day of June and on the first day of December in each year." Coupons were attached to each bond for the semiannual interest contracted to be paid for the entire period of 100 years. By article 16 of the trust deed securing these bonds it was provided that in case of default in the payment of any installment of interest, or of any coupon annexed to the bonds, such

default continuing for the period of one year, at the election of the trustee the principal of all the bonds secured by the instrument should become immediately due and payable. Default was made in the payment of the coupons maturing on the 1st day of June, 1893, and upon all succeeding maturing coupons. After December 1, 1895, the trustee duly elected that the entire principal sum of each and every of the consolidated mortgage bonds should forthwith become due and payable. The question is whether the contract rate of interest continued after default by the obligor and election by the trustee, or whether the legal rate of 6 per cent. should control.

I have found, and have been referred to, no case which directly rules the question involved, and must ascertain the principle which should govern from the rulings of the supreme court in cases more or less analogous. In *Brewster v. Wakefield*, 22 How. 118, it was ruled that a stipulated rate of interest greater than that allowed by statute, in the absence of stipulation for a rate of interest after maturity, would not be allowed after maturity, and that the legal rate should govern. In *Cromwell v. Sac Co.*, 96 U. S. 51, 60, it was held, under the statute of Iowa allowing the same rate of interest after maturity as that expressed in the contract to be paid until maturity, that the stipulated rate attended the contract until it should be merged in judgment. In *Holden v. Trust Co.*, 100 U. S. 72, it was ruled that, under the law prevailing in the District of Columbia, a note payable with 10 per cent. interest only drew that rate up to its maturity, and thereafter the legal rate of 6 per cent.; and the principle is there stated by Mr. Justice Swayne as follows:

"If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intentment cannot be inferred."

The case of *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, may also be referred to, but it does not alter the rule declared. So that the principle would seem to be established that the legal rate of interest is to be allowed as damages for the nonfulfillment of the contract, unless by the contract itself it is manifest that a different rate was intended to govern. Interest upon a matured debt is given by the law as damages for the improper detention of money. The rate specified by statute is allowed only in the absence of contract stipulation upon the subject, speaking to a period subsequent to its maturity. In the one case the obligation to pay interest after maturity arises from the assent of the parties; in the other, from a duty imposed by law.

Here the obligor by its bond agreed to pay a certain sum of money on December 1, 1889, a period of 100 years from the date of its obligation, and to pay interest upon its debt in the meantime,—that is, until December 1, 1889,—at the rate of 5 per cent. per annum. It attached to each obligation coupons representing the semiannual

interest at that rate and for that period of time. The stipulation of the trust deed which authorizes the trustee at its election to mature the principal upon default in the payment of interest does not purport to abrogate the rate of interest which the obligor agreed to pay during the stated period. The exercise of the election matured the principal, but left untouched the stipulation for interest. The rate was agreed upon by the parties to the contract, and was to continue during a stated period of time, and that rate should govern during that period of time, notwithstanding that by the election of the trustee the principal was matured at an earlier date than that specified in the contract. If the stipulated rate was greater than the legal rate, could the trustee, after election to mature the principal, be required to receive only the legal rate of interest? I think it logically follows, from the principle declared by the supreme court, that in such case the contract rate would govern, because the parties have agreed upon the rate for the period up to the time specified in the contract as the date of the maturity of the debt. And so, *e converso*, the trustee having exercised the election to mature the debt before the stipulated period of maturity, no one pursuing the debtor under such election can claim other benefit than to secure present payment of that which, without default of the debtor, could not be enforced until the period stipulated in the contract. If, after default and election to mature the debt, the creditor should receive his interest, or a court of equity should relieve from the default, the contract would remain intact in all its provisions. I am satisfied that the default by the debtor and the election by the trustee did not change the stipulation of the contract with respect to the rate of interest, and that the contract rate continued after the debt was matured by the election of this trustee.

The special master allowed interest upon the coupons at the like rate of 5 per cent. If that question was not embarrassed by considerations to which I shall presently advert, I am free to say that the creditor was entitled to interest at the rate of 6 per cent. upon the coupons. The law allows interest on a coupon for interest. It is a contract to pay a specified sum on a specified day. There is no provision in them, nor in the trust deed, with respect to the payment of interest upon the interest coupons. Consequently the legal rate of interest should prevail. But there is this difficulty in applying that principle to the present case: The trustee filed its bill to foreclose the trust deed. That cause was consolidated with the previous suit of Winston to subject the property of the debtor to the payment of its debts. In the consolidated cause the trustee demanded of the court that it ascertain the amount due upon the mortgage, and decree therefor, and for the sale of the mortgaged property pledged for the debt. A decree passed pursuant to the request of the trustee, in which the court determined the amount due on these bonds, the interest upon the coupons as well as upon the principal being therein computed at the rate of 5 per cent. per annum. This was the rate which the trustee asked the court to determine should govern, and it was so determined. The bondholders,

so far as they are represented by the trustee in that proceeding, are bound by that decree. If it be said that the effect of that decree was only to determine the amount which should be chargeable upon the mortgaged property, and that the assets now sought to be reached were not covered by the mortgage, it is a sufficient answer that the claimant here became a purchaser under that decree, and a party to that suit, and that the bill in sequestration filed by the trustee is not an original bill, but supplemental to the bill of foreclosure, and to the bill of Winston, and that the claimant here comes in under that bill seeking relief, and that all the determinations in these proceedings from the commencement of the litigation are *res judicata*; in other words, coming in under the decree, and asking for relief thereunder, the claimant accepts and adopts all that has been determined, and is not entitled to relief otherwise than in pursuance of the previous decrees. I therefore think the question of the proper rate of interest to allow upon the coupons is foreclosed by the decree of the court passed at the request of the representative of the bondholders, and that decree cannot now be impugned for error.

The exceptions are overruled, and the report of the master confirmed.

CITY OF LAMPASAS v. TALCOTT.

(Circuit Court of Appeals, Fifth Circuit. May 9, 1899.)

No. 757.

MUNICIPAL CORPORATIONS—DE FACTO OFFICERS—VALIDITY OF BONDS.

The city of Lampasas was incorporated April 18, 1873, under a special charter, authorizing its mayor and aldermen, among other things, to construct waterworks and issue bonds for public improvements. Its organization was perfected, and continued until 1876, when its officers resigned, and administration of its affairs was abandoned. In 1883 an effort was made to form a new municipality, including within its limits the territory of the original city and a large amount of contiguous territory. Officers were elected, and the new government was organized, and continued to perform the functions of a municipal corporation until 1890, when quo warranto proceedings were instituted, and the officers removed, on the ground that the special act of 1873 was still in force, and that the resignation of its officers and its failure to continue the administration of its affairs did not amount to a dissolution of the corporation. Thereafter an election was held under the charter of 1873, and its government reorganized, and nearly all of the additional territory attempted to be included in the new city was subsequently annexed. In 1885, while the illegal organization was in force, it issued bonds for the purpose of constructing waterworks. The waterworks were constructed and accepted by the city. Upon the dissolution of this organization, the waterworks, passed into the possession of one holding a claim for services as superintendent, and the city ceased to exercise control over the same, and paid to the person in possession monthly rates for the use of the water. *Held*, that the officers acting under the irregular organization were *de facto* officers of the city, and the bonds issued by them were valid.

In Error to the Circuit Court of the United States for the Western District of Texas.

This suit was brought to recover the sum of \$2,170, with interest, alleged to be due on 62 coupons attached to bonds issued by the city of Lampasas. A jury trial was waived by the parties, and at the request of counsel for both parties the court made a finding of the facts. The court held that the plaintiff was entitled to recover on the coupons, and rendered a judgment in his favor for \$2,479.86. The defendant, the city of Lampasas, sued out a writ of error. It is assigned as error that the court rendered a judgment against the city.

The following are the facts as found by the court:

(1) That the citizens of the city of Lampasas, in Lampasas county, Tex., were by special act of the legislature, approved April 18, 1873, granted a charter as a municipal corporation, under the name of the "Corporation of the City of Lampasas," with boundaries containing an area of 553 acres, covering the original town plat and a considerable area not laid out in regular blocks. In this special charter it was provided that the qualified voters should elect a mayor and board of aldermen, consisting of eight members, to hold office for the term of two years; and until their successors should be elected and qualified, and it was further provided that the mayor and five aldermen should constitute a quorum for the transaction of business. It was also provided that the first election should be held within 30 days, and one thereafter on the first Monday in January of each alternate year thereafter, by the mayor and three aldermen. The act made no provision for dissolving the corporation, and no period of time was fixed for the expiration of the charter.

(2) Under this special charter the said mayor and aldermen were granted power, by ordinance, among other things, to construct waterworks, open, grade, and keep in repair the streets, build bridges, and open sewers; to impose and collect taxes, not exceeding 1 per cent, per annum; and to issue bonds for public improvements. The mayor and aldermen were authorized to appoint a city marshal, who should also be ex officio assessor and collector of city taxes, and also to appoint a secretary and city attorney; but neither the office of treasurer nor any other officer than those named were provided for.

(3) That officers were elected, and the said municipal government was exercised by them, under the said special charter, from 1873 until 1876, when a mayor and board of aldermen were elected who favored abolishing the said municipal government, and they by formal resolution decided to resign, and did so, and abandoned their said offices, and thereafter no steps were taken, or action of any kind had, under this special charter, until March, 1890, after the decision of the supreme court of Texas in the case of *Largen v. State*, reported in 76 Tex. 323, 13 S. W. 161, hereinafter more fully referred to.

(4) That the said city of Lampasas was in 1873, and has since continued to be, the county seat of Lampasas county, and had a population in 1876 of about 800. That until the year 1882 the said town was without railroad facilities, when, upon advent of a railroad, it began to grow rapidly, and by April, 1883, had a population of about 4,500 people, with street railroad and other improvements. About 1884 the population began to decline, and continued to decline until about 1890.

(5) That at all times the business part of the town has been chiefly confined to the court-house square and streets leading out from it, and has been within the bounds of the said special charter; but during and since 1882 business houses were built near the railroad depot, outside of said bounds, and outside of the present limits, but inside of the boundaries of 1883, and business has been since transacted therein.

(6) That after the advent of the railroad numerous additions were laid out to the town, and residences built thereon by persons doing business in the town, and it continued to grow in population, until it reached about 5,000 in 1884 and 1885, when the decline in population began.

(7) That in February, 1883, a petition was presented to the county judge of said Lampasas county, by more than 50 qualified voters living in and around the limits of said town, asking that an election be ordered to determine wheth-

er the persons living within the limits in said petition set out should incorporate as a city of more than 1,000 inhabitants, under the provisions of the general laws of Texas, as contained in title 17 of the Revised Statutes. Upon this petition the said county judge made his order, and an election was held, resulting in a majority vote in favor of said corporation,—some of those voting living inside, and some outside, of the limits prescribed by said charter; and upon return thereof the said county judge, by proper order, declared the said city duly incorporated, with the limits in said petition set out, and which contained an area of 1,495 acres, embracing practically all of the lands included within the said special charter, and extending nearly one-half mile west, north, and east thereof, to include the railroad depot.

(8) That, in pursuance to this incorporation, a municipal government was organized, with all the officers prescribed in the general charter contained in said title 17 (some of the aldermen and other officers residing outside of the limits prescribed by said special act), and exercised all the powers and functions of a city of over 1,000 inhabitants, organized under the general laws of the state of Texas, levying and collecting taxes, and prescribing and enforcing police regulations, without any one contesting or disputing the validity of its lawful rights to act as such, until November 4, 1889, when, upon the relation of a citizen and taxpayer, the district attorney, himself also a resident taxpayer, filed an information in the nature of quo warranto against T. J. Largen, who was mayor, and all other persons assuming to act as city officers under this incorporation by vote of the people, alleging that the said incorporation by vote of the people in 1883 was invalid, because of the fact that the said special charter granted in 1873 had never been repealed, and that the action of the officers in resigning in 1876 was without effect, and praying that the said Largen and his associates be ousted from office, and the said incorporation of 1883 be declared invalid.

(9) That said suit was instituted by the said district attorney, without any direction by the attorney general or other executive officer of the state, and without making any of the creditors of said incorporation parties, and upon trial resulted in a judgment ousting the said Largen and associates from office, which judgment, on appeal, was affirmed by the supreme court of Texas on the 31st day of January, 1890, and its opinion may be found in 76 Tex. 323, 3 S. W. 161.

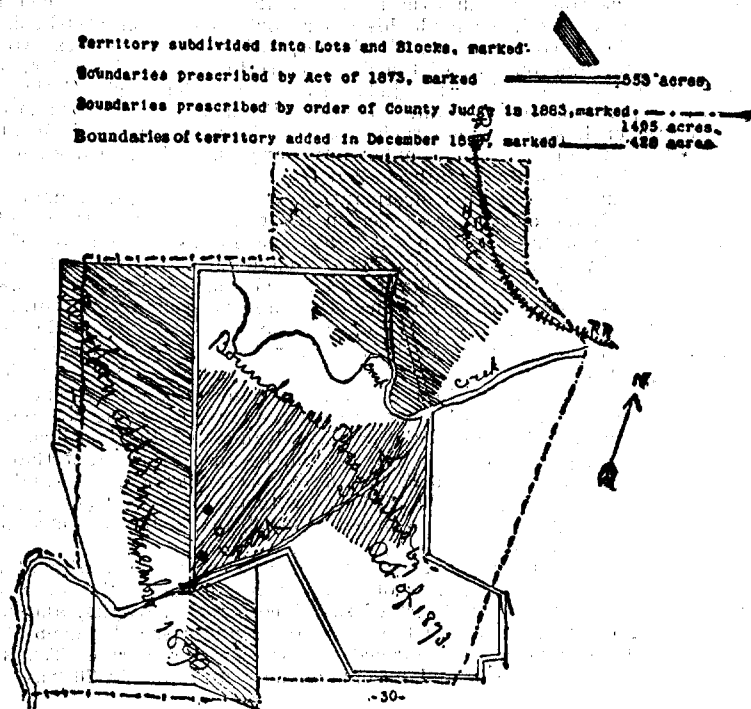
(10) That after the decision of the supreme court affirming said judgment of ouster, the said Largen and associates ceased to act, and upon an order for the election of mayor and aldermen under the special charter of 1873, made by the county judge of Lampasas county, an election was held by persons living within the limits of said charter on the 18th day of March, 1890, and the persons elected as mayor and aldermen met and organized March 19, 1890, and on March 22, 1890, by unanimous vote of the city council it was resolved to accept the provisions of "title 17 of the Revised Statutes of the state of Texas in lieu of the charter granted by the legislature," and a copy of this resolution was duly certified and recorded as required by law, and said city at once assumed to act under the general charter provided in said title 17, and is now acting thereunder.

(11) That on December 26, 1890, by vote of a majority of the resident citizens of the added territory hereinafter mentioned, there was added to the limits of the city, as set out in the special charter of 1873, all of the land west of the same which was included within the limits of 1883, and one tier of blocks additional, since which time the said city government has assumed jurisdiction over said added territory, but has not assumed any jurisdiction over that part lying north and east of said original limits, and which was included within the limits of 1883.

(12) The area of the territory added in December, 1890, was 428 acres, which embraced the greater part of the residence property of the city outside of its original charter limits of 1873.

(13) That the said territory lying north and east of said original limits, and which was within the limits of the charter of 1883, as adopted by the vote of the people, has situated thereon 77 residence houses, occupied by persons 90 per cent. of whom follow some kind of business within the town, as defined by charter limits of 1873. The following map, introduced in evidence, shows

the boundaries prescribed by the act of 1873, the boundaries defined in the order of the county judge in 1883, the boundaries of the territory added in December, 1890, the territory subdivided into lots, blocks, etc.:



(14) It was proven that all the books and papers of the city government of the city of Lampasas under the charter of 1873 and 1883 were lost, and could not be found, except the assessment rolls for the year 1889, from which it appears that the assessed value of all lands within the city limits of 1889 was \$661,429, and that the personal property was about \$400,000, and that the said assessment was divided as follows as to the lands, no division being shown as to personal property, viz.: Within old limits of 1873, \$452,444.00; within the part added in December, 1890, \$157,915; within the parts north and east, \$68,970.

(15) The witness who made the foregoing examination states that the said rolls show the names of 438 voters, divided as follows, viz.: Residing within old limits of 1873 were 175; residing on part added in December, 1890, 167; residing on parts north and east, 96.

(16) From the facts recited in the last two findings, the court finds that the city of Lampasas as now organized, and as it has existed since 1890, embraces about 90 per cent. in value of all real property situated within the city as organized under the charter adopted by vote of the people, and situated therein when the city government under Targen was dissolved, 66 per cent. being in original limits, 24 per cent. in territory added in 1890, and 10 per cent. in territory now excluded, and that of the number of resident voters therein at the time about 22 per cent. are shown to have resided outside the present limits, and of these 90 per cent. are shown to have followed some line of business in said original charter limits of 1873, which is shown to contain all the business part of the city except that near the depot; and from these facts the court finds that the present charter limits embrace substantially all of the persons and property embraced within the limits of the said city of Lampasas as it existed

under the charter adopted in 1883 by vote of the people, and recognized and acted upon by them as a valid city government from the time of its adoption until the quo warranto proceedings against Largen and associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the said limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices, without dispute by any person residing within the restricted limits of the charter of 1873, or by persons living outside of the same.

(17) The court further finds that in January, 1885, the city council of said city of Lampasas, elected under the provisions of the general charter contained in title 17 aforesaid, and assuming to act thereunder, and not under the provisions of the charter of 1873, in good faith, and in response to a general demand of the business men of the city for fire protection, and to furnish water to the city, then having a population of about 4,500, determined to build a system of waterworks for the city, and to pay for the same with the proceeds of sale of bonds of the city, and to this end, after full and open discussion, did pass ordinances to the following effect, viz.:

"Ordinance No. 59 [Printed on Back of Bond].

"An ordinance to be entitled 'An ordinance to provide for the issuance of waterworks bonds of the city of Lampasas and to provide for the payment of the interest and sinking fund of said bonds.'

"Section 1. Be it ordained by the city council of the city of Lampasas, that the mayor of said city be, and he is hereby, authorized and required to have engraved or printed coupon bonds of the city of Lampasas, with semi-annual interest coupons attached, falling due on the first days of January and July of each and every year from and after their date at the rate of 7 per cent. per annum interest; said bonds to be styled 'Lampasas City Waterworks Bonds.'

"Sec. 2. Said bonds shall be drawn to mature at fifty years from date of issuance, with the option reserved to the city council to redeem and retire ten thousand dollars of the principal of said bonds at the end of ten years from the date of the issuance of said bonds, and to redeem and retire five thousand dollars of the principal of said bonds at the end of each period of five years from and after said ten years from date of issuance.

"Sec. 3. Said bonds shall be issued to the amount of forty thousand dollars (\$40,000), or so much thereof as may be necessary, shall be dated at the time of issuance, and shall bear interest from said date of issuance.

"Sec. 4. Said bonds shall, at the time of their issuance, be dated and signed by the mayor, countersigned by the city secretary, and registered by the city treasurer.

"Sec. 5. The city secretary and city treasurer shall each keep a record of the number, date of issuance, and amount of said bonds, and the number, amount, and date of maturity of the coupons thereto attached, and shall indorse the countersigning and registration thereof on each of said bonds.

"Sec. 6. Said bonds shall be issued in sums of one thousand dollars each, payable to bearer, and the principal and interest thereon shall be payable at S. M. Swenson & Sons' Bank, New York City, or at the office of the city treasurer in Lampasas, the interest being payable semiannually on the coupons attached.

"Sec. 7. For the purpose of providing for the payment of the interest on said bonds, and to provide a sinking fund for the redemption of the same, a special ad valorem tax of twenty-five cents on every one hundred dollars' worth of property is hereby levied and ordered to be assessed and collected for the year 1885, and for each and every year thereafter until said bonds, principal and interest, are paid, on all property subject to taxation within the city of Lampasas, and rendered to and assessed by the city assessor and collector: provided, however, that the city council shall, from time to time, make a proportionate reduction in the amount or rate of the tax hereby levied whenever the whole amount of said tax shall not be necessary to meet the interest and sinking fund on the bonds of this issue then outstanding.

"Sec. 8. To provide funds for the payment of said interest and sinking fund, there is hereby appropriated out of the revenues of the city, arising from the

net earnings of the waterworks, a sufficient sum annually, beginning with the year 1885, to make up the deficiency (if any there be) of said interest and sinking fund after the collection of the special tax herein provided for, and the sums arising from the net earnings of the waterworks shall not be drawn upon or disbursed for any other purpose until said interest and sinking fund is fully provided for in each year, and the city treasurer shall keep a separate account of all moneys derived from said tax and net earnings of waterworks, to be known and designated on his books and reports as the 'Waterworks Fund.'

"Sec. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable, the city council may designate by an order entered of record on the minutes the numbers and amount of the principal (not exceeding \$10,000.00) and date of payment of such bonds of this issue as the city desires to redeem; said numbers being designated by lot or otherwise, as the council may then determine, provided the numbers designated are consecutive, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice, personally or otherwise, may be given to the holder of such designated bonds, their agents or representatives, as the council may determine at the time of such designation, and such designated bonds shall be paid upon presentation, and shall cease to bear interest from and after the date of payment fixed by said order; and at the end of each period of five years thereafter five thousand dollars (\$5,000.00) of the principal of said bonds may be redeemed in like manner.

"Sec. 10. The bonds herein provided for shall be sold at not less than par, and in such manner as is or may be hereafter provided by ordinance, resolution, or otherwise, and the proceeds of said bonds shall be devoted exclusively to the construction of a suitable system of waterworks for fire protection, family supply, and other public and private purposes, and for the purpose of such fire department supplies as may be deemed necessary by the council; said system of waterworks to be operated in such manner as may be hereafter provided by ordinance, resolution, or otherwise.

"Filed January 6th, 1885.

S. S. Potts, Secretary.

"Passed January 6th, 1885.

S. S. Potts, Secretary.

"I approve the above ordinance, January 6th, 1885.

"W. J. Standefer, Mayor of City of Lampasas.

"Attest: S. S. Potts, Secretary."

"Ordinance No. 60 [Printed on Back of Bond].

"An ordinance entitled 'An ordinance to provide for the collection of a special tax for the payment of interest and to provide a sinking fund for the redemption of waterworks bonds of the city of Lampasas.'

"Section 1. Be it ordained by the city council of the city of Lampasas, that the city assessor and collector be, and he is hereby, required to assess and collect a special tax of twenty-five cents on the one hundred dollars' worth of all property, subject to taxation within the city of Lampasas, rendered to and assessed by him for the year 1885, and for each and every year thereafter, for the payment of the semiannual interest, and to provide a sinking fund for the redemption of the waterworks bonds of the city of Lampasas, until said bonds, principal and interest, are paid: provided, however, that the city council shall from time to time make a proportionate reduction in the amount of the tax hereby levied whenever the whole amount of tax shall not be necessary to meet the interest and sinking fund on the bonds then outstanding.

"Filed January 6th, 1885.

S. S. Potts, Secretary.

"Passed January 6th, 1885.

S. S. Potts, Secretary.

"I approve the above ordinance, January 6th, 1885.

"W. J. Standefer, Mayor of City of Lampasas.

"Attest: S. S. Potts, Secretary."

"Ordinance No. 65 [Printed on Back of Bond].

"An ordinance to be entitled 'An ordinance to amend section 9 of Ordinance No. 59, passed and approved January 6th, 1885.'

"Section 1. Be it ordained by the city council of the city of Lampasas that section 9 of Ordinance No. 59, passed and approved January 6th, 1885, be so amended so as to read hereafter as follows:

"Sec. 9. At the end of ten years from the date of issuance of said bonds, or as soon thereafter as practicable, the city council may designate, by an order entered of record of the minutes, the numbers and amount of the principal, not exceeding \$10,000.00, and date of payment of such bonds of this issue as the city desires to redeem; said numbers so designated shall be consecutive, beginning at No. 1, and a copy of such order shall be published in some newspaper in the city of Lampasas, and such other notice, personally or otherwise, may be given to the holder of such designated bonds, their agents or representatives, as the council may determine at the time of such designation, and such designated bonds shall be paid upon presentation and shall cease to bear interest from and after date of payment fixed by said order; and at the end of each period of five years thereafter five thousand (\$5,000.00) of the principal of said bonds may be redeemed in like manner."

"Sec. 2. That this ordinance take effect and be in force from and after its passage."

"Passed March 21st, 1885. Approved March 21st, 1885."

"W. J. Standefer, Mayor."

"Attest: S. S. Potts, Secretary."

(18) As bearing on the question of the validity of said ordinances as the act of de facto officers under the charter of 1873, it is here stated that under said charter of 1873 it is provided:

"Sec. 12. All ordinances and resolutions enacted by said corporation shall be published by posting notice at three public places in the limits of the corporation or by publication for at least three successive weeks in a newspaper published within the limits of said city."

And it was further shown that the city council that passed said ordinances was composed of the mayor and five aldermen, all of whom were elected by general vote of the entire corporation within the limits of the charter under the incorporation of 1883, and that two of the said aldermen and the city secretary resided in the territory outside of the charter limits of 1873, and one of said two aldermen resided in territory northeast of said limits and outside of the present city limits.

(19) After the adoption of the ordinances aforesaid, the said city council advertised for bids for the construction of a system of waterworks, and personally inspected similar works in neighboring towns, and also tried to negotiate a sale of bonds for cash. Failing to effect a sale of the bonds by the time set for receiving the bids, the letting of the contract was postponed. At this time several bidders were ready to submit plans and bids, but, as all contemplated being paid in cash, no bids were made or received. It is shown that there were present at this time, prepared to submit a bid, a responsible party willing to build a system of waterworks for \$25,000 in cash; but it was not shown what kind of a system this party intended building, as to the size of mains, pumps, standpipe, or other details, to enable the court to draw any comparison as to whether this bidder proposed to build as good a system as was subsequently built, or not,—the fact being that this bidder demanded cash payment, and was unwilling to take bonds in payment.

(20) At a later date the said city council awarded the contract to a bidder who was willing to build a system according to his plans at the price of \$40,000, to be paid in bonds of the said city, and this contractor proceeded to build the said system, and the same was fully tested by the city council before acceptance, and upon such test and approval the said works were accepted and paid for by the delivery by the city council of the bonds as called for in the contract. The city officers paid for the waterworks in bonds, because they had been unable to sell the bonds for money. The bonds were not considered good for their face value. If they had been so considered, the waterworks could have been constructed for less.

(21) It was shown, over the objection of plaintiff as to the competency of the witnesses, by two persons who became familiar with the nature and extent of the said system as built, one about one year and the other about two years after it was constructed, that in their judgment the said system was worth, at cash values, based upon cost of construction, according to the estimate of one, the sum of \$25,000, and of the other \$26,279; neither witness al-

lowing anything by way of profits to the contractor. This was all the testimony on this point. Neither of these witnesses were shown to have been familiar with the price of material and labor in 1885, nor to have had any knowledge of building waterworks at that time; but one of them operated the works from 1885 to 1891, and the other had been engaged since 1887 in putting in waterworks under contract in various cities in Texas.

(22) The plaintiff introduced and read in evidence, for the purpose of identification, and to prove the ordinances indorsed thereon and hereinbefore set out, one of the bonds alleged to have been issued by defendant in payment for the said system of waterworks, which bond is in words and figures as follows:

"State of Texas.

"Lampasas City Waterworks Bond.

"The City of Lampasas

"Will pay one thousand dollars to bearer, fifty years after date hereof, with interest from date at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July, in each year, payable at the office of S. M. Swenson & Son in the city of New York, or at the treasurer's office in the city of Lampasas, on presentation of the proper coupon hereto attached. Issued under authority of an ordinance entitled 'An ordinance to provide for the issuance of waterworks bonds of the city of Lampasas, and to provide for the payment of the interest and sinking fund of said bonds,' passed January 6th, 1885, a copy of which ordinance is printed on the reverse side hereof, to which reference is made.

"Witness the hand of the mayor of the city of Lampasas, attested by the city secretary, with the corporate seal affixed, in the city of Lampasas, state of Texas, this twenty-seventh day of March, A. D. 1885.

"W. J. Standefer, Mayor.

"Attest: [Seal.] S. S. Potts, Secretary."

Attached to the said bond were coupons Nos. 24 to 100, inclusive. In the upper left-hand corner, in transverse form, and separated from the body of the bond by vignette line, was the following:

"_____, Comptroller State of Texas.

"S. S. Potts, Secretary City of Lampasas.

"W. S. Morris, Treasurer City of Lampasas."

On the back of said bond was the following indorsement: "Registered March 28, 1885. Wm. J. Swain, Comptroller." But no seal was affixed to such signature or indorsement. On the back of this bond was printed copies of the ordinances under which it was issued, as hereinbefore set out.

(23) The plaintiff introduced in evidence a certificate from the comptroller of public accounts of the state of Texas, made after the institution of this suit, certifying that the records of his office showed that on March 28, 1885, there were duly registered 40 bonds of the city of Lampasas, of the denomination of \$1,000 each, known as "Waterworks Bonds." And the plaintiff further introduced in evidence a certified copy of a statement submitted by W. J. Standefer, mayor, and S. S. Potts, secretary, of the city of Lampasas, to the comptroller, when said bonds were tendered for registration, certifying that the assessed value of all property situated within the limits of said city of Lampasas, as shown by the tax rolls for the year 1884, was \$1,447,200.

(24) The plaintiff read in evidence 62 coupons, described in his petition, each of the sum of \$35, and maturing at the different dates set out in his petition, which said coupons, except as to due date and number of bond, were of the following form:

"\$35.

The City of Lampasas

\$35.

"Will pay the bearer thirty-five dollars at the office of S. M. Swenson & Son in the city of New York, or at the treasurer's office in the city of Lampasas, on the 1st day of _____, 189-, being six months' interest on bond No. —.

"S. S. Potts, Secretary."

Upon which coupon the court finds that there is due the plaintiff on this day the sum of \$2,170 principal and \$309.86 interest.

(25) At the time of the affirmance of the judgment in *Largen v. State*, 76 Tex. 323, 13 S. W. 161, one H. E. Hedeman was in charge of the waterworks so acquired for said bonds, he having taken charge of said waterworks as superintendent before the dissolution of said organization of 1883. He held possession of said waterworks under a claim for \$150, back salary due him from the dissolved organization, and for some other moneys due him for a house placed on the waterworks grounds. Asserting such claim, he remained in charge of such waterworks for over one year from the dissolution of said corporation of 1883. He delivered possession of said waterworks to Coler & Bro., bankers and brokers of New York City, through their agent, W. L. Vining, for the reason that Coler & Bro. paid him the debt due him and for his interest in said house,—said Vining at the time exhibiting to him one of said bonds of said series, and stating that said Coler & Bro. owned it and all other bonds of said series; and said Coler & Bro. and their assigns have from that time controlled and claimed to own said waterworks, and still control and claim to own said system of waterworks. It was not shown that the bond exhibited to said Hedeman by Vining was one of the number from which any of the coupons in suit was taken, nor was any further proof made that Coler & Bro. owned any of said bonds, or represented any of the owners thereof. It was shown that the said Hedeman did not pretend to act for the city of Lampasas in making a settlement of said bond, and only assumed to act in the protection of his own individual claim.

(26) The court further finds that, since the reorganization of the city government in 1890, under the special charter of 1873 and the general charter adopted immediately thereafter, the city of Lampasas has exercised no control over said waterworks, but has paid, monthly, first to said Hedeman and then to Coler & Bro., for the use of water supplied by said waterworks system, and that since said reorganization in 1890 said city of Lampasas has not taken possession of any other property within its limits that was acquired or constructed between 1883 and 1890, except one bridge, built prior to 1890, which was not paid for, but which, on account of such nonpayment, was taken possession of by the builders, and sold by them to the county of Lampasas and the city as organized in 1890.

(27) It was shown that the pumping station of the waterworks as originally constructed was situated within the corporate limits as defined in the charter of 1883, but was removed by the city in 1887 to a point without the corporate limits of 1883, and has remained at said place ever since. It was further shown that the standpipe was located at a point near the west line of the charter limits of 1883, but within such limits, and that the distributing water mains leading from said standpipe were distributed through the part of the city west of the original charter limits of 1873, thence through the business part of the city within said original limits, and extending eastward and northward to the railroad depot, and that said standpipe and all of said distributing mains and fire hydrants are within the limits of the city as now existing (composed of the original charter limits and the territory added in 1890), except that for a distance of about 900 yards one of said mains extends northward to said depot, with one fire hydrant thereon.

(28) It was shown, and the court so finds, that there has at all times been a well-defined business center in the city of Lampasas, which is within the limits of the charter of 1873; and the court also finds that between 1883 and 1890 a number of business houses and residences were established in the neighborhood of the railroad depot, all of which were within the limits of the charter of 1883, but are not within the limits over which the present city government assumes jurisdiction. Within this territory it was shown that there are 77 inhabited dwellings and 2 vacant dwellings. It was shown that of the persons occupying these dwelling houses 90 per cent. did business within the present limits of the city.

Franz Fiset, C. H. Miller, and J. C. Matthews, for plaintiff in error.

T. B. Cochran and R. G. West, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The city of Lampasas was made a municipal corporation by special act of the legislature on April 18, 1873. Until 1876 the corporation remained organized under this special act. The city officers then resigned, and the administration of the town's affairs by officers was abandoned. In February, 1883, the population of the town having increased, an effort was made to form a new municipal corporation. The procedure was under statutes intended to apply to towns that had never been incorporated. The citizens of Lampasas were acting on the mistaken presumption that they had effectually abandoned and annulled the incorporation of the town under the special act. The town, as last organized, embraced substantially all of the territory covered by the special act, and also other lands so as to include a railroad depot. Each organization provided for the government of the town by a city council, and the usual officers were provided by each. The office of treasurer was not provided for by the special act. The last organization continued in practical force from February, 1883, to January 31, 1890, when the supreme court of Texas sustained quo warranto proceedings, and removed the city officers holding under an election had under the organization of 1883. The supreme court held that the effort to incorporate the town under the general laws was ineffectual, and that the mode adopted was only applicable to unincorporated towns. The effect of the court's opinion was to show that the special act of 1873 continued in force. *Largen v. State*, 76 Tex. 323, 13 S. W. 161. After the opinion of the supreme court was rendered, an election was held under the special charter of 1873, and soon thereafter the city regularly accepted the provisions of the general laws of the state relative to municipal corporations, as stated in the findings of the circuit court. By the charter of 1873 the mayor and aldermen were granted power to "construct waterworks" and to "issue bonds for public improvements." The bonds were issued, and used to secure the erection of the water works. The works are shown to be worth not less than from \$25,000 to \$26,000, without estimating profits made by the contractor. The bonds were used to pay for the waterworks. In the absence of proof to the contrary, they are presumed to have passed into the possession of the plaintiff before maturity, for a valuable consideration, and without notice of any objection to which they were liable. *City of San Antonio v. Mehaffy*, 96 U. S. 314. If it be true that the corporation had authority under any circumstances to issue the securities, the bona fide holder has a right to presume they were legally issued. *Id.*

The dominant question in this case is, had the corporation, at the date of these bonds, the right to issue them? In one aspect a municipal corporation is an agency of the state government to perform certain functions. It is brought into existence by the state, and can only be annulled by the creative power, or pursuant to laws regularly made. Its existence cannot be collaterally attacked. As a party to a contract, it must be looked on as an individual, or as a private corporation, for its contracts are equally

under the protection of law. The prohibition against their impairment is as effective as in the case of the contracts of individuals. It is protected, even against execution, in the ownership of property necessary to the exercise of its public functions. It holds for taxation the real estate within its limits and the personal property of its residents. These are its resources for discharging its debts. The people living in it are the units of which the corporation is composed. The people and the property are the whole debt-paying elements of a municipal corporation. The organization is the mere shell that holds it in shape. The kernel is composed of the people and the property. Looking practically at the substance, rather than at the form, the courts have uniformly held that no change of name or of organization will enable a municipal corporation to avoid the payment of its debts. Whatever the name may be, whatever the officers may be called, the new organization would be the successor of the old, would be composed of the same, or nearly the same, units, would embrace the same territory, holding the same, or nearly the same, subjects of taxation, and would in fact be the successor of the first organization. As the second government succeeds to the rights of the first, it is also subject to its liabilities. *Shapleigh v. City of San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957; *Laird v. City of De Soto*, 22 Fed. 422. In the case at bar the legal charter under the special act was laid aside. One illegal, but having all the appearances of legality, was formed. It named the necessary officers, elected them, and performed all the functions of a municipal corporation for a period of nearly seven years. The state, during this period, did not challenge its exercise of power. It issues \$40,000 of bonds, and obtains the benefit of their sale. Then, by judgment of the court, the officers are removed as officers of the new organization, and others elected under the first charter. Can it be held that the city, composed of the same people, including the same resources for revenue, is now absolved of all liability upon the bonds? Can a city, under an illegal and irregular change of limits, preserving the same name, obtain credit for public improvements, and, when the irregular charter is vacated, return to the use of the first, which has all along been in force, and then stand freed of the debt? The people and property now sought to be charged were all, or nearly all, included and represented in the irregular corporation which issued the bonds. They get the benefit of the bonds. The facts show that the city and citizens were acting in good faith. The bonds were issued with public approval, and without objection. The improvements were accepted, and it was intended that the bonds should be paid. If it had been otherwise, if the irregular organization had been assumed in order to obtain credit, and abandoned to avoid payment, could such a scheme receive judicial sanction? This would not be permitted. It would open wide an avenue for fraud and imposition. If it is plain that such a plan, no matter how ingeniously executed, would not be permitted to succeed, it must be equally clear that, when the citizens and acting officers of the irregular corporation acted in good faith, and believed their

action to be regular and valid, such irregularity will not be permitted to work injustice. The officers representing the city in the issuance of the bonds believed that they were clothed with authority by the procedure of 1883. In this they were mistaken. The charter of 1873 was still in existence. It authorized the election of officers of the city. These officers had been elected. Although they believed that they held office under the new organization, they were officers de facto of the city, actually filling places created by the special act of 1873. The special act of incorporation authorized the issuance of the bonds for public improvement. An ordinance was passed to issue them. The bonds, we hold, were not made invalid by reason of the illegal effort at incorporation made in 1883.

There are other defenses suggested in argument, but it would serve no useful purpose to extend this opinion. The whole of the findings of fact by the circuit court will appear in the statement of the case, and it is sufficient to say that we concur in the conclusion of the learned judge presiding in the circuit court that the plaintiff was entitled to judgment. The judgment of the circuit court is affirmed.

UNDERWOOD v. PATRICK.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1899.)

No. 1,146.

1. VENDOR AND PURCHASER — SALE OF LAND TO SYNDICATE — ACCEPTANCE OF NOTES OF ONE MEMBER FOR PURCHASE MONEY.

A vendor who sold land to a syndicate, conveying to one member and accepting his individual notes, secured by mortgage on the property for the unpaid purchase money, with knowledge that such arrangement was made for the express purpose of relieving another of the purchasers from personal liability for such unpaid purchase money, is estopped to claim such liability, and has no right of action against him on the notes, or otherwise, to recover a deficiency remaining due after foreclosure of the mortgage; nor was such right given by a declaration of trust executed by the grantee, declaring the interest of each member of the syndicate in the property and their several liabilities as between themselves.

2. LIMITATION OF ACTIONS—WHAT LAW GOVERNS.

A plea of the statute of limitations relates to the remedy, and is governed by the law of the forum.

3. SAME—ACCRUAL OF CAUSE OF ACTION.

Where a vendor sold land to a syndicate, taking notes of one member for deferred payments of purchase money, a right of action by the vendor against another member of the syndicate for the recovery of such purchase money, if any existed, accrued on the maturity of the notes.

4. SAME—EFFECT OF PAYMENTS.

As an action against another of the purchasers, who did not sign the notes, would not be based thereon, but on a collateral promise, a payment on the notes after their maturity by the maker or a subsequent grantee would not extend the time within which such action could be brought.

In Error to the Circuit Court of the United States for the District of Colorado.

Eliza W. Patrick, the defendant in error, brought this action against Frank L. Underwood, the plaintiff in error, to recover certain sums of money claimed to be due her on notes executed by one Nathan D. Allen. The substance of

the facts set out in the complaint are: That Mrs. Patrick was the owner of a tract of 615 acres of land adjoining the city of Omaha, Neb., which Underwood, Craig, and Allen wanted to purchase from her. That they represented to her that they wanted to form a syndicate consisting of themselves and other parties. That on the 12th of May, 1887, the sale was completed for the sum of \$510,000. That the deed for the property was executed and delivered by Mrs. Patrick to Allen, who paid her \$110,000 of the purchase money, and for the other \$400,000 executed to her his four notes for \$100,000 each, due, respectively, on the 1st days of January, 1888, 1889, 1890, and 1891. That, to secure their payment, Allen executed to her a mortgage on the real estate conveyed by her to him. That at the time the transaction took place she knew these parties (Underwood and Craig) were to be interested in the purchase of the property, but that the title should be taken in the name of Allen, the others to have an interest in proportion to the amounts to be paid by them respectively of the purchase money. That Underwood was the organizer and promoter of the syndicate, and the title of the property was taken in the name of Allen for the purpose of avoiding any personal liability on his part on the notes to be given on the deferred payments. That, after the conveyance had been made by her to Allen, he executed "for the benefit of the said persons composing said syndicate" a declaration of trust, of which the following is a copy:

"Know all men by these presents, that I, Nathan D. Allen, of Kansas City, of the state of Missouri, do make the following declaration of trust: That whereas, I have this day bought from Eliza W. Patrick, and she has conveyed to me by warranty deed, dated on the 12th day of May, and recorded in the records of Douglas county, Nebraska, certain lands in said county, in said deed more particularly described: Now, therefore, I do declare that the said land was bought by me for the following named persons: Frank L. Underwood, trustee; William B. Clark; William A. Clark, trustee; Theodocia I. Underwood; William H. Craig; and Nathan D. Allen,—and that the said F. L. Underwood, trustee, is entitled to two-elevenths ($\frac{2}{11}$) of the said property. That the said William B. Clark is entitled to one and one-half eleventh ($\frac{1\frac{1}{2}}{11}$) of the said property. That the said W. A. Clark, trustee, is entitled to one-eleventh ($\frac{1}{11}$). That the said Theodocia I. Underwood is entitled to four and one-quarter elevenths ($\frac{4\frac{1}{4}}{11}$) of the said property. That the said W. H. Craig is entitled to one-eleventh ($\frac{1}{11}$) of the said property. And that the said Nathan D. Allen is entitled to one and one-quarter elevenths ($\frac{1\frac{1}{4}}{11}$) of the said property, and that the same are liable in the same proportions upon the mortgage given to secure the deferred payments upon the said property. Dated this 12th day of May, 1887. Nathan D. Allen."

—That the plaintiff in error was the owner of two-elevenths of the property. That the object of the parties in purchasing this tract of land was to lay it off in lots and sites, and then dispose of it. That in pursuance of this agreement they did form a corporation under the laws of the state of Nebraska, named the Patrick Land Company, and the shares of stock in the corporation were issued and delivered to the parties in proportion to their respective interests in the property. That some of the property was sold and certain payments made to the plaintiff, but leaving the sum of \$285,277.31 due on the 11th of October, 1891. That foreclosure proceedings were instituted by her and the land sold, leaving a deficiency of \$101,278.76 still due her, for which deficiency a judgment was rendered against Allen but never collected, Allen being wholly insolvent. That the proportion of said deficiency for which defendant is liable by reason of his interest in the land amounts to \$32,225.06, together with interest from May 7, 1894, for which sum judgment was asked.

The suit was commenced more than six years after all of the purchase-money notes had become due. There was a demurrer to the complaint, assigning for grounds of demurrer that the complaint did not state facts sufficient to constitute a cause of action, and pleading the three and six years statute of limitations of Colorado. The demurrer was overruled, and the defendant filed an answer pleading the statute of limitations, and denying most of the material allegations in the complaint. The cause was tried before a jury, and the court directed a verdict for the plaintiff, and the cause has been removed to this court by writ of error.

Charles H. Toll and D. V. Buras, for plaintiff in error.
Robert W. Patrick, Charles J. Greene, and Ralph W. Breckenridge,
for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). From the view which we take of this case, it is unnecessary to consider more than two questions: (1) Do the facts show that Mrs. Patrick ever had a cause of action against the defendant? (2) If she ever had a cause of action, is it barred by the statute of limitations?

It is specifically alleged in the complaint that Mrs. Patrick, at the time the transaction took place, knew that Underwood had an interest in the purchase, "but, for the purpose of avoiding any immediate personal liability and obligation upon the notes to be given for the deferred payments, he, the said Frank L. Underwood, had the titles to said lands taken in the name of said Allen." The undisputed evidence shows the same facts, and also that, to relieve himself of any personal liability in case the venture proved unprofitable, Underwood refused to join in the execution of the notes given for the unpaid purchase money by Allen, and that these facts were known to the plaintiff. With knowledge of these facts, she executed the conveyance to Allen, and accepted his individual notes for the unpaid purchase money secured by mortgage on the lands conveyed, and afterwards, in pursuance of the understanding of which Mrs. Patrick had knowledge, and to which she consented, the lands were conveyed by Allen to the corporation created for that purpose, and she received from that corporation large sums of money realized by it from the sale of lots, which sums paid the interest on the notes, and reduced the principal from \$400,000 to \$285,277.31. These facts clearly estop her from setting up a claim of personal liability on the part of Underwood to her. Had Allen acted as agent for Underwood and this agency not been disclosed to Mrs. Patrick, or had he been a dormant partner, she might have had a good cause of action against him, although we do not so hold, as the question is not before us; but when she consented to accept Allen's notes, with full knowledge of all the facts, she, in effect, agreed that in the case of a deficiency she would not look to him for payment of any part of the deficiency. To hold otherwise would be to defeat the very object of Underwood which he had made known to Mrs. Patrick, and to which she must be held to have assented. There is no allegation in the complaint and no proof that there was any promise or contract by Underwood with her to pay any part of the notes, but, on the contrary, the transaction itself, as well as the allegation in the complaint, shows conclusively that she looked to Allen alone and the mortgage executed by him for the payment of the balance of the purchase money due her, and upon such a state of facts Underwood is clearly not liable to her on the notes, or otherwise. *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132; *Tuthill v. Wilson*, 90 N. Y. 423; *Stackpole v. Arnold*, 11 Mass. 27; *Williams v. Robbins*, 16 Gray, 77; *Williams v. Gillies*, 75 N. Y. 197.

Williams v. Gillies, *supra*, is a case on all fours with the case at bar. In that case the finding of facts was that the maker of the note executed it with the consent and knowledge of the defendants; that the defendants were really the partners of the maker of the note in the purchase for speculative purposes of the real estate for which it was given, but that the transaction was made in the name of Dobbs, to whom the land was conveyed, and whose notes secured by mortgage were executed for the deferred payments of the purchase money. It was claimed that this made the defendants liable as partners of Dobbs, but the court said:

"The substance of the transaction was that Dobbs was to take title and give his bond and mortgage in his own name and representing himself and no one else, and this is not inconsistent with the agreement that Raynor and Gillies [the defendants] were to have an interest in the speculation."

And the court held that they were not liable for the Dobbs debt, or any part thereof. But it is earnestly urged that when Underwood accepted Allen's declaration of trust which contained the provision, "and that the same [the persons interested with Allen in the purchase] are liable in the same proportions upon the mortgage given to secure the deferred payments upon said purchase," Underwood thereby became liable to Mrs. Patrick for the proportion of his interest under that declaration of trust executed by Allen. The plaintiff was not a cestui que trust, or beneficiary in this declaration of trust. Its purpose was to declare the rights, interests, and obligations of the purchasers of the land as between themselves. It is averred in the complaint that the declaration of trust was executed "for the benefit of the said persons composing said syndicate." Mrs. Patrick was content to take Allen's notes for the purchase money, secured by a mortgage on the land. She neither stipulated for nor desired other security. The claim now set up against Underwood is plainly an afterthought.

We proceed to the consideration of the defense of the statute of limitations. While the transaction took place in the state of Nebraska, yet, the suit having been instituted in the courts of Colorado, the statute of limitations of the latter state must control; for it is well settled that the laws of the forum govern the plea of the statute of limitations. *McCluny v. Silliman*, 3 Pet. 270; *Townsend v. Jemison*, 9 How. 407; *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. 260; *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176. In *McElmoyle v. Cohen*, 13 Pet. 312, the court said:

"Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy, and consequently that the *lex fori* must prevail. It would be strange if in the now well-understood rights of nations to organize their judicial tribunals according to their notions of policy it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts."

This case is cited and approved in the late case of *Campbell v. City of Haverhill*, 155 U. S. 610, 618, 15 Sup. Ct. 217. This doctrine is too well settled to require further discussion or citation of authorities. But, if in any jurisdiction the doctrine was doubtful, there is no room for contention in cases arising in the courts of

Colorado, because that state has made the rule statutory. Section 2915, Mills' Ann. St. Colo., reads as follows:

"Cause of action without the state—six years. It shall be lawful for any person against whom any action shall be commenced, in any court of this state, where the cause of action accrued without the state, upon a contract or agreement, express or implied, or upon any sealed instrument in writing, or judgment or decree of any court, more than six years before the commencement of the action, to plead the same and give the same in bar of the plaintiff's right of action."

Other provisions of the statute of limitations of Colorado applicable to the case read as follows:

"The following actions shall be commenced within six years, next after the cause of action shall accrue, and not afterwards: First. All actions of debt founded upon any contract or liability in action. * * * Fourth. All actions of assumpsit or on the case founded on any contract or liability, express or implied." Mills' Ann. St. Colo. § 2900.

"All personal actions, on any contract not limited by the foregoing sections, or by any other law, in this state, shall be brought within three years after the accruing of the cause of action, and not afterwards." *Id.* § 2905.

It is clear that, under the foregoing provisions of the Colorado statute of limitations, if Mrs. Patrick ever had any right of action against Underwood for an amount of the purchase money equivalent to his interest in the land, it is barred. Authorities are not wanting to support the contention that the action would be barred under the three-years statute of limitations. *Willard v. Wood*, 164 U. S. 502, 17 Sup. Ct. 176; *Dismukes v. Halpern*, 47 Ark. 317, 1 S. W. 554; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831. But, as the action is unquestionably barred under the six-years statute, we express no opinion as to the applicability of the three-years statute. If Underwood was liable for any portion of the purchase money, the cause of action against him therefor accrued when the purchase money was due, and, as more than six years elapsed after the last note matured before this suit was brought, the action is barred. It is conceded that Underwood, if liable at all, is not liable on Allen's note, but on a different contract, and the payment alleged in the bill as having been made on January 23, 1893, was a payment on Allen's note, and will not serve to prevent the running of the statute in favor of Underwood on the alleged collateral promise on which he is sued. Moreover, that payment is not alleged to have been made by Allen. On the contrary, it is quite clear from the language of the complaint that it was not made by him, but by the Patrick Land Company, to which Allen had conveyed the land, and certainly no payment made by that company could have the effect to suspend the running of the statute of limitations as to Underwood. *Wood, Lim. Act.* 226, 228. We do not wish to be understood as intimating that, if the payment had been made by Allen, it would have the effect to extend the running of the statute as to Underwood, even though Underwood had been a joint maker of the note with Allen. *Bergman v. Bly*, 27 U. S. App. 650, 13 C. C. A. 319, and 66 Fed. 40. That question is not in the case. But it is urged in argument that Mrs. Patrick had no cause of action whatever until after the foreclosure proceedings and the ascertainment of the deficiency, and

as that deficiency was not determined until May 7, 1894, the statute of limitations was not set in motion until that date. We are referred to the decision of the supreme court of Nebraska in *Meehan v. Bank (Neb.)* 62 N. W. 490, as determining that proposition. But examination of that case does not sustain the contention of learned counsel. All that is decided by that case is that in that state a creditor whose debt is secured by mortgage may either sue at law on his debt or proceed by foreclosure; but, having elected which means he will adopt, and commenced proceedings accordingly, he must exhaust the remedy so chosen before resorting to the other. But this Nebraska law can have no extraterritorial operation. It cannot suspend the running of the Colorado statute of limitations. Unquestionably Mrs. Patrick might have sued Underwood in Colorado, on the cause of action now declared on, at any time after the maturity of the notes. It is not believed that such suit would have precluded her from foreclosing the mortgage on the land in Nebraska at the same time; but, assuming that it would, she had her election to do the one thing or the other, but her election could in no manner operate to deprive Underwood of any right under the statute of Colorado. She could not exercise her election to his prejudice, further than to bring suit against him immediately upon the maturity of the notes, which she had an undoubted right to do, if he was liable, as claimed, for any part of the purchase money of the land. It results that the lower court erred in instructing the jury to find a verdict for the plaintiff, and refusing to direct a verdict for the defendant. The judgment of the circuit court is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion. So ordered.

JOHNSON v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court, N. D. Iowa, W. D. June 7, 1899.)

RAILROADS—RIGHT TO FORCE TRESPASSERS FROM TRAIN.

Where one attempting to beat his way persists in boarding a moving train, notwithstanding repeated warnings to desist, and he is finally forced to drop from the car by the brakeman, and receives injuries, the railroad company is not liable.

At close of plaintiff's testimony the question was presented whether there was sufficient evidence to go to the jury, upon which the court ruled as follows.

Hallam & Stevenson, for plaintiff.

Wright, Call & Hubbard, for defendant.

SHIRAS, District Judge. The question now presented to the court is whether, under the evidence adduced on behalf of the plaintiff, there is any ground upon which the plaintiff is entitled to go to the jury, or, to state the proposition in another form, whether the plaintiff's own testimony does not conclusively show that he is not entitled to a verdict against the defendant company, in which case it becomes the duty of the court to instruct the jury that the verdict

must be for the defendant. According to the plaintiff's testimony, the accident resulting in the personal injury of the plaintiff occurred in the following manner: The plaintiff, being in Sioux City, wished to go southward in search of work. With that end in view, he went to the yards of the defendant company, and crawled through the end door into a stock car, which formed part of a freight train that was about to leave the yards. After this train had proceeded some distance westwardly, a brakeman thereon found the plaintiff on the car, and, on being informed by plaintiff that he wished to go southwardly, he told plaintiff that the train did not go in that direction, and that he must leave the train when it reached the next station, which was Dakota City, distant some six miles or more from Sioux City. Upon reaching that station, the plaintiff left that train, and, finding that it would be some hours before a south-bound train would pass through Dakota City, he determined to return to Sioux City upon a freight train that shortly afterwards went eastward. This train did not stop at Dakota City, but it passed by the station at a slow rate of speed, and when it came along the plaintiff climbed on a ladder on the side of one of the freight cars, where he was discovered by a brakeman on the train, who told him he must get off the train at the next station, to wit, South Sioux City. When this station was reached, the plaintiff got off the ladder upon which he had been riding, and stood on the ground some little distance from the train, until it again started on its journey, when he again climbed upon the ladder, whence he was ordered off by the brakeman. The plaintiff dropped down upon the ground, and then ran back one or two car lengths, and again mounted a ladder on the side of a car, when the brakeman, who had passed back on top of the cars, again ordered him off, and enforced the order by climbing down on the ladder and tramping on plaintiff's fingers, and by kicking plaintiff on the back of the head. Being thus forced off the train, which, according to plaintiff's testimony, was moving rapidly, and possibly at a speed of from 15 to 20 miles an hour, the plaintiff fell upon the ground in such a position that his foot was crushed by the wheels of the train, necessitating an amputation of the leg between the knee and ankle joint. The plaintiff testified that he had not purchased a ticket, and his evidence clearly shows that he was engaged in beating his way along the defendant's railway, without any purpose of paying fare thereon. The relation, therefore, between the parties was not that of passenger and carrier. *Condran v. Railway Co.*, 14 C. C. A. 506, 67 Fed. 522. The evidence shows that the injury to the plaintiff was received by him when he was engaged in an unlawful trespass upon the property of the defendant company, and under circumstances which surely should preclude him from holding the company responsible for the consequences of his own unlawful conduct. I am well aware of the rule that a trespasser is not necessarily placed without the pale of the law, and that he may recover for injuries willfully or recklessly inflicted upon him. Thus it is well established that a railway company cannot be justified in evicting a person from one of its trains when the same is in such rapid motion as to necessarily cause risk to the life or limb of the person evicted, even though he is a trespasser upon the train. The high

regard which, in law, is placed upon the life and limb of a citizen, compels the company to exercise its right to evict a trespasser from its trains in such a manner as not to incur the charge of willful or reckless disregard of the safety of the person evicted; but this rule should not be so applied as to absolve a trespasser from the direct consequences of his own wrongful conduct. The plaintiff's testimony shows that when the employes of the defendant company discovered him on the train after he had wrongfully boarded it at Dakota City, they did not then evict him, but simply warned him that he must leave the train at the next station. When this station was reached, and the train halted thereat, the plaintiff got down from the ladder on which he was riding; but his subsequent conduct clearly shows that he had no intention to obey the proper request of the trainmen, but that it was his purpose to continue on the train in defiance of their instructions, and to circumvent, if possible, their efforts to keep him from again getting on the train, and thus committing a trespass on the property of the defendant company. The plaintiff himself testifies that when he got off the ladder at South Sioux City he remained in close proximity to the train until it again started on its way, when he again mounted the ladder from which he had been warned by the brakeman; and when the latter again ordered him off the train he dropped down uninjured upon the ground, and then ran back one or two car lengths, and again mounted a car ladder, from which the brakeman compelled him to drop by personal violence. The plaintiff's own testimony clearly shows that he voluntarily engaged in a running contest with the brakeman, in which the plaintiff was unlawfully endeavoring to force himself upon the defendant's train, and the brakeman was lawfully endeavoring to prevent the trespass; and to hold that under such circumstances the railway company was a wrongdoer, and for that reason must respond to the plaintiff for the personal injuries he thus brought upon himself, would be a travesty on all proper conceptions of the relative rights of the parties. No rule is better established than the one which holds that where a party, by his own want of proper care, causes or aids in causing an accident and resulting injury to himself, he cannot recover from the other party, although the negligence of the latter was also a proximate cause of the accident. There can be no question, under the facts of this case, that the plaintiff, by his own willful misconduct, aided in bringing about the accident which caused the injury to himself. Notwithstanding the repeated warnings he had received from the brakeman, he persisted in his efforts to get upon the train after it was in motion, and by his own unlawful conduct he brought on the contest with the brakeman, and he is not in any position to assert that he is free from responsibility in the premises. Under the peculiar circumstances of this case, I can see no just ground upon which a verdict against the company can be sustained, and the defendant is therefore entitled to an instruction to the jury to return a verdict in its favor.

In re BLUMBERG.

(District Court, E. D. Tennessee, S. D. 1899.)

1. BANKRUPTCY—DEBTS AFFECTED BY DISCHARGE—JUDGMENTS IN ACTIONS FOR FRAUDS.

Where, in an action for the price of goods sold, property in the possession of a third person was attached, on an allegation that it had been conveyed to him by the defendant in fraud of the latter's creditors, and such vendee, to obtain the release of the property attached, executed a replevin bond with sureties, and judgment was rendered against him, which the sureties were forced to pay, and he was then adjudged bankrupt, held, that the claim of such sureties against their principal, by subrogation to the rights of the original creditor, was not a "judgment in an action for fraud," within the meaning of Bankruptcy Act, § 17 (30 Stat. 550), providing that such judgments shall not be released by the bankrupt's discharge; the language of the statute referring only to judgments in actions where the fraud of the bankrupt is the ground of action and basis of the right of recovery.

2. SAME—EFFECT ON PRIOR ATTACHMENT.

While a discharge in bankruptcy releases the bankrupt from a provable debt which is not within the excepted classes, and takes away the creditor's right to proceed against him therefor in personam, it does not affect the lien of a valid attachment levied on the bankrupt's goods more than four months before the filing of the petition in bankruptcy.

In Bankruptcy.

Specifications in opposition to the bankrupt's application for discharge were filed, as follows:

"Shapira & Dryzer, of Knoxville, in the county of Knox and state of Tennessee, parties interested in the estate of H. Blumberg, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for grounds for such opposition do file the following specifications: The debt of Shapira & Dryzer against said bankrupt is one which arose from the following circumstances: Two suits were brought in the chancery court of Loudon county, Tenn., by Hamburger Bros. and Adams & Beyer, two creditors of one Paletz, alleging that certain goods belonging to said Paletz had been secreted and concealed by the said bankrupt, H. Blumberg, and others, with the intention to cheat, wrong, and defraud said creditors of said Paletz. Under said bill the goods in the possession of said Blumberg and others were attached, and at the solicitation of said H. Blumberg, the firm of Shapira & Dryzer, as sureties, signed a replevin bond for said goods; and afterwards, on a decree being rendered against said Blumberg and others, they signed the appeal bond as sureties. The court of chancery appeals and the supreme court of Tennessee, in said causes, decreed that said bankrupt, H. Blumberg, and others, had committed a fraud in concealing said goods, etc., and entered a decree against them; the final decree in the supreme court being November 11, 1897. On this decree execution issued, and, on default of payment by said Blumberg and others, principals, said Shapira & Dryzer, as sureties, were forced to pay said decree, and are subrogated to the right of said original complainants in said cause. These creditors, therefore, represent to the court that said decrees are judgments obtained in actions for fraud, and are, therefore, such debts as are excepted from the operation of the bankrupt act, and are debts from which said bankrupt cannot be discharged. These creditors further show to the court that about February, 1898, they filed an attachment suit at Jasper, Tenn., against said Blumberg and others, upon said indebtedness, and attached certain property alleged to belong to said Bankrupt, H. Blumberg; that said attachment suit is now pending in the chancery court at Jasper, Tenn. They show that a discharge of said H. Blumberg might indirectly operate to affect the right of these creditors in said suit, as it might be pleaded therein by said bankrupt. Certified copies of the decrees of the court of chancery appeals and of the supreme court, and all other pertinent records, will be filed on or before

the hearing upon this matter. These creditors ask that a time be set at which these matters may be heard, and that it be decreed by the court that said bankrupt be not discharged from the payment of said debt, and for general relief."

The referee in bankruptcy to whom the case was referred found and reported as follows:

"This cause is before me upon an order of reference from the honorable C. D. Clark, Judge, based upon an application for discharge filed by the petitioner, Blumberg, and upon objections thereto filed by Shapira & Dryzer, of Knoxville, Tenn., creditors of said petitioner, together with an agreed statement as to proof, which said application and specifications of objections were set for hearing this date; the said reference directing me to report the facts, and whether or not petitioner is entitled to his discharge as to the debt of said creditor. There are two grounds of objection raised by said creditor to the application for discharge. The facts upon which said objections are predicated are all matters of record in the suits referred to, and will be briefly noticed as to the first ground:

"On Oct. 19, 1894, Hamburger Bros., a mercantile firm of Cincinnati, Ohio, filed a bill in the chancery court of Loudon county, Tenn., against L. Paletz, I. Gary, and H. Blumberg, to collect an account of \$516.99, for a bill of goods sold L. Paletz, who, when the goods were sold him, was a merchant doing business in Dayton, Rhea county, Tenn., while I. Gary and H. Blumberg, the petitioner in the application for discharge, were at the same time conducting business in Loudon, Tenn., under the name of Blumberg Dry-Goods Company and I. Gary. It is alleged in the bill that Paletz had fraudulently disposed of his property to defraud and defeat his creditors; that he owned certain goods, wares, merchandise, then in the county of Loudon, and that defendants, I. Gary and Blumberg Dry-Goods Company, were fraudulently concealing and covering up this property of Paletz to keep it out of the reach of creditors; that said Blumberg Dry-Goods Company and Gary had in their possession a small stock of goods in Loudon county, the most, if not all, of which was the property of Paletz; and that said defendants and Paletz had colluded and conspired together to cheat and defraud complainants, and to fraudulently conceal some of the property of Paletz. An attachment was asked for, based upon these charges, which was issued and levied upon the goods then in possession of the Blumberg Dry-Goods Company and I. Gary, who subsequently replevined the goods, giving bond in double the amount of the debt sued for, conditioned to pay the debt, interest, and costs, if cast in this suit; said creditors, Shapira & Dryzer, becoming sureties thereon. Said Gary and H. Blumberg each filed separate answers to the bill, denying all material allegations. After proof taken, the cause was heard by the chancellor, November 16, 1896, and a decree rendered for complainants against defendants and said sureties on their replevin bond, to wit, Shapira & Dryzer, for the amount sued on and interest, amounting to \$580.50. From this decree I. Gary and H. Blumberg, composing the firm of Blumberg Dry-Goods Company, and I. Gary, individually, prayed an appeal to the supreme court of Tennessee; said creditors, Shapira & Dryzer, becoming also surety on their appeal bond. This cause, upon appeal, was heard by the court of chancery appeals May 29, 1897; the opinion of said court, fully setting out the above facts, being reported in 42 S. W. 807, from which it appears that the decree of the chancellor was sustained in all respects, and decree rendered against the appellants and said Shapira & Dryzer, sureties, on appeal, for the amount due complainants, with interest and costs. This decree was also appealed from, but affirmed by the supreme court of Tennessee, in an oral opinion rendered November 6, 1897, and said creditors, Shapira & Dryzer, as sureties aforesaid, paid the full amount thereof, as appears from reference to the certified copy of the execution issued thereon, filed with me upon the hearing of this application. By reference to the opinion of the court of chancery appeals, it appears that they were unable to resist the conclusion 'that Paletz, doing business at Dayton, something like a month before his failure, determined to put as many of his goods as possible beyond the reach of his creditors, and that these appellants (I. Gary and H. Blumberg) entered into his fraudulent scheme to assist him in carrying it out.' That this decree, as

contended for by Shapira & Dryzer, in the specifications above set out, constitutes a 'judgment in an action for fraud,' within the provisions of subsection 2, § 17, of the bankruptcy act, which excepts such judgments from the operation of a discharge in bankruptcy, I have no doubt, and so hold; and the language of the court of chancery appeals, above quoted, clearly implicates the petitioner, H. Blumberg, as particeps criminis to such fraud. I am, therefore, of opinion that this first ground of objection to the discharge prayed for is well taken, in so far as its operation upon the debt due said objecting creditors is concerned, and, being of this opinion, it becomes unnecessary to determine the second ground of objection raised by the specifications.

"Counsel for the petitioner, H. Blumberg, offered testimony allunde the record in the case heretofore referred to, for the purpose of showing (1) certain facts not disclosed in the record, but touching the same transaction; (2) to show that these objecting creditors, Shapira & Dryzer, had full knowledge, at the time of signing said replevin bond and appeal bond, of the facts upon which said decree was afterwards predicated; (3) that said replevined goods, after the execution of the replevin bond, were delivered to Shapira & Dryzer, and sold by them, and proceeds converted to their own use. I see no force in either of these contentions. I decline to consider any evidence of fraud outside the record in the case upon which the judgment for fraud is predicated, because, in my opinion, I am concluded thereby; said judgment being rendered by a court of competent jurisdiction, and all the parties being properly before it. Neither do I regard the evidence offered to show the knowledge of Shapira & Dryzer at the time of signing the bond as material, for several reasons: (1) Because they signed at the request of the petitioner; (2) because they were in no way implicated in the fraud in this record; (3) their right, as creditors, to resist the discharge, arose out of their subrogation to the right of complainants, Hamburger Bros., by virtue of having, as sureties, paid off and discharged the judgment rendered in favor of Hamburger Bros., and even if estopped for any reason, on their own account, they may, by well settled principles, assert a right by subrogation which they could not maintain directly. See *Motley v. Harris*, 1 Lea, 577, where it is held that, 'where a surety attacks a trust assignment of his principal for fraud, the benefits of which are accepted by the creditors, and the assignment is sustained, the surety is not estopped by such action from the right of subrogation to the creditor, whose claim has been satisfied, for so much thereof as he may have paid.' As to the last evidence offered to show conversion by Shapira & Dryzer of the goods retaken under the replevin writ, it is sufficient to state that Shapira & Dryzer held a demand on Blumberg Dry-Goods Company and I. Gary, at the time of this conversion, for about \$700, for goods sold them on their own account, which was independent of the demand growing out of their liability on this bond, and said conversion was prior to the adjudication of such liability. In addition to this, it does not appear that the value of the goods converted and sold exceeded the two debts aforesaid, nor was any objection raised by the petitioner, Blumberg, or his counsel, to the proof of claim filed by said creditor at the first creditors' meeting, in the presence of said Blumberg and said counsel, based upon this very demand. I therefore conclude that, under the facts properly presented, the petitioner, Blumberg, should not be discharged from the debt due said Shapira & Dryzer, but that the decree of discharge, when rendered, should contain a reservation to this effect.

"Counsel for Shapira & Dryzer have called my attention to the fact that they were also sureties upon the replevin and appeal bonds in the case of Adams & Beyer against Paletz and others, referred to in the specifications in opposition to discharge filed by them, and likewise paid the judgment rendered in that case, as appears from the certified copy of the execution before me. This Adams & Beyer case was brought against the same defendants, and involved precisely the same issues as the Hamburger Bros. litigation, and therefore, as to the amount paid by said Shapira & Dryzer in this case, to wit, \$——, said discharge of petitioner, Blumberg, should likewise be inoperative.

"D. L. Grayson, Referee."

A. W. Gaines, for objecting creditors.
Creed F. Bates, for bankrupt.

CLARK, District Judge. For the purpose of this case, the debt due to the creditors of Paletz may be identified as the "original debt," and his creditors as the "original creditors," and the judgment on the replevin bond executed in the attachment suits in order to release the property may be called the "replevin bond judgment" or "replevin bond debt." In regard to the effect of a discharge in bankruptcy, the language of the bankruptcy act, so far as it affects the matter now under consideration, is:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."

It is not to be doubted that the purpose of this statute is the same as a similar provision found in the former bankruptcy law, and that the word "fraud" means moral turpitude or intentional wrong, and that a part of the purpose of the statute was to discourage and punish such moral turpitude or intentional wrong. There is, of course, a difference in the phraseology between the former and the present statute; the former law designating the debt as one created by fraud or embezzlement, etc., while, as will be observed, the language of the present act is "judgments in actions for frauds," etc. Under the former bankruptcy law it was not, and could not be, doubted that the debt which could not be discharged was one based upon the fraud and the injury resulting from such fraud; the fraud itself being the foundation of the right and of the recovery, if a recovery was had. In my opinion, there is nothing in the present statute to warrant the conclusion that any different meaning is to be attached to the language used. The statute, besides specifying judgments in actions for frauds, also enumerates, in the disjunctive, judgments for willful and malicious injuries to the person or property of another, or for obtaining property by false pretenses or by false representations. The meaning in each one of the cases thus enumerated, and following each other, is exactly the same, and means a judgment based on a right or injury growing out of the fraud, false pretenses, false representations, or willful and malicious injuries to the person or property of another. It could not possibly, I think, have any application to a case where the judgment is not based upon the fraud as a ground of recovery, or a willful or malicious injury as a ground for recovery.

Take the case I am now dealing with: The judgment is not one in an action for fraud, and the recovery, in the original attachment suits, was based upon a bona fide account and an unquestioned debt, having no connection with any fraud, even suggested, in its original creation. The action was one to collect a bona fide debt, and, as an obstruction in the way of collecting such debt, the suit sought to set aside the conveyance or concealment of property. There was not, in these suits, any judgment rendered against any one which represented an injury done by any fraud. The judgment was for a perfectly just debt, and nothing more,

and incidentally, in the way of collecting that judgment, a sale of the property was set aside as fraudulent; but the judgment was in no wise based upon that fraud, but, as stated, was for, and represented exactly, the original account made with the creditors of Paletz; nor was there, nor could there be, anything connected with the replevin bond judgment which could be called a fraud. That was a statutory obligation, provided for in an attachment proceeding, by which a money obligation is substituted for property, in specie, in order to release the property to the claimant; and the judgment rendered on that bond was not on account of the fraudulent conveyance, but because the obligors on that bond had distinctly agreed that if the fraudulent sale should be set aside, and the property demanded for the purpose of satisfying the original debt, they would either return the property, pay its value, or pay the original debt. It was not open to the original creditors of Paletz, at any time, to assert that their debt was one in an action for fraud, in which the recovery would represent the injury done by a fraud. Their suit was one based upon a just debt, having its origin back of any suggestion of fraud, in which there was sought the incidental relief of setting aside a fraudulent conveyance. Such a fraudulent conveyance itself, under the law of the state, gave nobody a right to a money judgment in the first instance. It simply rendered the sale void, and enabled any creditor against whom it was declared void to have it set aside, just as if it never had been made, and to reach the property and subject it to a debt not created at all by the fraudulent conveyance, but created prior thereto, and to obstruct collection of which the fraudulent conveyance was made. If the fraudulent vendee had disposed of the property, so that a judgment might be rendered against him for the value of the property, such a judgment would be for the property, on the ground that, the fraudulent sale being void, it belonged to his fraudulent vendor, and that his disposition of it was a conversion.

I do not think that I need to elaborate further to make plain my view that, conceding that the creditors now objecting are substituted to the original debt due the creditors of Paletz, with all the rights, including the right to make any objection which the original creditors might have made, it seems to me quite clear that the objection to the discharge of the petitioner in this case is not well founded. The creditors of Paletz could not come, if their judgments had not been satisfied, and say that they had a judgment in an action for fraud. It would obviously be a complete answer to this to say that their judgment was based upon an account for goods sold and delivered, and that the judgment was based upon this right, and not upon any injury done to them by a fraud, or (if their case had been different) for obtaining any money by false pretense, or for willful or malicious injury to their person or property. The objection to the petitioner's discharge is not, in my opinion, well taken; and to so hold would be an entire misapplication of the purpose, as well as the very language, of the statute, upon any fair construction which must be given to

it. Willing as the court is at all times to punish persons for a contemptible fraud, this must only be done when it is reasonably clear that it is authorized by law.

In regard to the other ground of objection to this discharge, such an objection goes to the effect of the discharge, rather than to the right to such a discharge. It is doubtful, therefore, if I have the right, even by consent, to adjudge this question. It appears that the attachment suit pending at Jasper, Tenn., was brought during February, 1898, while the petition for discharge in this case was filed the 16th day of December, 1898. The statute, by clear language, does not affect any right acquired by a proceeding in rem, or partly in rem, at an earlier date than within four months next before filing the petition. So far as creditors of Blumberg may have acquired a lien upon property by attachment levied more than four months before the petition was filed, it is not affected by the discharge, and the right to proceed to subject any property validly attached by levy cannot be questioned; and, if the creditors can satisfy their debt in that method, their right to do so is clear, and is not in the least affected by this proceeding. It is only the debt, with the right to proceed against Blumberg in personam, that is discharged. Ordered accordingly.

Since writing the above I find U. S. v. Rob Roy, 1 Wood, 42, 27 Fed. Cas. 873 (No. 16,179), and Brown v. Broach, 52 Miss. 536, which seem to settle the question.

UNITED STATES v. DODGE & OLCOTT.

(Circuit Court, S. D. New York. May 18, 1899.)

No. 2,526.

CUSTOMS DUTIES—ENFLEURAGE GREASE—ESSENTIAL OIL.

A concentrated essence produced by the enfleurage process, in which a variety of petroleum was used as the original solvent, is free of duty as "enfleurage grease," within the tariff act of 1894, par. 568, and not dutiable, under paragraph 60, as "essential oil."

Appeal by the United States from a decision of the board of general appraisers, which reversed the action of the collector of customs in assessing duty upon the merchandise in question.

J. T. Van Rensselaer, Asst. U. S. Atty.

Albert Comstock, for importers.

TOWNSEND, District Judge. The merchandise in question was assessed for duty at 25 per cent. ad valorem, under paragraph 60 of the tariff act of 1894, as "essential oil," and was claimed by the importers in their protest to be free of duty, under paragraph 568 of said act, as "enfleurage grease." The object of the enfleurage process is to carry the odor of flowers from the place where they grow to the place where the perfume is made. Among the various enfleurage processes is one whereby the flowers are either brought in contact with, or in close proximity to, some fatty or greasy matter,

such as animal fats, vegetable oils, and certain preparations of petroleum, including vaseline. The fatty substance absorbs the odor from the flowers, and the absorbent or solvent may or may not be then removed by heat, leaving the body of perfume. This product is not then a completed product, in the sense that it is ready to be used by the ordinary consumer, but, when subjected by the perfumer to the influence of alcohol, the alcohol leeches out the perfume. The article in question is a highly concentrated essence or extract, produced by the enfleurage process, in which some variety of petroleum was used as the original solvent. After being subjected to heat, a mere undefined vestige of the petroleum remains, and the resultant product is described as the wax of the flower or a concentrated essence.

The counsel for the United States contends that it is not enfleurage grease. In support of his contention he shows that the term "grease" in the dictionaries ordinarily means the fat of land animals, and that there is a well-known substance commercially called "pomade,"—not to be confounded with the substance popularly known as "pomade,"—which consists of grease or fat impregnated with the odor of flowers, and which is enfleurage grease; while he contends that this concentrated concrete essence contains the essential oil of the perfume of the flower, and is therefore either an essential oil, as classified by the collector, or a manufactured article advanced to the condition of a concrete essence, and advertised and sold under that name in trade circulars. This contention is not successfully supported by the evidence. It appears from the various dictionary, encyclopedia, and dispensatory definitions that the term "grease" may include "oily or unctuous matters of any kind." But irrespective of these definitions, inasmuch as the witnesses for the government admit that vaseline is one of the solvents used in producing the pomade, which is admittedly an enfleurage grease, and that vegetable oils are used in making enfleurage grease, and inasmuch as the article in question is a grease in its physical character in the same sense as vaseline, and, furthermore, inasmuch as the preponderance of expert testimony is to the effect that this article is enfleurage grease, I think the decision of the board of appraisers should be affirmed. If the forcible argument of counsel for the United States that the article is not a grease were assumed to be correct in the sense that grease implies an animal origin or nature, then in view of the oily or greasy character of the article, and the fact that it contains the essential oil of the perfume from the flowers, some of the merchandise might perhaps be included under the head of the various oils mentioned in said paragraph 568 of the free list, such as oil of jasmine, etc., and therefore free as oils, if not free as enfleurage grease; or in view of the uncontradicted testimony of one of the importers that there is only a vestige of the petroleum remaining therein, and that the substance really consists of nothing but perfume and the wax of the flower, it might be free as "vegetable wax," under paragraph 668 of said act. The decision of the board of general appraisers is affirmed.

UNITED STATES v. FRASSE et al.

(Circuit Court, S. D. New York. May 15, 1890.)

No. 2,198.

CUSTOMS DUTIES—CLASSIFICATION—STEEL DRILL RODS.

Polished steel rods made by Stubbs, in England, commonly and commercially known as "drill rods," or "Stubbs steel," which are in fact used for making drill rods, being the standard for making the best drills, are dutiable under paragraph 124 of the tariff act of 1894, as drill rods, and not under paragraph 122, covering steel in all forms and shapes not specially provided for.

Appeal by the United States from a decision of the board of general appraisers which reversed the classification of the collector of customs of the importations in question.

J. T. Van Rensselaer, Asst. U. S. Atty.
Stephen G. Clarke, for the importers.

TOWNSEND, District Judge. The merchandise in question comprises certain fine steel rods or bars, highly polished, of the class known as "Stubbs steel," one-half and three-sixteenths of an inch in diameter, and about 36 inches long. They were returned as steel drill rods, valued above 4 cents a pound, and duty was assessed thereon, in accordance with the provisions of paragraph 124 of the act of 1894, at 40 per cent. ad valorem, as "drill rods." The importers protested, claiming that they were dutiable under the provisions of paragraph 122 of said act, for "steel in all forms and shapes, not specially provided for in this act, valued above sixteen cents per pound," etc. The board of appraisers found that they were neither wire nor strip steel, but that they were bright steel rods. The counsel for the United States contends that they are drill rods in fact, and, if material to this question, that they are drill rods of wire, under the subheading of "wire" in said paragraph 124.

These rods were manufactured by Peter Stubbs, of England, from special tool steel. The analyses show that the steel contains a very small quantity, comparatively, of phosphorus; that it was made in a crucible, out of the best iron, into ingots; was then heated and hot rolled to about the size of the finished rods; that these rods were then passed through the rolls cold, then annealed soft, then drawn cold through dies to the exact gauge, then unrolled, straightened, and polished and cut into lengths, and when so made, by reason of the low percentage of phosphorus, were eminently suitable for drill rods. There is further much evidence to show that this Stubbs steel was the standard for the best drill rods, and it is in fact used to make drill rods. It is proven that these rods are commonly or commercially known as "drill rods," although known by other names, such as "Stubbs steel" and "steel rods." It is further proven by uncontradicted testimony that rods of this character, and of the length and diameter shown by these exhibits, were included in the wire class by commercial designation in this country; and it is shown by the testimony of expert witnesses that they come within the definition

of wire, in that they are composed of metal drawn cold through a die, with an even diameter, and a smooth, bright surface. It is established by uncontradicted testimony that these articles have gone through the processes which are essential in the making of wire, and which are essential to fit them for the making of drills, and that they have been cut into appropriate lengths; and it is abundantly established by the evidence of manufacturers, as well as dealers, that they are commercially included within the class of wires or wire, and are commonly known as "drill rods." Inasmuch as they are also steel rods for making drills, and therefore drill rods in fact, the decision of the board of general appraisers is reversed.

HEMPSTEAD et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 17, 1899.)

No. 2,583.

CUSTOMS DUTIES—REVIEW OF ASSESSMENT—SUFFICIENCY OF PROTEST.

A protest against the assessment of duty on an importation of glass under paragraph 95 of the tariff act of 1894, with 10 per cent. added, under paragraph 97, on account of the glass being beveled,—the ground of objection stated being that the glass, which was described in the protest as cylinder and crown glass, was only dutiable under paragraph 92,—is insufficient to raise the question, on review, whether the additional duty under paragraph 97 was correctly imposed, conceding the importation to have been dutiable under paragraph 95, on the claim that it should have been classified thereunder as "looking-glass plates."

Appeal by the importers from a decision of the board of general appraisers which sustained the classification of the collector of customs of the importations in question.

Henry W. Rudd (Howard T. Walden, of counsel), for appellants.
J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge. The merchandise in question chiefly consists of cast polished plate glass, silvered, known as "French looking-glass plates, beveled," and was assessed for duty under the appropriate provisions of paragraph 95 of the tariff act of 1894, and an additional duty of 10 per cent., under paragraph 97 of said act, as beveled. The importers protested against said assessment of duty as follows:

"Protest is hereby made against your decision assessing duty at 10%, and specific rate, on cylinder and crown glass, polished or beveled, covered by entries below named. The ground of objection, under the tariff act passed by the 53d congress on or about August 13, 1894, and known as 'H. R. 4864,' is that said merchandise is not dutiable at 10%, under paragraph 97, in addition to the specific rates provided for under said paragraph 92, and is dutiable thereunder only at the appropriate rate according to size.

"O. G. Hempstead & Co."

The petition for review, however, is not based on the protest under paragraph 92, but on the claim that the merchandise should only have been assessed under paragraph 95 of said act, as "looking-glass plates." In other words, it is now claimed that the pro-

test was not in fact on the ground that the merchandise was cylinder and crown glass, polished, or was otherwise included under the provisions of paragraph 92, nor on the ground that cast polished plate glass, silvered, as described in the invoices referred to in the protest, was not dutiable under paragraph 97, but on the ground that the merchandise was looking-glass plates, under paragraph 95, and was therefore not "cast polished plate glass, silvered and beveled," under paragraph 97. It appears that there is a class of German looking-glass plates, made of cylinder and crown glass, and commercially known as "looking-glass plates," some of which were included in this importation. It is not clear that the original protest was not on the ground that as these glasses were cylinder and crown glass, commercially known as "looking-glass plates," they were included under paragraph 92, and were therefore not properly classified for duty under paragraph 97, which contains no provision for looking-glass plates. The protest under paragraph 92 was therefore insufficient to inform the collector of the protestants' position as to commercial designation under paragraph 95; and I therefore think the protest is insufficient, as found by the board of general appraisers. In one of the protests, paragraph 92 is not referred to, but the claim is made that the articles are dutiable only at the appropriate rate according to size. Inasmuch, however, as the goods are described as cylinder and crown glass, beveled and polished, I think this protest was not sufficiently definite, within the rule. This decision is not upon the ground that the protest would necessarily have been insufficient as to the 10 per cent. additional duty under paragraph 97 alone, but because the assertion that the glass was cylinder and crown glass, under paragraph 92, and therefore not dutiable under paragraph 97, raised an entirely different question as to such glass commercially known as "German looking-glass plates," under paragraph 92, from the question as to "cast polished plate glass or looking-glass plates," under paragraph 95.

Counsel for the importers has requested the court to find whether the merchandise would have been included under paragraph 97, provided the protest had been sufficient. But it does not seem advisable to pass on this point, because a part of the invoices consisted of German looking-glass plates, and the rest of cast polished plate glass, silvered; and, while the determination of this further question might have been different in the two cases, the counsel for the importers has in open court abandoned the contention as to the German looking-glass plates. The decision of the board of general appraisers is affirmed.

UNITED STATES v. HUILSMAN.

(District Court, E. D. Missouri, E. D. May 8, 1899.)

OFFENSES AGAINST POSTAL LAWS—OPENING OF LETTER—WHAT CONSTITUTES DELIVERY.

After a letter has been delivered by the postal authorities to the person in whose care it is addressed, it is no longer in the custody of the United States, nor subject to its jurisdiction; and, the opening and destruction of such letter, or the abstraction of its contents, after it has been so delivered, though readdressed to be forwarded, but before it has been again deposited in the mail, is not an offense, under Rev. St. § 3892.

This was an indictment under section 3892, Rev. St. U. S. Plea, not guilty.

A jury having been impaneled and sworn, counsel for defendant stated that they would agree with the United States attorney that the facts in the case were as follows: A letter directed to Miss H., "care Superintendent City Hospital, St. Louis, Mo.," was in due course of mail received by the superintendent, at his office in the City Hospital. This superintendent was authorized to receive the mail of patients for ultimate delivery to them. Miss H. had been discharged from the hospital when the letter reached there, and had left her new address with the superintendent. The latter erased the address from the envelope, wrote on it the new address of Miss H., and delivered the letter, so readdressed, to the defendant, who was a messenger boy in the hospital service, with directions to him to put it in the street letter box. Defendant took the letter, opened it, took out some money and stamps which were in it, and destroyed the letter and envelope; of course, not depositing either in the letter box.

Counsel for defendant, on this state of facts, agreed to by the district attorney, submitted that there was no offense cognizable under United States law or under the constitution; citing U. S. v. Safford, 66 Fed. 942, and U. S. v. Lee, 90 Fed. 256, and cases therein referred to.

The United States attorney read opinion from the assistant attorney general for the post-office department, relying mainly on case of U. S. v. Hall, 98 U. S. 343, in support of the indictment and the prosecution.

E. A. Rozier, U. S. Atty.

Geo. D. Reynolds and Jos. P. Vastine, for defendant.

ADAMS, District Judge (orally). This is not a new question with me. I had occasion lately, while holding court in the Western district, to examine the law very carefully. I then held that section 3892, Rev. St., did not, when properly construed, contemplate such a case as this, and, if it did, it was doubtful if the power of congress, under the constitution, would permit such legislation. Congress has full power, under the constitution, to regulate the carrying of the mail, and to protect all mail matter as long as it is in the custody of the postal authorities. When the postal authorities have fully discharged their duties, by delivery of the letter to the person to whom or in whose care it was addressed, they have fully discharged their functions, and in my opinion have gone as far as congress has authorized them to go. Whatever offense the defendant has committed, if any, in this case, is one which may be cognizable under state law, but is not under the United States law. The jury will return a verdict of "Not guilty." That being done, the defendant will be discharged.

Verdict accordingly. Defendant discharged.

In re ANDERSON et al

(Circuit Court, W. D. North Carolina. May 20, 1899.)

1. FEDERAL COURTS—HABEAS CORPUS — PERSONS IN CUSTODY OF STATE AUTHORITIES.

It is a general rule that a person held in custody by the authorities of a state, charged with an offense, will not be discharged on a writ of habeas corpus by a federal court before his trial, but will be left to submit his defense to the state courts, and, if denied any rights under the federal constitution or laws, to pursue his remedy by direct proceedings in error to the supreme court of the United States; and it is only in exceptional cases that a federal court will exercise its discretionary power to interfere in the first instance.¹

2. SAME.

Where, however, the act for which a person is held in custody by state authorities is one which was done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, as where it was done as an officer of the United States in the execution of a process of a federal court of competent jurisdiction, and the officer acted within his jurisdiction and the scope of his process, he is entitled to federal protection, and will be discharged on a writ of habeas corpus.

3. UNITED STATES MARSHALS—EXECUTING PROCESS OUTSIDE OF DISTRICT.

Rev. St. § 788, providing that marshals and their deputies shall have in each state the same powers in executing the laws of the United States as sheriffs and their deputies may have by law in executing the laws thereof, refers only to the district in which the marshal is appointed, and gives him no authority to act as an officer outside of such district.

4. SAME.

A marshal who attempts to execute a process outside of his own district and in another state, although it is one relating to real estate, and the court in his district has assumed to exercise jurisdiction to determine rights therein, and in going upon the land he follows the command of his writ, acts as a trespasser, and the writ affords him no protection.

5. FEDERAL COURTS—HABEAS CORPUS—ARREST OF UNITED STATES MARSHAL BY AUTHORITIES OF ANOTHER STATE.

Petitioners for a writ of habeas corpus in a federal court, a deputy United States marshal of the Eastern district of Tennessee and his assistants, were arrested by the authorities of North Carolina, charged with the commission of an assault and other trespasses in that state. On the hearing it was shown that the acts charged against petitioners were committed while executing a writ of possession awarded by the United States circuit court in the Northern division of the Eastern district of Tennessee upon a decree entered in that court; that petitioners arrested the defendant found in possession of the land, and held him in custody for two days, while they removed his effects to a distance from the land, and dismantled his house; also, that the land was situated in the state of North Carolina. There was also evidence tending to show other acts of petitioners not warranted by the process under which they assumed to act. *Held*, that upon such showing they would not be discharged.

This was a hearing on the application of Murphy L. Anderson, William N. Barr, and George W. Metcalf for a writ of habeas corpus.

Will D. Wright, U. S. Atty., A. E. Holton, U. S. Atty., P. E. H. McCroskey, and Jones & Jones, for petitioners.

F. P. Axley, Ben Posey, J. H. Dillard, and Merrimon & Merrimon, for respondent.

¹ For jurisdiction of federal courts on habeas corpus, see note to *In re Huse*, 25 C. C. A. 4.

EWART, District Judge. The petition of Murphy L. Anderson avers that he is a citizen and resident of Knox county, Tenn., and that he is a duly authorized and empowered deputy marshal of the United States for the Eastern district of Tennessee, and that he is illegally, unjustly, and unlawfully held in duress, imprisoned, and detained in the town of Murphy, in Cherokee county, N. C., under the following circumstances and charges: That under a judgment rendered in the circuit court of the United States for the Northern division of the Eastern district of Tennessee, at Knoxville, on the 11th day of July, 1892, in case No. 864 (Stevenson et al. v. Lovingood et al.), a writ of possession for certain lands therein specifically described was awarded against the defendants in said suit; that in pursuance of said judgment a writ of possession was issued by the clerk of the circuit court on the 21st day of April, 1899, and was regularly placed in the hands of the petitioner Anderson, as deputy United States marshal, to execute; that in pursuance of this duty he proceeded to the lands described, and, anticipating some trouble, he summoned, as his posse and assistants, his co-petitioners, Barr and Metcalf, to assist him in the performance of his duty under the said writ of possession; that while in the discharge of said duty, and while peaceably, lawfully, and cautiously executing the said writ, assisted by his co-petitioners, Barr and Metcalf, he was, with his co-petitioners, arrested by one J. N. Elliott, claiming to be a constable in the county of Cherokee, N. C., by whom he was removed to the town of Murphy, where he is now held a prisoner. The petitioner further avers that on the 29th day of April, 1899, while the said Anderson, Barr, and Metcalf were held in custody by the said Elliott, one A. J. Martin, claiming to be the sheriff of the county of Cherokee, served other papers on the said Anderson, Barr, and Metcalf, as follows, viz.: A magistrate's warrant charging the said Anderson, Barr, and Metcalf with assaulting Jasper Fain with deadly weapons; second, a magistrate's warrant charging said Anderson, Barr, and Metcalf with making an assault upon and imprisoning Fain without warrant or authority or reasonable cause; third, by serving a process in a civil suit brought by the said Fain against the said Anderson, Barr, and Metcalf for damages for false imprisonment in the sum of \$10,000, which last-named papers were served upon said parties,—and said Martin now claims to hold said Anderson, Barr, and Metcalf under arrest by him. The petitioners further aver that all these charges are based solely and entirely on their cautious, careful, and legal performance of their duties in executing the said writ of possession, and that the arrest of petitioners on the part of the said Elliott and Martin is part of a deliberate scheme, plan, and conspiracy on the part of the said Fain and his associates to prevent the execution of the said judgment against him, and are mere pretenses to that end. Petitioner further avers that when Anderson, Barr, and Metcalf were captured and put in duress under pretense of arrest by the said Elliott, they were on the waters of Tellico river, in Monroe county, Tenn., upon or near land described in said writ of possession, and in the peaceable and lawful discharge of their duties. Petitioners further aver that when they were arrested by the said Martin they were then

in duress and custody of men who were county officials of Cherokee county, where they have been illegally and forcibly taken, and that all of the said arrests were illegal and without probable cause, and that the said petitioners are wrongfully, illegally, and falsely deprived of their liberty, and are illegally under duress. The petitioner Metcalf avers that he is a citizen of the United States, and a citizen and resident of Knox county, Tenn., and that he is illegally and unjustly and unlawfully held in duress, imprisoned, and detained in the town of Murphy under the same circumstances and charges as set out by the petitioner Murphy L. Anderson. The petitioner William N. Barr avers that he is a citizen of the United States, and citizen and resident of Monroe county, Tenn., is the duly-elected and acting sheriff of said county, and that he is illegally, unjustly, and unlawfully held in duress, imprisoned, and detained in said town of Murphy under the same circumstances and charges set out in the petition of Murphy L. Anderson.

If it be true, as stated in the petition, that these petitioners are held in the custody of the authorities of Cherokee county "for an act done in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof," there does not seem to be any doubt but that under the statutes of the United States on that subject, they should be discharged by this court. Section 753, Rev. St., reads as follows:

"A writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof. * * *

And section 761 declares that when, by writ of habeas corpus, the petitioner is brought up for hearing—

"The court or justice or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require."

This, of course, means that if he is held in custody in violation of the constitution or law of the United States, or for an act done or omitted in pursuance of the laws of the United States, he must be discharged.

The facts in this case, as appear from the evidence heard by the court, are as follows:

A bill in equity was filed in the circuit court of the United States for the Northern division of the Eastern district of Tennessee by Stevenson et al. and George P. Wetmore, citizens, respectively, of the city and state of New York and of the state of Rhode Island, against Lovingood, Woody, Hoss, Fain, and Marr, all citizens and residents of the county of Monroe, state of Tennessee, and Nixon, a resident and citizen of Hamilton county, Tenn. The plaintiffs sued defendants for the recovery of certain tracts of land situate in Monroe county, in the state of Tennessee; and subpoena was issued, requiring the said defendants to appear and answer or demur, returnable August 5, 1889. Process was returned executed as to Lovingood, Woody, Hoss, and Marr; Fain not to be found. Nixon and Marr, de-

fendants, filed a disclaimer, disclaiming all right, title, or interest in any part of the said lands; and on the 26th of January, 1889, an order was made by the circuit court that as to defendants Lovingood, Woody, and Hoss, bill should be taken as confessed, and the cause set for hearing *ex parte*. An alias subpoena was issued as to the defendant Fain. On the 27th of January, 1892, the cause having been continued from time to time, the marshal having returned that Fain could not be found in his district, it was ordered by the court that Fain be directed to appear, plead, answer, or demur to the complainants' bill on or before March 1, 1892, and that a copy of this order be served on said Fain, if practicable, wherever found. It was further ordered that, in case Fain did not appear within the time so limited, the court, upon proof of the service or publication of the said order, would entertain jurisdiction, and proceed to the hearing and adjudication of the above suit as if the said Fain had been served with process in said district. On the 26th of May, 1892, service of said process was made on Fain by the United States marshal of the Western district of North Carolina, through his deputy, by delivering a copy of this order to the said Fain at Murphy, N. C. On the 11th of August, 1892, a decree was signed by his honor, D. M. Key, of the circuit court for the Northern division of the Eastern district of Tennessee, rendering judgment by default as to Lovingood, Woody, Hoss, and Fain. On the 10th of February, 1893, a writ of possession was issued and placed in the hands of the United States marshal. On the 24th of May, 1893, this writ was executed by the United States marshal by removing Lovingood, Woody, and Hoss from the premises therein described; the returns of the marshal showing furthermore that Fain had been permitted to remain upon the premises through the agent of the plaintiffs, under an agreement between them. On the 10th of February, 1894, an alias writ of possession was awarded, to be issued on application of complainants. On the 21st day of April, 1899, a writ of possession was issued by the circuit court of the United States for the Northern division of the Eastern district of Tennessee. This writ of possession, after reciting the names of the complainants and defendants, directed that the marshal of the said district should put the complainants into possession of a certain tract or parcel of land, described in the writ as follows:

"In fractional township 2, range 7, East Ocoee district, section 5, section 6, section 7, section 8, section 9, section 16, section 17, section 18, section 19, section 20, section 21, section 28, section 29, section 30, section 31, section 32."

This writ of possession was placed in the hands of Murphy L. Anderson, a United States deputy marshal for the Eastern district of Tennessee. It appears from the evidence that, in consequence of information received by the said Anderson from the attorneys representing the complainants, the deputy marshal anticipated that he would have trouble in ejecting the defendant Fain, and that he summoned Barr, the sheriff of Monroe county, to assist him in ejecting the said Fain. On arriving at the house of Fain, he informed him of his business, and requested him to at once give possession of the premises which he occupied. It further appears that Metcalf was

the authorized agent of the Stevenson heirs and Wetmore, complainants in the bill of equity, and that about this time he came up armed with a Winchester rifle, and stated to the said Anderson that he was the agent of the owners of the said property, and was ready to take possession of the property when Fain was ejected. It further appears that Anderson informed him that there would probably be some trouble in ejecting Fain, and that he would summon him to assist him in ejecting the said defendant Fain. As to whether any resistance was made by Fain, there is some conflict in the evidence; the officers insisting that Fain made an attempt to get his gun, which had been taken charge of by one of the officers, and the defendant Fain denying that he made any resistance, but simply stated to the officers that he was a citizen of the state of North Carolina, and that they had no right to interfere with his real or personal property in that state. It further appears that the officers placed him under arrest, and one of the officers, producing a pair of handcuffs, ordered that they should be placed upon him. On the remonstrance of Fain against this course, he was not handcuffed, but, it appears, was held as a prisoner by them over his protest for a period of two days or more. It further appears that one Mitchell, an employé of Fain, was also arrested and held in custody for a period of over two hours. The personal effects of Fain and Mitchell were then taken by the officers from the house, and hauled a distance of nearly four miles to a point across the state line, or where the state line was alleged to be by one of the petitioners,—Metcalf. It further appears that the officers proceeded to dismantle the house of Fain to that extent as to make it uninhabitable. While petitioners were at a place occupied by a party named Roberts, alleged by the petitioners to be in the county of Monroe and state of Tennessee, and while they still held Fain in their custody, one Elliott, a constable from the county of Cherokee, and state of North Carolina, with a posse, arrested the petitioners on a warrant issued by a justice of the peace of the county of Cherokee, charging petitioners with having committed an assault with a deadly weapon upon Fain. The petitioners were taken to the town of Murphy, in the county of Cherokee, where other warrants charging them with the offenses named in the petition of petitioners were served upon them; also, civil process in arrest bail proceedings.

The only question arising in this case is whether the petitioners are held in the state courts to answer for an act which they were authorized to do by the laws of the United States, which it was their duty to do as deputy marshals, and whether in the discharge of their duties they did more than was necessary and proper for them to do.

The general rule, as laid down by leading decisions of our courts, is that parties being prosecuted in state courts will not be released on writs of habeas corpus, but will be left to reach the supreme court of the United States by writ of error. This rule is abundantly sustained by numerous decisions, but it is equally as well established that the federal courts have power to grant writs of habeas corpus if special circumstances require, and that such courts possess a discretion in the matter which must be governed by the facts in each

particular case. Let us briefly examine a few of the leading cases establishing this principle.

In *Ex parte Royall*, 117 U. S. 247, 6 Sup. Ct. 740, Mr. Justice Harlan says:

"Does the statute imperatively require the circuit court by writ of habeas corpus to wrest the petitioner from the custody of the state officers in advance of his trial in the state court? We are of the opinion that while the circuit court has power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the national constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that congress intended to compel these courts by such means to draw to themselves in the first instance the trial of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the constitution of the United States. The injunction to hear the case summarily, and therefore to dispose of the case as law and justice require, does not deprive the court of discretion. That discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution."

In *Re Wood*, 140 U. S. 278, 11 Sup. Ct. 738, the same doctrine is laid down, and reaffirmed.

In *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, the court says:

"Whilst power to issue writs of habeas corpus to state courts which are proceeding in disregard of the right secured by the constitution and laws of the United States may exist, the practice of exercising such a power before the question has been raised or determined in the state courts is one which ought not to be encouraged. Should such rights be denied, his remedy in the federal courts will be unimpaired."

In *Re Frederick*, 149 U. S. 73, 13 Sup. Ct. 795, the court says:

"While a writ of habeas corpus is one of the remedies for the enforcement of the right of personal freedom, it will not issue as a matter of course, and it should be cautiously used by federal courts in reference to state prosecutions."

In *New York v. Eno*, 155 U. S. 90, 15 Sup. Ct. 30, it is decided that the United States court should refuse to issue writs of habeas corpus unless it also appears that the case is one of urgency. In *Re Belt*, 159 U. S. 100, 15 Sup. Ct. 987, Chief Justice Fuller says that it is only in rare and exceptional cases that such writs should be issued.

In *Re Swan*, 150 U. S. 648, 14 Sup. Ct. 228, Mr. Chief Justice Fuller says:

"We reiterate what has been so often said before,—that a writ of habeas corpus cannot be used to perform the office of a writ of error or appeal, but when no writ of error or appeal will lie, or if a petitioner is imprisoned under a judgment of the circuit court which has no jurisdiction of the prisoner or of the subject-matter, or authority to render the judgment complained of, this relief may be accorded him."

In *Re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, the same doctrine is affirmed.

In *Ex parte Royall*, and other cases cited, is illustrated how careful federal courts are in exercising a discretionary power to interfere with processes issued under state courts; that it is not only a

matter of comity, but is a principle of right and law, and therefore of necessity, and it is the duty of these courts to conciliate, rather than alienate and dissever, the federal and state tribunals, so that they may co-operate as harmonious members of one judicial system. As has been said by a distinguished writer, this machinery of a federal government is at once delicate and complex, and consists of plans and adjustments for all time to come, so that there may be no friction; like the harmony of our solar system, where each planet moves in its own orbit, without any impingement by the greater orb which lights all. In the decisions of the federal courts—both circuit and district courts and the circuit court of appeals—we find many important cases reported relating to proceedings in habeas corpus instituted under the provisions of section 753, Rev. St. U. S. In every instance where efforts have been made by the state courts to obstruct the execution of federal processes placed in the hands of federal officers, emanating from courts of competent jurisdiction, and where the officers acted within their jurisdiction and within the scope of their process, the courts have never hesitated to throw around them every measure of protection, and to promptly accord to them the privileges of the writ of habeas corpus. Perhaps the most important cases cited are:

First, *Ex parte Siebold*, 100 U. S. 371. This case involved the constitutionality of certain sections of title 26, Rev. St., entitled "Elective Franchises." A marshal of the United States was arrested by state officers while attempting to enforce process under this law. In proceedings in habeas corpus he was promptly discharged by the federal courts.

U. S. v. Jailer, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463, is another important case. This was a case where a deputy marshal was arrested by Roberts in endeavoring to serve process upon Call, charged with crime under the internal revenue laws, and who was killed by Roberts. He was arrested by state authorities, and on proceedings in habeas corpus was promptly discharged by the United States judge, the proof being conclusive that he was in the actual discharge of his duties when he was assaulted by Call. In this case the judge delivering the opinion says:

"I disclaim all right and power to discharge the relator on any such ground as that the proof shows that he acted in self-defense. A jury would probably acquit him on such ground, independent of the process under which he acted, but I have nothing to do with such an inquiry. It belongs only to the state court. I have only to inquire whether what he did was in pursuance of a law and process of the United States, and so justified, not excused, by that law and process."

In *Re Neagle*, 135 U. S. 3, 10 Sup. Ct. 658, it was held that it was the duty of the United States marshal to protect the person of a United States judge; and in an assault made upon such judge, where the deputy marshal took the life of the assailant, it was held by the court that he was acting within the scope of his duties, and that he could not be committed to the custody of the state courts and tried for the offense.

In *Re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, it was held that a defendant arrested for perjury committed in the case of a contested

congressional election should be discharged on a writ of habeas corpus, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted would greatly impede and embarrass the administration of justice in the national tribunals. See, also, *In re Krug*, 79 Fed. 309.

In *Re Lewis*, 83 Fed. 161, the petitioners in proceedings in habeas corpus were special employes of the treasury department. In making a search of the premises of Yeegee, certain papers supposed to contain incriminating evidence against Yeegee were seized. The petitioners were indicted in the state courts for robbery. The judge presiding in the United States circuit court held that they were in discharge of their official duties, and that, while their conduct was not perhaps entirely what it should have been, in searching the premises and seizing these papers they acted in good faith and with no felonious purpose or intention, and that, as they were in the actual discharge of their duties, they should be discharged.

In all these cases it will be observed that, in every instance where petitioners in proceedings in habeas corpus were discharged, it was upon proof that they were at the time actually engaged in carrying out or enforcing a decree, process, or mandate of the United States courts, or that the right of a citizen, secured and guarantied by the constitution of the United States, had been infringed upon. But it will also be observed that the vital principle running through our laws is that, subject to well-defined exceptions, not material to be stated here, the authority of the United States marshals and their deputies to act in an official capacity is confined entirely to the respective districts for which they have been appointed. The official character of such officers can only be recognized in their own districts. Outside of such district, except in certain special cases, not material in this consideration, they are simply private citizens, and as such amenable to the laws of the place where they chance to be. No warrants can be served by such officers outside of their districts, no process of any character or description can be executed, and their official authority can only be recognized in the districts of which they are officers.

In *Walker v. Lea*, 47 Fed. 645, Justice Lamar, of the supreme court, reversing the judgment of the district court, decided that a deputy marshal of the state of Tennessee, while temporarily in Mississippi, having heard of the whereabouts of a party for whom he had a process, and who, arming himself, went in search of such party, and while actually engaged in effecting the arrest of such party was arrested by state officers, charged with the offense of carrying concealed weapons, was not entitled to be discharged on a writ of habeas corpus instituted in the federal courts. The effect of this decision was to declare that section 788, Rev. St., cited by counsel for petitioners, providing that marshals and their deputies shall have in each state the same powers in executing the laws of the United States as sheriffs and their deputies may have by law in executing the laws thereof, refers only to the district to which the marshals are appointed. See, also, the case

of *Toland v. Sprague*, 12 Pet. 300; *Ex parte Graham*, 3 Wash. C. C. 456, Fed. Cas. No. 5,657; *Day v. Manufacturing Co.*, 1 Blatchf. 628, Fed. Cas. No. 3,685.

In *Re Huse*, 25 C. C. A. 2, 79 Fed. 306, Judge Hawley says:

"It was never intended by congress that the courts of the United States should, by writs of habeas corpus, obstruct the ordinary administration of the criminal laws of a state."

In *Ableman v. Booth*, 21 How. 524, and *U. S. v. Booth, Id.*, Mr. Chief Justice Taney, delivering the opinion of the court, says:

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and any attempt to enforce it beyond these boundaries is nothing less than lawless violence."

In the case of *Whitten v. Tomlinson*, 160 U. S. 247, 16 Sup. Ct. 302, Mr. Justice Gray says:

"A prisoner in custody under the authority of a state should not, except in a case of peculiar urgency, be discharged by a court or a judge of the United States upon a writ of habeas corpus in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties."

How far courts are bound to interfere for the protection of their own officers is a question upon which there are many perplexing and conflicting decisions. In *Peck v. Jenness*, 7 How. 624, the court says:

"It is a doctrine of law too long established to require citation of authorities that where a court has jurisdiction it has a right to settle every question which occurs in a cause, and, whether its decision be correct or not, its judgment, till reversed, is regarded as binding in every act, and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, the right cannot be wrested or taken away by any proceedings in another court."

In *Erskine v. Hohnbach*, 14 Wall. 613; the court says:

"It is easy to see what widespread mischief might result from permitting an executive officer to decide on his own knowledge that he ought not to serve a process or warrant put into his hands for service, and to consider what justly must follow from such doctrine. In short, the executive officer must do his duty, which is to obey all legal writs, and must not abrogate to himself the right of disobeying the paramount commands of those to whose mandates by law he is subjected. It seems that the weight of authority and of reason is clearly in favor of the proposition that the officer may safely obey all process fair on its face, and is not bound to judge of it by facts within his knowledge which may be supposed to invalidate it, and which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion in which the order of process was issued."

See *Savacool v. Boughton*, 5 Wend. 171; *Earl v. Camp*, 16 Wend. 563; *Chegaray v. Jenkins*, 5 N. Y. 376; *Sprague v. Birchard*, 1 Wis. 457; *Dynes v. Hoover*, 20 How. 65.

As stated by an eminent text writer, it seems to be that the only question for a ministerial officer is, in the execution of a process coming into his hands, whether such process is issued from a court

of competent jurisdiction, and is regular on its face. If such process is issued by a court of competent jurisdiction, and is regular on its face, he is by law required to act. The manner, time, and circumstances of his action are prescribed. He has no discretion. His action may be compelled by legal process. His duty is to do, not reason why.

In Illinois there are dicta in a number of cases (*Barnes v. Barber*, 6 Ill. 401; *McDonald v. Wilkie*, 13 Ill. 22), followed by an authoritative decision (*Leachman v. Dougherty*, 81 Ill. 324), that where an officer has notice of an excess or want of jurisdiction in the magistrate from which his process emanates, he would render himself liable for acting under it. This doctrine has been approved by the courts of Wisconsin. *Sprague v. Birchard*, 1 Wis. 457. But these decisions have not met with general acceptance. It is expressly denied in the state of New York, where the courts decided, in *Webber v. Gay*, 24 Wend. 485, and *People v. Warren*, 5 Hill, 440, that in a case in which jurisdiction to issue the particular process depended on the defendant's residence within the jurisdiction of the county, and the officer knew him to be a nonresident, such officer was not liable for acting under such process. Similar decisions have been rendered in the courts of Connecticut. In *Buck v. Colbath*, 3 Wall. 345, the court held that it was the duty of a court of competent jurisdiction, issuing its process, to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not.

It has been contended by the able counsel for the respondents in this case that the circuit court for the Northern division of the Eastern district of Tennessee had no jurisdiction of a proceeding in ejectment, and that its proceedings were *coram non judice*. In support of this contention, *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. 277, is relied upon. Mr. Justice Field, delivering the opinion of the court, says:

"It will be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity, as distinguished from an action at law, but this may be said: that, where an action is simply for recovery and possession of specific real or personal property, the action is one at law. An action for recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property, and the remedy which he wishes to obtain is its possession and enjoyment; and, in a contest over a title, both parties have a constitutional right to call for a jury."

Referring to the act of the legislature of Iowa conferring jurisdiction upon courts of equity to hear and adjudge causes instituted in such courts for the possession of real property (138 U. S. 152, 11 Sup. Ct. 277), Mr. Justice Field says:

"If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity as exercised in the state courts, but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law,' or the constitutional right of the parties in action at law to a trial by jury."

It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, without which the action of the court is a mere nullity; such, for example, as the service of process in the state of the defendant in a common-law action. *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, Id. 436; *Pennoyer v. Neff*, 95 U. S. 714; *Noble v. Railroad Co.*, 147 U. S. 173, 13 Sup. Ct. 271.

If this position be correct, as urged by counsel for respondents, the proceedings in the circuit court in Tennessee in this case were *coram non judice*, and the writ of possession issued by such court, and placed in the hands of the marshal for enforcement, was a nullity; but this court is not an appellate court, nor has it any power to modify or annul the judgment of a federal court in another state. But, while it is vested with no such powers, it certainly can inquire, in a proceeding such as is now pending before this court, whether the petitioners attempted to execute a process emanating from a federal court in the state of Tennessee in the state of North Carolina, or whether such officers, in attempting to enforce such a process outside of the limits of their state, and in the confines of another state, committed an assault with deadly weapons upon a citizen of this state, or arrested him without process or without reasonable cause or justification, or destroyed his property, such property being within the limits of this state. Certainly, if such officers crossed the boundary lines between the states of Tennessee and North Carolina, and, entering upon North Carolina territory, proceeded to violate the laws of this state, such officers were not in the discharge of any duty enjoined upon them by the laws of the United States, nor were they executing any process or mandate issued by the courts of the district of Western North Carolina.

It is insisted by the petitioners that they were acting within the limits of the Northern division of the Eastern district of Tennessee in executing this process, issued, as they insist, by the circuit court of the said district,—a court of competent jurisdiction. In attempting to ascertain whether such officers crossed the state line and executed such process in the state of North Carolina, much evidence was introduced by both the petitioners and respondents, and heard by this court. It appears from such evidence that in the year 1789 an act was passed by the general assembly of the state of North Carolina, known as the "Cession Act," empowering one of the senators of the state of North Carolina, and two of the representatives, to execute a deed or deeds on the part and in behalf of the state conveying to the United States of America "all right, title and claim which the state has to the sovereignty and territory of the land situate within the chartered limits of the state west of the line beginning on the extreme height of the Stone Mountain at a place where the Virginia line intersects it; * * * thence to a place where it is called the Great Iron or Smoky Mountains; thence along the extreme height of the said mountain to a place where it is called to Unacoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of the said mountains to the

southern boundary of this state." See Rev. St. N. C. p. 172. A controversy arose concerning the Unaka Mountain, and commissioners were appointed by an act passed in 1796 by the legislature of Tennessee and the legislature of North Carolina to ascertain which was the mountain so called in the act of cession. In 1819 an act was passed by the North Carolina legislature declaring that it was essential to the interests of this state in the disposal of the lands lately acquired by treaty from the Indians, and to the continuance of the good understanding and happiness subsisting between this state and the state of Tennessee, that the boundary lines between the two states should be accurately run, distinctly marked, and permanently established. The commissioners met at Newport, Tenn., on the 14th of July, 1821, to make the necessary arrangements for running and completing the line between the two states. See Rev. St. N. C. p. 93. In the year 1821 an act was passed by the legislatures of both the states of Tennessee and North Carolina confirming the boundary line established by these commissioners, and located and marked by the commissioners appointed by the two states. The act of the North Carolina legislature confirming said boundary line specifies that the whole line was distinctly marked as follows: "Two chops and a blaze on each fore and aft tree; three chops on each side line tree; a mile mark at the end of each mile." The evidence as to the location and marking of this line with the marks described in the act of 1821 by the commissioners appointed by the states of Tennessee and North Carolina is, to my mind, conclusive. There can be no sort of question but that the line was established, located, and marked on what is known as the "state ridge line," and which has been generally recognized from that date to this as the true boundary line between the states of Tennessee and North Carolina. The petitioners insist that this was not the true line between the two states, and was not the line located and marked by the commissioners under the act of 1819. They insist that the line marked on the maps in evidence, referred to as the "rainbow line," is the true boundary line between the two states; but there seems to be very little proof to sustain that contention. The weight of the testimony is that the line known as the "state ridge line" was the line located and marked by the commissioners; that the act of the commissioners in so locating and marking this line was fully ratified and approved by the people of the states of Tennessee and North Carolina, through their respective general assemblies, by Act 1821. It is true that the state of Tennessee has issued grants for the land within what are known as the state ridge and rainbow lines, and it is probable that the lands claimed by Stevenson and Wetmore are within this boundary, though it appears no actual survey has been made of the alleged rainbow line. But it is also true that the state of North Carolina has for many years exercised sovereignty over the same territory, by issuing grants to its citizens, collecting taxes from them, requiring them to work its public roads, and recognizing residents within that territory as citizens of North Carolina. If the state ridge line be the correct and true dividing line between the states,—a fact of which, from the evidence submitted to this court, there can be no doubt,—

the act of Anderson, Barr, and Metcalf in crossing the state line and forcibly ejecting from his possessions a citizen of North Carolina, who held his title under and by virtue of a grant from the state of North Carolina, in violently dispossessing the said Fain, a citizen of North Carolina, and in removing his personal effects a distance of four miles, against and over his protest, in committing an assault upon him with deadly weapons, in threatening to place handcuffs upon him, and in arresting him and holding him in custody for a period of over 48 hours, without any warrant and without any reasonable excuse or justification, was an act nothing short of lawless violence on the part of such officials. Under the process issued by the circuit court of Tennessee, a court of competent jurisdiction, these officers had the undoubted right to enforce such process to its fullest extent within the jurisdiction of the United States circuit court for the Northern division of the Eastern district of Tennessee, but not one inch beyond such district. Whenever they crossed the boundary lines of a sovereign state, they ceased to be officers. They were private citizens only, and had no right to arrest a citizen of North Carolina and subject him to imprisonment or indignities. No court will go further than this court in protecting the officers of the federal government in the discharge of their duties; and if at any time such officers, in the peaceable and lawful discharge of their duties within the jurisdiction of this court, are interfered with or obstructed in any way, directly or indirectly, by the officers of the state, or officers acting under the instruction of state courts or tribunals, immediate relief will be granted them by this court, upon the proper application for the same. But officers of the federal government must act within their own jurisdiction, and always within the scope of their warrant or process. Federal courts were not established for the purpose of discharging federal officials when charged with violation of state laws, simply because they hold commissions from the federal government; nor was this statute granting relief to federal officers when charged with violation of state laws passed for the purpose of relieving such officials from deserved prosecution and conviction in the state courts, but the statute was passed to prevent needless, unnecessary, or unlawful obstruction and hindrance of federal officials when actually carrying out or enforcing the laws, decrees, or mandates of the United States courts, and while acting within their jurisdiction, and within the limits of the warrants or process in their hands.

In this case there can be no reason why the petitioners cannot have a fair and impartial trial in the courts of the state of North Carolina. If their contention be true, that they were engaged in executing a process issued by the circuit court of Tennessee in the county of Monroe, in the state of Tennessee, and acting strictly within the limits of such process, certainly they are not guilty of any violation of the laws of North Carolina. If manifest wrong or injustice is done them in such courts, they have the right to invoke the aid of the federal courts, even after judgment rendered by the state courts. The writ of habeas corpus in this case is denied, and the prisoners remanded to the custody of the state court.

LA REPUBLIQUE FRANCAISE et al. v. SCHULTZ.

(Circuit Court, S. D. New York. May 23, 1899.)

1. TRADE-NAMES—INFRINGEMENT—"VICHY" MINERAL WATER.

The name "Vichy," as applied to mineral waters, is a geographical name, used generally by the owners of springs near Vichy, in France, to designate the locality of origin, and indicate the general characteristics of their waters. It is not a trade-mark or trade-name in a legal sense, and a suit by such owners against a defendant for applying the name to artificial waters can only be maintained on the theory of unfair competition.¹

2. SAME—UNFAIR COMPETITION—LACHES.

Defendant's testator began the manufacture of artificial "Vichy" water in New York in 1862, advertising and selling the same under the name of "Schultz's Vichy Water," as his own product, and as made from analyses of the natural spring water. His waters attained a high reputation and a large sale, being considered by many superior to the natural water. There was no attempt at deception, and his labels were entirely dissimilar from those under which the natural spring water was sold. *Held*, that the use of the name "Vichy" in connection with this product did not tend appreciably to confuse the identity of the natural and artificial products, but, even if it did so, it having been begun in good faith, and continued for 30 years without objection on the part of complainants, they could not be heard to assert the right to an injunction.²

This was a suit by La Republique Francaise and others against Louise Schultz, executrix, for alleged infringement of rights in a trade-name.

Rowland Cox, for complainants,
Antonio Knawth, for defendant.

WALLACE, Circuit Judge. Upon the proofs in this case it is clear that the name "Vichy" is not a trade-mark or trade-name of the complainants in the strict legal sense of the term, but is a geographical name, applied by them as well as various other owners of mineral springs at or near Vichy, in the department of Allier, France, to designate the locality of origin, and indicate the general characteristics of the waters. The bill can only be maintained upon the theory of unfair competition by the defendants and their testator in applying that name to the artificial mineral water manufactured and sold by them in this country. *Canal Co. v. Clark*, 13 Wall. 311; *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151; *Association v. Piza*, 23 Blatchf. 245, 24 Fed. 149; *Newman v. Alvord*, 51 N. Y. 189; *Wotherspoon v. Currie*, L. R. 5 H. L. 508-513.

For 50 years or more artificial mineral waters approximating more or less closely in their ingredients and properties to the natural Vichy water have been prepared and sold by the name of "Vichy" by manufacturers in Europe and in this country. Natural waters lose their original virtues, more or less, when removed from their sources, while artificial waters manufactured under pressure of carbonic acid gas remain intact in all their ingredients. Mr. Schultz, the testator

¹ As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and, supplementary thereto, note to *Lare v. Harper*, 30 C. C. A. 376.

² For laches as a defense in suits for infringement of patents, copyrights, and trade-marks, see note to *Taylor v. Spindle Co.*, 22 C. C. A. 211.

of the defendants, began the manufacture of artificial water in New York City in 1862, and from that time until the present bill was filed—a period of 30 years—continued to make and sell it in large quantities here, advertising it as “Schultz’s Vichy Water.” His earliest circular to the trade in the record contains this statement: “The mineral waters will be made with the greatest care, and according to the best analyses known, so that they will not differ from the natural springs.” As was said of him in a quite similar case by Judge Coxe (*City of Carlsbad v. Schultz*, 78 Fed. 471): “The case is devoid of any element of actual fraud, and the defendant has acted in good faith throughout.” His product acquired a high reputation for its purity, was prescribed extensively by physicians, and was considered by many to be preferable for therapeutical purposes to the natural waters. It became popular as a beverage, being kept by druggists generally to be drawn from fountains or syphon bottles, and sold by the glass. The labels used by Schultz were widely dissimilar from those used with the natural water. It is apparent that he was solicitous to have the water identified with his name as its manufacturer, and that, so far from attempting to palm it off upon the public as the natural Vichy water, he sought to commend it as an artificial water having substantially the ingredients and properties of the natural water, but of greater excellence and purity than the water made by his competitors. If any part of the public bought or used his product supposing it to be the natural Vichy water, they must have been very ignorant or very careless persons.

Assuming that the use of the name “Vichy” in connection with the artificial water made by Schultz may have tended to divert to some extent sales of the water of the complainants, I do not think it tended appreciably to confuse the identity of the two articles.

If it should be assumed, however, that Schultz’s use of the name did tend to some extent to confuse the identity of the two articles, the case presents the question whether, after he had used it for nearly 30 years, publicly and notoriously, without any interposition on the part of the complainants, the latter can be heard to assert the right to an injunction. It is impossible that the owners of the natural waters should not have known that wherever they were extensively sold artificial waters were being made and sold extensively by the same name. If the artificial waters had been made and sold as purporting to be the natural waters, there would be less equity in the defense of laches and acquiescence; but they were not. They were made and sold to supply a demand for artificial waters having properties similar to those of the natural water. It is very late to ask the intervention of equity to suppress a course of business which originated innocently, and has been so generally adopted. Equity is indisposed to assist parties who have slept upon their rights, and acquiesced in their appropriation by others for a great length of time. The unexampled delay and acquiescence in the present case, I think, should defeat the action. *Manufacturing Co. v. Williams*, 37 U. S. App. 109, 15 C. C. A. 520, and 68 Fed. 489; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78; *McLaughlin v. Railway Co.*, 21 Fed. 574.

The bill is dismissed, with costs.

NATIONAL CASH-REGISTER CO. v. LELAND et al. (three cases)

SAME v. WRIGHT et al.

(Circuit Court of Appeals, First Circuit, April 12, 1899.)

Nos. 224-227.

1. FEDERAL PRACTICE — ACTIONS AT LAW — INTERROGATORIES UNDER STATE STATUTES.

Interrogatories addressed to the opposite party in the manner and form prescribed by the Massachusetts statute (Pub. St. c. 167) are not admissible in actions at law in the federal courts, since Rev. St. § 861, declares that the mode of proof in actions at law "shall be by oral testimony and the examination of witnesses in open court, except as hereinafter provided," and the provisions subsequently made (Rev. St. §§ 863-870) relate exclusively to depositions de bene esse, in perpetuam memoriam, or under a *dedimus potestatem*. Rev. St. § 914, adopting state practice, procedure, etc., in actions at law in the federal courts, does not apply, as congress itself has regulated the particular matter by express legislation.

2. SAME.

The act of 1892 (27 Stat. 7) permitting the taking of depositions in the mode prescribed by the laws of the state in which the federal courts are held was merely intended to simplify the practice of taking depositions, and did not authorize the taking of any depositions in instances not previously authorized by federal statutes. It did not confer any additional right to obtain proofs by interrogatories addressed to the adverse party in actions at law.

3. PATENTS—EXPERT EVIDENCE.

In an action at law an expert in a patent case may not be permitted to state that the omission of a connecting mechanism would be a "fatal fault" in a cash register. It is proper for the witness to describe the results of the omission of the connecting mechanism, but his opinion that it is a "fatal fault" goes beyond the province of an expert.

4. SAME.

It is proper for an expert, after describing to the jury the details of the two machines in question, to state that a certain part of defendant's machine was the equivalent of, or "exactly the nature of," a certain part of plaintiff's machine.

5. SAME—ADMISSIBILITY OF EVIDENCE.

Where a corporation and its officers or directors are sued for infringement, and it is claimed by plaintiff that the corporations are mere devices to protect the individual defendants against the consequences of their infringement, it is proper to admit the testimony of one of the defendants as to his belief in the validity of a patent under which the defendants claim to make their machines. This evidence is admissible as tending to show that defendants are acting in good faith.

6. APPEAL—FORM OF EXCEPTIONS.

Under rule 24, par. 3 (31 C. C. A. clxv., 90 Fed. clxv.), of the circuit court of appeals for the First circuit, an excepting party must not only set out or indicate the specific ruling for which he contends, and the specific portion of the charge to which he excepts, but must also make proper references to the pages of the record containing the evidence on which the requests were based, or the evidence establishing that the charge objected to was erroneous. The court may, however, notice plain errors, though the exceptions fail to comply with the above requirement.

7. PATENTS—INFRINGEMENT BY CORPORATIONS—LIABILITY OF DIRECTORS.

A director of a corporation, who, by his vote or otherwise, has specifically commanded the subordinate agents of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages; and it is immaterial whether or not he knew that the article manufactured and sold did infringe a patent.

Brown, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Lysander Hill (Thomas H. Russell and Arthur H. Russell, on the brief), for plaintiff in error, National Cash-Register Co.

Robert F. Herrick and Samuel J. Elder (Frederick P. Fish, on the brief), for defendants in error.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. These are four suits at law, brought by the National Cash-Register Company to recover damages for the infringement of a patent. The cases were tried together, and the jury found verdicts for the defendants. The plaintiff has excepted to some of the rulings made in the course of the trial and preliminary thereto. The plaintiff in error will hereafter be called the "plaintiff," and the defendants in error the "defendants." The plaintiff filed interrogatories to the defendants in the manner and form prescribed by Pub. St. Mass. c. 167. These interrogatories the defendants did not answer, and upon their failure to do so the plaintiff moved the court to default them, which motion the court denied, and ordered the interrogatories to be stricken from the files. The plaintiff thereupon duly excepted.

Section 861 of the Revised Statutes enacts that the "mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." As the proceeding proposed by the plaintiff in his interrogatories filed in this action at common law is neither by oral testimony nor by examination of witnesses in open court, he seeks to procure its admission by bringing it within section 914 of the Revised Statutes. This provides that the "practice, pleadings, and form and modes of proceeding in civil causes, in the circuit courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit courts are held." In *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, the circuit court for the Southern district of New York had imprisoned for contempt a defendant who had refused to answer interrogatories propounded before trial by the plaintiff in the manner prescribed by Code Civ. Proc. N. Y. § 870 et seq. In the opinion rendered by the supreme court, Mr. Justice Miller pointed out that the case was one of evidence and procedure; that these matters were dealt with in two chapters of the Revised Statutes; and that, "if congress has legislated on this subject, and prescribed a definite rule for the government of its courts, it is to that extent exclusive of any legislation of the states in the same matter." 113 U. S. 721, 5 Sup. Ct. 727. He next stated that the Revised Statutes are intended to provide a system to govern the practice of the federal courts; that they provide a definite mode of proof in those courts, and specify the only admissible exceptions to that mode. "This mode is 'by oral testimony and examination of witnesses in open court, except as hereinafter

provided." 113 U. S. 723, 5 Sup. Ct. 728. The New York interrogatories, not being a mode of testimony by oral proof, must, to be admissible in the federal courts, fall within the specified exceptions dealt with in sections 863 to 870 of the Revised Statutes, which sections, as observed by Mr. Justice Miller, relate exclusively to depositions *de bene esse*, in *perpetuam memoriam*, or under a *dedimus potestatem*. The opinion goes on to point out that the New York interrogatories were not put under circumstances which made it admissible to take a deposition *de bene esse*, pursuant to the Revised Statutes, and that they did not observe the conditions under which a *dedimus potestatem* is granted "according to common usage," pursuant to section 866. "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel to extract something, which he may then use or not, as it suits his purpose. This is a very special usage, dependent wholly upon the New York statute." 113 U. S. 724, 5 Sup. 729. It was therefore held that the interrogatories fell neither within the rule of section 861 nor within the exceptions specified in the following sections, and the opinion concludes by repeating that: "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides." The prisoner was discharged. The circumstances of the case at bar closely resemble those of *Ex parte Fisk*, and the reasoning of the court has an important bearing on the decision in this case. The Massachusetts interrogatories are sought as a "mode of proof in trials at law." The answers to them are not oral testimony, and therefore, to be admitted, must be brought within the exceptions specified in the Revised Statutes. They are not a deposition taken under the circumstances in which it is permitted to take a deposition by sections 863 to 865 of the Revised Statutes, and, like the New York examination, the Massachusetts interrogatories violate common usage by seeking to call the party in advance of the trial at law, and to "subject him to all the skill of opposing counsel to extract something which he may use then or not as it suits his purpose." As the Massachusetts interrogatories fall neither within the rule of section 861 nor within the exceptions allowed by the following sections, and as that rule and those exceptions provide an exclusive mode of proof in trials at law in the federal courts, it should seem that the interrogatories are inadmissible here. See, also, *Railway Co. v. Botsford*, 141 U. S. 250, 257, 11 Sup. Ct. 1,000.

It is further contended by the plaintiff that the interrogatories in question are admissible as a statutory substitute for a bill of discovery in aid of an action at law, and are thus brought within the provision of section 914 of the Revised Statutes. This view of the Massachusetts interrogatories was taken by the circuit court for this district in *Bryant v. Leyland*, 6 Fed. 125. We think the contention unsound. The supreme court has constantly maintained the distinction between the systems of law and equity, and has refused to adopt into the practice of the federal courts any part of the practice of the state courts which confounds the two systems. Moreover, the provisions of section 914 apply only to suits at law in the federal courts,

and, in the absence of express language, can hardly be intended to introduce into the practice and procedure of such suits statutory procedure which is in its nature plainly equitable. We find, therefore, that it has been decided by the supreme court that, if the statutory interrogatories are to be treated as laying the foundation for a deposition, they are inadmissible in federal practice, because a deposition is not authorized to be taken in such a case by the statutes of the United States; that an examination authorized by state statutes has been excluded on this ground when such examination, though not altogether similar, was yet in most respects similar to the interrogatories in the case at bar, the grounds for the exclusion, as stated by the supreme court, being largely applicable to the interrogatories in this case. We find, furthermore, that, if these interrogatories are to be treated, not as questions put to a deponent, but as a statutory substitute for a bill of discovery, they are excluded as an encroachment upon that control of equity procedure which belongs to the federal courts except when regulated in express terms by an act of congress. For these reasons we think that the interrogatories were forbidden by Revised Statutes, and not authorized by section 914 of the Revised Statutes, or any other federal law.

The plaintiff further contends that, even if the statutory interrogatories be treated as the taking of an ordinary deposition, and hence forbidden by section 861, yet they are permitted by chapter 14 of the Acts of 1892 (27 Stat. 7), which permits the taking of depositions in the mode prescribed by the laws of the state in which the courts are held. This position seems to us plainly untenable. The act of 1892, as stated by the learned judge in the circuit court, was intended only "to simplify the practice of taking depositions by providing that the mode of taking in instances authorized by the federal laws might conform to the mode prescribed by the laws of the state in which federal courts were held," and not "to authorize the taking of depositions in instances not heretofore authorized by the federal statutes, and to confer additional rights to obtain proofs by interrogatories addressed to the adverse party in actions at law." For these reasons the exception to the refusal of the judge of the circuit court to default the defendants must be overruled.

We now come to the plaintiff's exceptions taken in the course of the trial. Two of these relate to the exclusion of testimony. Mr. Dayton, an expert, and one of the plaintiff's witnesses, stated that the omission of a "connecting mechanism," so called, would be a "fatal fault" in a cash register. On objection by the defendant, the learned judge below held that the witness might describe the results of the omission of the connecting mechanism, but could not be permitted to call that omission a "fatal fault." As the word "fatal" contained an inference which went beyond the province of an expert, we think that the learned judge was right; and, moreover, under the circumstances, the ruling seems not to have been hurtful to the plaintiff's case. The same witness was not permitted to testify, on direct examination, that a certain part of one machine was the equivalent of, or "exactly the nature of," a certain part of

another machine. The witness had already explained to the jury the details both of the plaintiff's machine and of the alleged infringing machine, and from his explanation it might reasonably have been inferred that he thought the parts in question were the mechanical equivalents each of the other. The mechanism, however, was complicated, and an ordinary man, unskilled in mechanics, might well have failed to understand it completely. It was proper, therefore, that a witness skilled in mechanics, and understanding the meaning of the term "mechanical equivalent," should be allowed to express to the jury his opinion of the relation of one machine to the other, subject to further direct examination and to cross-examination, in order to bring out more clearly the grounds of his opinion. *Curt. Pat. 489*; *Keyes v. Grant*, 118 U. S. 25, 37, 6 Sup. Ct. 974; *Bischoff v. Wethered*, 9 Wall. 812, 814. This general proposition concerning expert testimony is, indeed, almost conceded, but defendants' counsel seems to contend that the evidence excluded would not have been helpful to the plaintiff. A direct statement of equivalence from a competent expert, however, might well have been helpful to an unskilled jurymen unable to comprehend fully a statement of differences of detail. It is doubtful if the answer which was stricken out was exactly responsive to the question put to the witness, as that question appears on the record, and a want of responsiveness in the answer may have been the cause of the ruling of the learned judge. As a new trial is to be ordered for errors outside the one covered by this exception, our opinion just expressed is sufficient.

The fifth and sixth assignments of error relate to the admission of the testimony of William W. Drew, who is one of the defendants, concerning his belief in the validity of the Webster patent. As the plaintiff claimed that the corporations were mere devices to protect the individual defendants, evidence showing that the defendants were acting in good faith was admissible, and Drew's testimony objected to by the plaintiff was of this character.

The plaintiff's remaining exceptions relate to the judge's charge, and to his refusal to give rulings which the plaintiff requested. Before dealing with the substance of these exceptions, we think it proper to say something about their form, and about the form of that part of the plaintiff's brief which relates to them. Rule 10 of this court (31 C. C. A. cxlv., 90 Fed. cxlv.) requires the excepting party to state distinctly the several matters of law in a charge to which he excepts. Exceptions taken to long extracts from the charge are improper in form, and need seldom be considered by an appellate court on a writ of error. *Holloway v. Dunham*, 170 U. S. 615, 620, 18 Sup. Ct. 784. The exceptions to the refusal to give the rulings requested in the case at bar were taken in the general words, "except in so far as the same have been given." It is held that this form of taking exceptions is ordinarily fatal to their validity. *Beaver v. Taylor*, 93 U. S. 46; *Walker v. Bank*, 5 C. C. A. 421, 56 Fed. 76, 78. It is settled, however, that a plain error may be noticed by the appellate court, though the exceptions are irregularly taken. *Wiborg v. U. S.*, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197. Rule 11 of this

court (30 C. C. A. cxlvi., 90 Fed. cxlvi.) recognizes this principle in allowing the court, at its option, to notice a plain error not assigned. The record shows clearly that the question of the liability of the defendants for their acts done while they were officers of the infringing corporations, which is the principal question left for consideration, was understood by the court below and by both the parties to be fundamental. All knew what the question was. The attention of the learned judge had been called to it, and he had it most plainly in mind when refusing the plaintiff's requests, and when charging the jury. As to the form in which the exceptions to the refusal to give the rulings requested were taken, it may be sufficient to say, as was said in *Hicks v. U. S.*, 150 U. S. 442, 453, 14 Sup. Ct. 144: "The learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him, and we think they sufficiently raise the questions we have considered." *Lucas v. U. S.*, 163 U. S. 612, 618, 16 Sup. Ct. 1168. It is clear that the formal statement in the bill that the exceptions were allowed controls the informal conversation set out in the record to which the defendants have called our attention.

We come next to the brief. Paragraph 3 of rule 24 (31 C. C. A. clxv., 90 Fed. clxv.) requires the brief to contain a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record relied upon in support of each point. Under this rule the excepting party must not only set out or indicate the specific ruling for which he contends, and the specific portion of the charge to which he excepts, but he must also make proper references to the pages of the record containing the evidence upon which the requests were based, or the evidence which establishes that the charge objected to was erroneous. This has not been done. For example, the plaintiff's brief fails to point out specifically the particular clauses, sentences, or paragraphs of the long extract from the charge, printed in the brief, which he contends are erroneous, and it makes no reference to the pages of the record which contain the evidence relating to the parts of the charge objected to. The court has done its best, under the circumstances, to marshal the evidence bearing upon the various exceptions, but, if any matter has been overlooked, the responsibility for the omission does not rest upon us. In a case which contains 51 assignments of error and more than 70 requests for instructions, the need of orderliness is especially great.

In conclusion, though we have felt it right, by way of guiding future practice, to comment upon the form of the exceptions and the brief, we think that, upon the record as it stands, we can dispose of the principal question which the parties intended to raise. That question concerns the liability of the directors and other officers of a corporation for infringements committed by the corporation under their direction. The general principles determining this liability are in no wise peculiar to the patent law, but are equally applicable to all torts. As a general principle, no man can justify the commission of a tort by showing that he was employed by some one else, or that he committed the tort as the agent or in the interest of another. *Mitchell v. Harmony*, 13 How. 115, 137; *Pol.*

Torts (5th Ed.) 190. Thus generally stated, the proposition would hardly be controverted by the defendants; but the physical act which constitutes infringement—the manufacture, sale, or use of the infringing article—is commonly not the physical act of the director or superintendent or manager of a corporation, but the act of some subordinate who is the agent or servant, not of the director, but of the corporation. To this subordinate the director or other superior officer of the corporation has given orders, and in giving them has professed to speak, not as an individual, but as the corporation's mouthpiece, and in the corporation's name. These directions and orders, given by the director in the corporation's behalf, it is urged, do not render the director liable for the infringement, which is to be treated as the tort of the corporation alone. It is true that the liability of the corporation for infringement and other torts physically committed by its subordinate agents and the liability of the corporation's director for these torts are not necessarily the same. This is well pointed out by Lord Chief Justice Cockburn in *Weir v. Bell*, 3 Exch. Div. 238, 247, a case in which it was sought to hold the directors of a company liable for false representations contained in a prospectus issued by its manager:

"The defendants, in what they did, were acting as the agents of the company, and not as principals, and therefore they would not be liable, generally speaking, for misrepresentations made without their authority by persons employed by them on behalf of the company, and who, in such employment, were acting, not as their agents, but as the agents of the company."

Again, in *Brown v. Lent*, 20 Vt. 529, which was a suit brought against an agent for the negligence of his subordinate, it was said:

"In torts a party may be responsible civiliter by reason of participation in an act occasioning the injury, either by direct personal interference or by giving directions, or commands, or permission, which will make the act, though done by others, his own; or he may be liable constructively by reason of his particular relation and connection with the agent who commits the injury."

That is to say, one who does not actually and physically commit the tortious act may yet be liable if he directs or commands its commission, or if he sustains to the person actually committing it the relation of master or principal; but when the tort is not committed by his direction or command, nor committed by one who stood to him in the relation of agent or servant, he is not liable, though the tort was committed by the subordinate agent of his own principal, over which subordinate he had authority as an agent of higher rank. *Bath v. Caton*, 37 Mich. 199; *Paper Co. v. Dean*, 123 Mass. 267. The corporation may be liable, not only for the tort of its agent, committed in obedience to its orders, but also for a tort committed without orders, or even in direct disobedience to orders, if that tort is committed by the corporation's agent in the course of his employment. The director, on the other hand, is ordinarily liable only for those torts which he himself commits, or the commission of which he specifically commands. Where, however, the director, manager, or other agent of a corporation, though in the name of the corporation, himself commands the commission of a tort by the subordinate agent of the corporation, the former is individually liable. Thus, in *Wilson v. Peto*, 6 Moore, 47, the defend-

ant, who, as the superintendent or foreman of a contractor, had charge of the erection of buildings which obscured the plaintiff's ancient lights, was held liable, as the work was carried on under his sole superintendence and management. So, in *Power Co. v. Allen*, 120 Mass. 352, the water commissioners of Boston were held personally liable for the diversion of water by their subordinates under their directions. See, also, *Peck v. Cooper*, 112 Ill. 192.

It is urged that, while a manager, or superintendent, or other like officer of a corporation may be liable for acts of infringement committed by the subordinate agents of the corporation in obedience to his orders, yet that a director who, by his vote in the board of directors, orders the commission of such acts, is not made liable for the acts committed in pursuance of the order which he has voted to pass. To hold a director liable in such case, it is said, is not merely to strip him of the defense that his act was done as the agent of another, but to impose upon him liability for an order which was not his order at all, but that of a board of which he was a member. This contention, plausible as it may seem at first sight, we deem unsound. We have said that the agent of a corporation who individually and personally commands a subordinate agent of that corporation to commit an act of infringement (omitting from consideration cases in which the agent merely transmits an order given him by another) becomes liable therefor, although the order so given is expressed to be, and is in fact, the order of the corporation. If this be so, it can hardly be contended that, when two or more agents join in giving such commands, they do not each become personally liable. To enable one of such agents—a director, for example—to escape liability by setting up that the order which he had joined in giving was neither his several nor his joint order, but was the command only of a fictitious person or entity of which he was a component part, would permit, in effect, what we have held to be unlawful,—that a man should justify the commission of a tort by showing that he committed it, not in his personal capacity, but in some other. Thus, in *Weir v. Barnett*, 3 Exch. Div. 32 (on appeal, sub nom. *Same v. Bell*, Id. 238), above referred to, it was assumed throughout that the defendant directors would have been liable if they had specifically directed the publication of the false prospectus complained of in the declaration. Those of them who obtained a verdict obtained it only because it was shown that the false statements were made without their direction, authority, or knowledge. The fact that the directions which they gave were given by them in their capacity as directors was not even suggested as a valid defense. Thus Lord Justice Bramwell said (page 243):

"The defendant, then, is not actually guilty of this fraud. He did not commit it himself, nor procure its commission knowingly. Had he done so, he would have been liable, whether as director, manager, printer of the prospectus, or entire stranger to the company, and acting merely from mischievous love of roguery."

See, also, *Amy v. Supervisors*, 11 Wall. 136.

In *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 251, a suit was brought against the members of a presbytery for rejecting a nomi-

nee as presentee to a church. The case contains much that has no bearing upon this discussion, but, among other defenses, the appellants set up, "that the conclusions of the libel are directed against the defenders solely as individuals in consideration of acts alleged to have been done by the presbytery of Auchterarder in its official and corporate capacity," and much more to a similar effect. The house of lords overruled this defense. Lord Lyndhurst said:

"But then, my lords, it is said that the action cannot be supported against these parties, as the act complained of was the act of the body. How can you bring an action, it is said, against them individually? My lords, it was these individuals who did the wrong. If all of them refused to take Mr. Young upon trial, and they, by their vote, prevented his being taken upon trial by the others, they are the parties, therefore, that did the injury, and consequently they are subject to an action. Suppose it had been a unanimous vote, —that, all had concurred in it,—the party sustaining the injury might, if he had thought proper, have brought action against all of them or against any one, because it is laid down as a general principle that torts are joint and several. It would not have been necessary for him to bring an action against all if all had concurred, but he might have brought his action against one or more of them, as he might think proper. Here he has brought his action against those who did the wrong, and they are clearly liable to make compensation and to give redress. My lords, it was suggested at the bar, in the course of argument, that it is possible, as this was put to the vote, that some of these parties might have voted on the other side. Had that been the case, that circumstance, so far as such individuals are concerned, would have been a ground of defense; but that does not appear upon the record. It is not stated; it is not suggested. On the contrary, from the shape of the record, the conclusion is directly the other way." *Id.* 282.

See, also, the remarks of Lord Brougham at page 289.

We refer to this case, not upon any supposed analogy between the Church of Scotland, or one of its presbyteries, and a manufacturing corporation, nor because the quasi judicial duties of members of a presbytery are deemed similar to the duties of directors, but only to show that members of a body who have voted to commit an actionable wrong cannot shield themselves by a plea that the wrong done was not the act of them as individuals, but merely of the body of which they were members.

It is not necessary to refer here to the cases decided in the circuit courts concerning the liability of the officers of a corporation for acts of infringement directed by them in their official capacity. Most of the decisions rendered are doubtless correct, but the language of the opinions is sometimes irreconcilable, and often goes further than was required by the facts under consideration. For us it is sufficient to say that a director's liability to an injunction does not conclusively establish his liability in an action at law for damages, and, conversely, that his liability in an action at law does not conclusively establish that he may properly be enjoined, or ordered to account for profits. In *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, we find nothing contrary to the opinion just expressed. It is said at page 18, 161 U. S. and page 445, 16 Sup. Ct., that the officers and agents of the United States, "though acting under order of the United States, are personally liable to be sued for their infringement of the patent," and a plea that the defendants only operated and used the infringing article as officers, servants, and em-

ployés of the United States was overruled. 161 U. S. 23, 16 Sup. Ct. 447. An injunction against the use of the infringing article was denied because that article was the property of the United States, which could not hold or use it except through their officers or agents, and were, therefore, "an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought." As the United States, at the same time were a necessary party to the suit, and yet, as sovereign, could not be made an involuntary party thereto, it followed that the injunction could not be granted without violating the principles affirmed in a long series of decisions of the supreme court. A decree awarding profits or damages was also refused because "the only gain, profits, and advantages upon which the report of the master and the decree of the court were based were those which had accrued to the United States," "and the master found that no damages in addition to such gain, profits, and advantages had been proved." We are of opinion, therefore, that by the general principles of law, and by analogy with other torts, a director of a corporation, who, as director, by vote or otherwise, specifically commands the subordinate agents of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages brought by the owner of the patent so infringed. As with other infringers, it is immaterial whether the director knew or was ignorant that the article manufactured and sold did infringe a patent.

It remains to apply this rule to the facts of the case. The plaintiff was the owner of a patent for a cash register. At the trial it introduced evidence to show that the Boston Cash Indicator & Recorder Company was a corporation organized in 1886 to manufacture cash registers of a particular pattern, which manufacture, for the purposes of this opinion, must be taken to have infringed the plaintiff's patent; that between September 3, 1886, and September 3, 1891, the corporation, with part of the defendants as its officers, manufactured and sold a considerable number of these infringing cash registers; that the Boston Cash-Register Company was organized in 1890 "for the purpose of purchasing the assets of the Boston Cash Indicator & Recorder Company, and continuing its business aforesaid," and, as no business of the Boston Cash Indicator & Recorder Company is mentioned in the record except the manufacture and sale of registers of the aforesaid infringing pattern, it appears sufficiently for our purposes that the "business aforesaid" was, at least in part, an infringing sale and manufacture; that on April 5, 1891, the Boston Cash-Register Company purchased the assets, and that it made and sold machines containing the infringing mechanism. Of the four suits before us, No. 227 was brought to recover for acts of infringement alleged to have been committed between September 3, 1886, and September 3, 1891; No. 225 for alleged acts of infringement between April 30, 1890, and April 15, 1891; No. 226 for alleged acts of infringement between April 15, 1891, and April 30, 1892; No. 224 for alleged acts of infringement between April 30, 1892, and September 14, 1895. The defendants in all four suits were not the same, but some persons were defendants in two or more

of them. All the defendants were, at the several times in question, directors either in the Boston Cash Indicator & Recorder Company or in the Boston Cash-Register Company. Further evidence was introduced tending to show (so we construe the somewhat vague phrases of the bill of exceptions) that part of the defendants organized the Boston Cash-Register Company for the purpose stated, and that part of the defendants, as boards of directors of the Boston Cash Indicator & Recorder Company, and others of the defendants as boards of directors of the Boston Cash-Register Company, controlled and directed all the business operations of the companies, respectively, and that part of the defendants, as boards of directors of the Boston Cash-Register Company, appointed one Chauncey H. Pierce, of Northampton, Mass., its general manager and managing director, giving him authority and power to conduct its business of manufacturing and selling registers in its behalf; and that from time to time reports were received by part of the defendants as directors at directors' meetings, and circulars were exhibited to them, and instructions by them given to continue the business of the last-named corporation, and to put the infringing machines upon the market, and to push their sale. Taking the whole record together, we think it sufficiently appears that there was evidence that some of these directions and instructions of the defendant directors were specifically concerned with registers of the infringing pattern. The record does not make it plain if these directions and instructions were limited to formal votes given by the defendants as members of the board of directors. It rather seems that they were not so limited, for, if they had been, it could hardly have happened, as stated in the bill of exceptions, that "there was a controversy whether they [the defendants] were acting as individuals or as directors." By reason of such acts of the defendants, or some of them, done while they were directors of one or the other above-named corporations, the plaintiff seeks to hold some of the defendants personally liable for infringement in each suit; and we are led to infer that the same question was raised in each of the four cases, and that evidence enough to raise it was offered in each, although the bill of exceptions is far from being clear about this.

We come now to the specific errors in the judge's charge, assigned by the plaintiff. The first six have been already dealt with. The twentieth assignment concerns the effect of the decision of the supreme court in *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 15 Sup. Ct. 434. Regarding this the learned judge charged the jury that this decision had no materiality in this proceeding, unless the jury should find that the defendants sustained an individual or personal relation to that case; and, by reason of individual and personal acts of adoption and control, became, in effect, parties thereto. He submitted, therefore, to the jury, this question: "Did these defendants, in their individual capacity, not officially, as a matter of fact, adopt and carry on the defense in that proceeding?" Regarding certain advances of money made by the defendants to the Boston Cash Indicator & Recorder Company for the purpose of carrying on the suit above mentioned,

he charged the jury that, if the "funds so obtained by the corporation were expended under the direction and control of the officers in charge of the interests of the corporation in respect to such litigation, then they [the defendants] would not be bound by it." As there was no evidence that any individual defendant was, in the sense of the law, in privity with the litigation in the supreme court, these instructions, which are the substance of the long extract from the charge, set out in the assignment, were plainly correct, and properly protected the defendants' right.

The twenty-third assignment sets out a portion of the judge's charge substantially as follows:

"Invention may be of two kinds: First. What is known as 'primary invention.' That means inventions of entirely new principles or new ideas,—principles and ideas which have not been used or been known. The other class is known as 'secondary inventions,' and are such as involve a combination of previously known principles or functions in such a way as to accomplish different or better results. It is not claimed for the Ritty and Birch device that it belongs to the first class,—that is to say, that it involves primary invention; but the claim is that it describes a new combination, and is therefore of the class known as 'secondary inventions.'"

This is a correct statement of the law, and applicable to the patent in suit. If the plaintiff wished to object to the use by the learned judge of the word "claimed," he should have excepted specifically to the judge's remark concerning the claim made; but this he has not done.

The requests asked for by the plaintiff and refused by the judge, which are set forth in the twenty-fourth and twenty-fifth assignments, were properly refused, because the words "assented to," contained in them, are too vague. We are not prepared to say without qualification that every director or officer who assents to an infringement is personally liable therefor.

The requests contained in the twenty-sixth and twenty-seventh assignments were sufficiently covered by the charge.

The twenty-eighth assignment concerns the refusal of the learned judge to give the following request:

"If the jury believe from the evidence that any of the defendants personally caused or aided in causing a corporation to be created, organized, or promoted for the purpose of manufacturing or selling machines that are an infringement of the first claim of the plaintiff's patent in suit, and that such defendants became officers or directors of such corporation, and that said corporation, while said defendants were officers or directors as aforesaid, proceeded to manufacture or sell said infringing machines, then the jury are instructed that said defendants who participated in the creation, organization, or promotion of said corporation, and in the control of its operations during the period while it was infringing as aforesaid, are themselves infringers of said first claim of the plaintiff's patent, and are personally liable to the plaintiff for their said infringement."

The principles of law underlying this request we have already sufficiently discussed, and, as there must be a new trial in any event, we need not now determine whether the request does or does not fit the record, and conform to law in every detail.

The plaintiff's requests for a ruling regarding the defendants William W. and Oscar Drew, set out in the thirty-first assignment, are

disposed of by the fact that upon the whole record it is clear that the plaintiff never sought in these suits to proceed for any infringements except those with which the defendants were connected through their relation to the infringing corporations. The request was therefore properly refused.

The thirty-second assignment concerns the refusal of the learned judge to give the following instruction, requested by the plaintiff:

"If the jury believe from the evidence that the Boston Cash Indicator & Recorder Company or the Boston Cash-Register Company infringed the plaintiff's patent by the direction or procurement of the defendants, or any of them, they then acting as directors of said infringing company, they are instructed that such acts of infringement were illegal, and were not within the scope of the lawful authority of such defendants as directors of such company to order or direct. The law gives directors of a corporation authority to perform only lawful acts; and when, under cover of their official position, they proceed to perform, or direct the company to perform, unlawful acts, they are therein acting outside their lawful authority, and thereby rendering themselves liable personally for any damages which may result therefrom. Even the government itself cannot authorize its agents to do unlawful acts, much less a mere corporation created under the authority of the government."

The last sentence of the instruction requested is irrelevant and immaterial, and there are in the rest of it several errors of form. Considering, however, what has already been said, we think that the request was sufficiently explicit to require the judge to charge the jury that a defendant who directed that infringing machines should be manufactured and put upon the market, and that their sale should be pushed, was not relieved from liability by reason of the fact that he was acting as director of a corporation, or in its behalf. The instruction requested was not given, but, on the contrary, the jury was instructed that the defendants were not liable unless they acted in their individual capacity in the specific acts of infringement, or gave directions outside of their ordinary and usual duties as directors or stockholders. In refusing the instruction requested, and in instructing the jury as he did, the learned judge was doubtless following *Nickel Co. v. Worthington*, 13 Fed. 392, decided in the circuit court for the district of Massachusetts. The opinion in that case does not, as we have shown, state the law correctly.

The requests contained in the thirty-third, thirty-fourth, and thirty-sixth assignments, regarding the loan of money by the defendants to the infringing corporations, do not state a correct rule of law, and as to some of them there is no evidence in the record making them relevant to the case at bar.

The request contained in the thirty-fifth assignment does not state the law correctly, for the reasons above given, inasmuch as one of its alternatives would hold the directors of a corporation individually liable for all the torts of the subordinate agents of the same corporation.

Regarding the thirty-seventh assignment, there is no evidence in the record applicable to the request contained in it.

The thirty-eighth assignment covers a long extract from the charge under such circumstances that it is impossible to say what questions it intends to raise.

The thirty-ninth assignment is concerned with the following paragraph of the judge's charge:

"Affirmative general directions as directors, or agents, or superintendents as to the general management, and scope, and conduct of the general business of the corporation would not render the directors, or stockholders, or agents, or superintendents liable. This would not be enough to charge them, provided you should find the corporation to have been organized in good faith, and for a supposed bona fide and lawful purpose. If you should find this, they would not be liable unless they acted affirmatively in their individual capacity in the specific acts of infringement, or gave directions outside of their ordinary and usual duties as directors or stockholders; and in that event they would be liable."

This paragraph, as a whole, does not leave upon the mind a correct impression of the law, though we have here no occasion to deny the general proposition contained in its first sentence. The questions of good faith and lawful purpose do not enter into this case, except so far as an issue is made that at least one of the infringing corporations was purposely organized as a sham, and as a cover for what in fact was merely the interest of individuals. And, for the reasons we have already given, the last sentence is also misleading, because, if any one of the defendants directed specifically the manufacture and sale of the infringing device, the law considers it immaterial whether, in that particular, he acted in his individual capacity or otherwise, and whether his directions were given while he was acting within or outside of his ordinary and usual duties as a director. So long as he was active within the limits which this opinion has pointed out, he could not properly raise the question which the last sentence in the paragraph recited permitted him to raise.

The fortieth assignment is concerned with the following paragraph of the charge:

"It becomes, or at least it may become, necessary for you to determine whether this corporate existence was founded in good faith or bad faith; whether it was created for the purpose of imposition, and for the purpose of avoiding the consequences of such imposition, or whether it was a supposed legitimate corporate business enterprise. If it was an imposition, a general scheme to avoid liability, as I have said, they would all be liable for the consequences of the infringement, if there were any, whether they actually or actively participated or not. This would be upon the ground that the defendants associated themselves together for the general purpose of promoting an unlawful business scheme, such general purpose rendering them liable for the acts of agents and officers acting within the scope of such general purpose or scheme. On the other hand, although the right or supposed invention upon which their enterprise was founded proved to be no invention, and therefore one not entitled to protection, they would not be liable while acting within the line and scope of their duty as agents and officers."

We are not called upon to determine if all the above statements are true without qualification. It appears that "one theory of the plaintiff's case was that the Boston Cash Indicator & Recorder Company and the Boston Cash Register Company were sham corporations, formed by the defendants" as a shield for their operations "in stealing the plaintiff's business and infringing its patents"; "and a further theory was that, even if these were regularly chartered companies, legitimately doing business, the directors were personally responsible for directing the company to commit a tort," and for

participating in it as directors. A part of the paragraph set out in the assignment refers to the first theory, and is favorable to the plaintiff. A part may refer to the second theory, though this is not altogether clear. As the exception was taken to the paragraph as a whole, it was not sufficiently specific, and cannot be sustained.

The remaining assignments of error were not urged in argument.

The following judgment is entered in each of these cases: The judgment of the circuit court is reversed, the verdict set aside, and the case remitted to that court for further proceedings in accordance with law; the plaintiff in error to recover of the defendants in error its costs in this court.

BROWN, District Judge, agrees with so much of the opinion as relates to interrogatories, but does not concur with the views of a majority of the court as to the liability of directors, nor in the conclusion.

CROSBY STEAM GAGE & VALVE CO. v. ASHTON VALVE CO.

(Circuit Court of Appeals, First Circuit. May 4, 1899.)

No. 264.

1. PATENTS—INVENTION.

In a safety valve, the making of an extension consisting of two rods, upward, within and through the top of the valve case, and above the muffler, for the purpose of affording means for controlling from the outside the steam-regulating device, does not, under the circumstances of this case, involve patentable invention.

2. SAME—SAFETY VALVES.

The Lohbiller patent, No. 496,058, for improvements in safety valves, is void for want of invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Crosby Steam Gage & Valve Company against the Ashton Valve Company for alleged infringement of a patent for improvements in safety valves. The circuit court adjudged that the patent was valid, and had been infringed by defendant, and entered a decree for complainant. From this decree, the defendant has appealed.

Ralph W. Foster (Joshua H. Millett, on the brief), for appellant.

James E. Maynadier and William Maynadier, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a suit against an alleged infringer by the holder of letters patent, issued April 25, 1893, to Anton Lohbiller, for improvements in safety valves. Only one claim is in issue (the third), as follows:

"The combination in a safety valve and muffler of a valve seat, valve, and a steam-regulating device encircling the valve seat, and extending upward within and through the top of the valve case, and above the muffler, whereby the regulating device may be operated without removing the muffler or any part of the valve case, all substantially as specified."

The case was heard in the circuit court, on the merits, on bill, answer, and proofs, and an interlocutory decree was entered for a master and an injunction, although the learned judge who sat in that court expressed doubt as to the validity of the patent. The only novelty covered by the claim in issue is the extension upward within and through the top of the valve case, and above the muffler, of means of controlling from the outside the regulating device. This extension, as shown in the drawings and specification, is by means of two straight rods passing vertically from the regulating ring, through the valve casing and the muffler, to points above the muffler and exterior to it. It is claimed that this was the first time in which such an extension appears in connection with a pop valve having a muffler. There is, perhaps, no doubt on the question of mere novelty; also, there is no doubt on the question of utility, as the device permits the regulating of the valve without removing the muffler, as stated in the claim.

The difficulty is on the question of invention. It is admitted that in the earlier art such extensions had been made through the casings of valves which had no mufflers. The thought involved in the mere idea of having some contrivance by which any interior work can be controlled through a rod extending exteriorly, thus avoiding the necessity of taking apart, is, of course, a primary one in all the arts; so that the suggestion of making such a connection in this case clearly involved no invention. This is illustrated by a patent taken out by the same patentee, dated November 17, 1891, for a safety valve without a muffler, in the specification of which, after describing a rod, called there a "pin," which serves the same purpose as the rods in the case at bar, and which pin did not extend through the upper part of the safety-valve case, he said:

"It is obvious that the pin might be extended upward, and have its wrench block secured at the top of the highest part of the casing if desired."

He added that great advantage would be derived therefrom when the valve is used on locomotive boilers. Moreover, there is nothing called to our attention, or which we have found, which shows that there was any difficulty in making the extension, or any ingenuity involved in doing it. We therefore necessarily conclude that no inventive idea is covered by the claim in issue; and, inasmuch as the decree of the court below, although an interlocutory one, followed a hearing of the merits on bill, answer, and proofs, and the whole record is before us, we are able to dispose finally of the case, in accordance with what is now the settled rule of practice. The decree of the court below is reversed, and the case is remanded to that court, with directions to dismiss the bill with costs; and the costs of appeal are awarded to the appellant.

HOGG v. GIMBEL et al.

(Circuit Court, E. D. Pennsylvania. May 26, 1890.)

DESIGN PATENTS—NOTICE OF PATENT—MARKING ARTICLES.

Under Rev. St. § 4900, if the patented articles sold by complainant are properly marked "Patented," either on the articles themselves or the inclosing package, this is general notice to the public, so that one who makes or sells such articles is liable for infringement, though he may in fact have been ignorant of the patent.

This was a suit in equity by William James Hogg against Gimbel Bros. for alleged infringement of a patent for a design for carpets.

Southgate & Southgate, for complainant.

John G. Johnson, for defendants.

MCPHERSON, District Judge. This case was heard upon bill and answer. The complainant, who is a manufacturer of carpets, is the owner of design patent No. 25,907, and has made and sold large quantities of carpeting embodying such design. The patent embraces two claims,—one for a carpet body, and the other for a carpet border; and, as the answer admits, both claims have been infringed by the defendants. They made sales of a body and a border that were exact copies of the complainant's design, but they seek to avoid liability by denying actual knowledge of the patent at the time the sales were made. This denial of knowledge in fact must be accepted as true,—no testimony having been taken,—and the question for decision, therefore, is whether other facts averred in the bill, and not denied by the answer, are sufficient to visit the defendants with the consequences of constructive knowledge. These facts are, as averred in paragraph 4 of the bill, that the complainant gave "sufficient notice to the public that the [design] is patented by affixing thereon the word 'Patented,' together with the date and year the patent was granted, or by affixing to it, or the package wherein said carpeting was inclosed, a label containing a like notice, and has complied in all respects with the statute in such case made and provided."

Upon these facts, I think that the complainant has fulfilled the obligation imposed upon him by section 4900 of the Revised Statutes. The point was decided in *Dunlap v. Schofield*, 152 U. S. 248, 14 Sup. Ct. 577, in which the supreme court declare that this section makes it the duty of every patentee or his assignee, and of all persons vending any patented article for or under them, to give the public sufficient notice that it is patented, by putting the word "Patented" upon it, or upon the package inclosing it, and then go on to say:

"The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against the infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article 'Patented,' or to the particular defendants by informing them of his patent and of their infringement of it. One of these two things—marking the articles, or notice to the infringers—is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him."

The same section was considered in this circuit in *Matthews & Willard Mfg. Co. v. National Brass & Iron Works*, 71 Fed. 518.

In the present case the undisputed fact is that the complainant gave notice to the whole public, thus including the defendants, by marking properly the manufactured articles or the inclosing package. This being so, it is not material that the defendants did not have actual notice or knowledge of the patent. It is also undisputed that the defendants have infringed both claims of the complainant's patent, and I am therefore of opinion that a decree must be entered imposing the statutory penalty of \$250, under the act of February 4, 1887 (24 Stat. 387; 1 Supp. Rev. St. p. 533), for each of the two acts of infringement.

A decree may be drawn containing the preliminary injunction and making it perpetual, and directing the defendants to pay the sum of \$500, with costs.

OWATONNA MFG. CO. v. F. B. FARGO & CO.

(Circuit Court, D. Minnesota. February 1, 1899.)

1. PATENTS—SUIT FOR INFRINGEMENT—PARTIES.

While the owner of the title to a patent is for technical reasons a necessary party to any suit for its infringement, where the complainant in such a suit in equity is the owner of the exclusive right to manufacture and sell the patented article in the United States he has all the substantial right to the relief and to the recovery, the owner of the title being only a formally necessary party, who may be brought in by amendment, and the complainant may be permitted to show, by supplemental bill, that he acquired the technical title to the patent immediately after the commencement of the suit, and in such case the fact that the prior owner was not made a party will not defeat the suit.

2. SAME—INFRINGEMENT—COMBINED CHURN AND BUTTER WORKER.

The machine described in the Disbrow patent, No. 490,105, for a combined rotary churn and butter worker, while not the first to embody the idea of combining the two functions, was the first to perform the double function in such satisfactory manner as to bring it into extended and general use, and the patent is entitled to the liberal construction in respect to equivalents accorded to pioneer inventions. It is infringed by a machine different from that described therein only in respect to the gearings, which are either merely changed in form, without any substantial change in device, or in which obvious mechanical equivalents are substituted for some of the parts in the patented machine.

This was a suit in equity by the Owatonna Manufacturing Company against F. B. Fargo & Co. for alleged infringement of a patent.

Paul & Hawley, for complainants.

Benedict & Morsell, for defendants.

LOCHREN, District Judge. The complainant, a Minnesota corporation doing business at Owatonna, in that state, brings this suit to restrain the defendant, a Wisconsin corporation, from infringing patent No. 490,105, issued January 17, 1893, to Reuben B. Disbrow and Darius W. Payne for combined churn and butter worker, and to recover damages for past infringement. The defendant, be-

fore answer, moved to have the service of the subpoena set aside and vacated, on the alleged ground that it was a corporation and citizen of the state of Wisconsin, having no business, place of business, or agent in the state of Minnesota. On the showing made then, the motion was overruled, but, on the evidence taken in the cause, the defendant on the hearing renews the same objection to the jurisdiction of this court. The defendant, as stated, is a Wisconsin corporation, having its principal place of business and its manufactory for churns and dairy machinery and implements at Lake Mills, in that state. It is admitted that for a considerable time prior to December 22, 1896, it kept a store for the sale of its manufactured articles, and also dairy supplies manufactured by others, which it also dealt in, at Nos. 32 and 34 East Fairfield avenue, in St. Paul, Minn., and that this store in St. Paul was advertised by defendant as its branch house, and that C. E. Frink was the manager, and J. L. Crump the assistant manager, of that store or branch house. The evidence shows that about December 22, 1896, the principal officers and stockholders of the defendant formed a corporation under the general laws of the state of Minnesota, having the same name as the defendant, and became large stockholders thereof, taking in also, as stockholders, the said J. L. Crump and his wife, who is the daughter of the vice president of the defendant, but no other persons not officers and stockholders of defendant; and that this Minnesota corporation has ever since continued to carry on the same business at the same place in St. Paul, under the same manager and assistant manager, with no change in signs, circulars, or advertisements, making periodical detailed accounts of the business of the St. Paul house to the defendant, which has continued to advertise the St. Paul house as the branch house of defendant, as before said Minnesota corporation was formed. The whole evidence is persuasive that the business of the St. Paul house is still in fact the business of the defendant, and that the Minnesota corporation is the agent of the defendant, as are also its manager and assistant manager. The service of the subpoena was therefore sufficient.

The defendant urges that the suit should be dismissed, because when it was commenced the title to the patent was not in the complainant, but in the Disbrow Manufacturing Company. Disbrow and Payne, the patentees, by contract in writing, on October 2, 1893, granted to the complainant the exclusive right to manufacture and sell throughout the United States combined churns and butter workers, under said patent 490,105. As this writing did not by its terms convey to complainant the exclusive right to use the patented invention, it did not, under the decision in *Waterman v. Mackenzie*, 138 U. S. 255, 11 Sup. Ct. 334, amount to a transfer of the title to the patent, and therefore must be classified as a license, leaving the holder of the title a necessary party to any suit for infringement of the patent for technical reasons, although, in every case of infringement by the unauthorized manufacture or sale of the patented article, the complainant alone would, in equity, be entitled to all damages recovered. The complainant could even maintain an

action against the owner of the patent, should he, after the grant of such exclusive license, manufacture and sell such patented article in the United States; and in the case of suit against other infringers, if the owner of the patent refused to join as complainant, he might be brought into the suit by being joined as defendant.

In a suit in equity, where the complainant has all the substantial right to the relief and to the recovery, if he omits to join a technically necessary, but really formal, party, he will be allowed to bring such party in by amendment; and in this case, as the complainant actually acquired the technical title to the patent just after the suit was begun, it was properly allowed to allege that fact by supplemental bill. There was no longer any reason to make the prior holder of the title to the patent a party, as, even in respect to the past infringements alleged, the equitable and substantial right of recovery was in the complainant alone.

In respect to the validity and scope of the patent, and to the charge of infringement, it is true that, prior to this Disbrow patent, rotatory cylindrical churns, with slats or flights on the inner surface of the periphery, to agitate the cream, were in use, and in some cases were so arranged that after the churning was done, and the buttermilk drawn off, rollers could be introduced within the churn for kneading and working the butter, brought up by the slats and dropped upon the rollers by the rotary movement of the churn. The Disbrow churn, however, seems to have been the first which without removing any of the parts from the machine, or introducing into it any further or other appliances, could be changed in a moment, by a shift of the gearing, effected by the movement of a lever, from a successful churn to a successful and satisfactory butter worker. The value of the invention appears to have been promptly recognized by dairymen, and I think the patent must be regarded as entitled to that liberal construction in respect to equivalents which are accorded to patents for what are called "pioneer inventions." Although prior inventions disclose the conception of the idea of combined churns and butter workers, and the construction of such machines, of varying utility and convenience, the Disbrow machine differed from all the others, and the evidence fairly shows that it was the first machine to perform this double function in such satisfactory manner as to bring it into extended and general use.

Without attempting any technically accurate description, it may suffice to say that the Disbrow machine, as described in the patent owned by complainant, has a cylindrical rotatable drum, the two heads of which have openings in the centers, and are supported by metal spiders fastened to the outside of the rims of the heads around the openings and journals upon the frame at each end, outside the drum. The openings in the heads are closed by independent heads or disks, on the inner side, through which pass the journals of two rollers, side by side, to crossheads outside the heads of the cylinder at each end; which journals are thrown out of gear by a lever movement when the disks are clamped to the heads, to close the openings in churning. Then the rollers revolve with the

cylinder in churning, and perform no function unless in slightly aiding in the agitation of the cream. When the churning is completed, the buttermilk is drawn off, the disks covering the openings in the heads are unclamped, and the journals of the rollers, by a slight movement endwise, by means of a small lever, are slipped into gear, and no longer revolve with the cylinder, but, lying side by side near the center of the machine, turn towards each other, each on its own journal, and squeeze and knead the butter as it is carried up by the slats of the revolving cylinder, to drop by gravity upon the rollers, when, after passing between them and falling to the bottom of the cylinder, it is again carried up and dropped upon the rollers as before, and this process continued until the butter is sufficiently worked. The evidence shows that the complainant, almost immediately after beginning the construction of these machines, adopted a mechanical change from the form shown in the patent, by bringing the rear crosshead upon which the journals of the rollers rest at that end within the cylinder, and, in the stead of the loose head or disk at that end, a shaft to support that crosshead passes in a collar or gudgeon through the center of the rear head of the cylinder, supporting that crosshead, and the ends of the rollers resting thereon, upon the frame, outside the cylinder. This device is plainly the mechanical equivalent of that shown and described in the patent, and performs the same functions in the same way.

The defendant, in its earlier construction of combined churns and butter workers, of the kind of which the so-called "Kilkenny Machine" is a sample, copied, with immaterial variations, the machine, with two open heads, described in the Disbrow patent. In its later construction of the kind called its "Style A Machine," it copied, with like immaterial variations, the machine as made by the complainant, with the rear crossheads within the cylinder, as above described. The differences between the defendant's machines and those of the complainant, in each of these instances, are in respect to the gearings, and consist in the adoption of obvious mechanical equivalents or mere changes in form, in respect to which any skilled mechanic can vary the manner and form indefinitely, without any substantial change in the devices. The intent of the defendant to infringe the Disbrow patent, and use the patented invention in disregard of complainant's rights, is evidenced, as I think, by its procuring the transfer to it of the technical title to that patent, subject to complainant's rights, in connection with its employment of Disbrow, the patentee, and Brown, the mechanic who had constructed for Disbrow his first experimental machine, and by its procuring of one of complainant's machines for use in making patterns, and also by its attempts, with the assistance of Disbrow and Brown, to overthrow the Disbrow patent, upon the claim, which it failed to sustain, that Brown, and not Disbrow, was the real inventor. Let decree be entered affirming the validity of said patent No. 490,105, and complainant's title thereto, and adjudging that the defendant has infringed the same, and that complainant is entitled to recover of defendant the gains

and profits it has received from such infringement, and awarding a perpetual injunction, and an accounting of such gains and profits as prayed in the bill and costs.

CONSOLIDATED FASTENER CO. v. AMERICAN FASTENER CO.

(Circuit Court, N. D. New York. May 21, 1899.)

No. 6,713.

1. PATENTS—PRELIMINARY INJUNCTION—PUBLIC ACQUIESCENCE.

To take the place of an adjudication, public acquiescence must be long continued, under such circumstances as to induce the belief that infringements would have occurred but for the fact that a settled conviction existed in the minds of manufacturers, vendors, and users that the patent was valid, and must be respected. A patent which is not molested simply because it is for no one's interest to infringe is not "acquiesced" in, within the legal acceptance of that term.

2. SAME—PROOF OF INFRINGEMENT.

To obtain a preliminary injunction, the complainant must, on the question of infringement, satisfy the court beyond a reasonable doubt.

3. SAME.

The Mead patent, No. 437,161, for a garment fastener, considered, and a preliminary injunction denied, because the proofs left the question of infringement in doubt.

This was a suit in equity by the Consolidated Fastener Company against the American Fastener Company for alleged infringement of a patent. The cause was heard on a motion for preliminary injunction.

John R. Bennett and Odin B. Roberts, for complainant.
W. H. Kenyon, for defendant.

COXE, District Judge. This is a motion for a preliminary injunction seeking to restrain the infringement of the first claim of letters patent No. 437,161, granted to Albert G. Mead, September 23, 1890, and now owned by the complainant.

The patent has never been adjudicated. There has been no general acquiescence. Infringement is stoutly denied. Where these conditions concur the rule is well nigh universal that a preliminary injunction should not issue. *Smith v. Meriden Britannia Co.*, 92 Fed. 1003, and cases cited.

In order to take the place of an adjudication acquiescence must be long continued in such circumstances as to induce the belief that infringements would have occurred, but for the fact that a settled conviction existed in the minds of manufacturers, vendors and users that the patent was valid and must be respected. A patent which is not molested simply because it is for no one's interest to infringe is not "acquiesced" in within the legal acceptance of that term.

It is true that the Mead patent has been in existence since September, 1890, and has not been infringed; but on the other hand it is asserted, and not contradicted, that neither Mead nor the complainant ever made and put upon the market a fastener em-

bodily the device covered by the first claim. It never went into commercial use.

Upon the question of infringement the complainant must, in order to obtain the summary relief demanded, satisfy the court beyond a reasonable doubt.

The claim covers "a female member made in two parts" and it is conceded that if the claim be strictly construed and limited to two parts, the defendant does not infringe, for the reason that more than two parts are actually assembled in the construction of its button-hole member.

That the claim is susceptible of the construction contended for by the defendant cannot be denied. It is enough for the present motion that the court entertains doubt as to the propriety of the complainant's contention. For manifest reasons the court should not at this stage of the litigation extend the discussion beyond the point necessary for the decision of the motion in hand.

The motion must be denied.

BUNDY MFG. CO. v. DETROIT TIME-REGISTER CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1899.)

No. 604.

1. PATENTS—INFRINGEMENT—JOINDER OF ELEMENTS.

One may not escape infringement by the mere joinder of two elements into one integral part, if the united part effects the same results, in substantially the same way, as the separate parts before the union.

2. SAME—MECHANICAL EQUIVALENTS—WORKMEN'S TIME RECORDERS.

In a workman's time recorder, the mere substitution, for a turning key having the workman's number on its ward, of a pushing key having such number upon a fin, the function of each being to set in motion mechanism which operate the impression devices, is but the use of a mechanical equivalent.

3. SAME.

A patent for a workman's time recorder, in which the printing is done by pressing a recording strip against the type by a blow from an impression hammer, is infringed by a mechanism in which the type is pressed upon the recording strip by pressure only. The two methods are mere mechanical equivalents.

4. SAME—CONSTRUCTION OF PATENT.

To be entitled to the benefit of the doctrine of equivalents, it is not essential that the patent shall be for a pioneer invention in the broad sense of that term. If the invention is one which marks a decided step in the art, and has proved of value to the public, the patentee will be entitled to the benefit of the rule of equivalents, though not in so liberal a degree as if his invention were of a primary character.

5. SAME—MERITORIOUSNESS OF INVENTION.

The meritoriousness of an improvement depends—First, upon the extent to which the former art taught or suggested the step taken; and, second, upon the advance made in the usefulness of the machine as improved.

6. SAME—ESTOPPEL BY ACCEPTING ACTION OF PATENT OFFICE.

To be estopped by the action of the patent office, the patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed.

7. SAME—WORKMEN'S TIME RECORDERS.

The Bundy patent, No. 452,894, for a workman's time recorder, construed, and *held* infringed as to claims 3 and 4 by the time recorder of the Watson patent, No. 515,805.

8. SAME.

The Bauer patent, No. 305,882, for a watchman's time detector, construed, limited, and *held* not infringed as to claim 4 by the time recorder of the Watson Patent, No. 515,805.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Alan D. Kenyon and Wm. Houston Kenyon, for appellant.
James Whittemore, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. This is a bill to restrain infringement of the third and fourth claims of patent No. 452,894, of May 26, 1891, to W. L. Bundy, for a workman's time recorder; and also the fourth claim of patent No. 305,882, of September 30, 1884, to W. Bauer, for a watchman's time detector. The defendant is a corporation known as the Detroit Time-Register Company, and is engaged in making and selling a workman's time recorder, under a patent to N. M. Watson, No. 515,805, of March 6, 1894. Bundy's invention relates to time-recording mechanism actuated directly by a clock, and connections with a clock, by which the time of the arrival or departure of workmen, clerks, or other employes may be recorded by the employes themselves. His specifications state that his object is "to provide a mechanism by which each workman or employe in a shop or factory, or the like, will, by his own act, accurately record the time of his arrival or departure, thereby preventing all disputes, each workman having his own key, and being known by an arbitrary number, which is embossed upon the bit of the key, and, upon its being inserted and turned, will present the embossed number in alignment with the numbers upon the hour and minute recording wheels, and through the agency of a hammer and pad thereon, actuated by the key, and a ribbon and strip of paper in proper juxtaposition the hour, minute, and the number of the key will be printed upon the paper, and a feed mechanism will shift the paper and ribbon a fixed space, ready for the operation of the printing mechanism by the next workman and the recording of his time and the number of his key, as before. Then the 'time' of each workman is made up from the paper strip, crediting each one with the time between his arrival and departure, whether it be full time or only a part thereof." The claims which are here involved are as follows:

"(3) A clock movement and hour and minute recording wheels, synchronous mechanism actuating said wheels, a key provided with a bit carrying numbers, brought into alignment with the hour and minute wheels by the turning of the key, a recording strip, and an impression hammer, in combination as set forth.

(4) A clock movement, hour and minute recording wheels, synchronous mechanism actuating said wheels, a key provided with a bit carrying numbers brought into alignment with the hour and minute wheels by turning of the key,

a ward upon the key, a recording strip, and an impression hammer operated by mechanism actuated by the ward of said key as it is turned, in combination as set forth."

The patentee does not claim any novelty in any of the parts or elements of his combination. The claims involved are distinctly for the union or combination of all the elements arranged and combined together so as to accomplish a given result, in the manner described. Neither does the complainant insist that the structure of the defendant includes the precise mechanism described in the specifications of his patent, nor that the elements combined to produce the results attained are identically the elements described in the patent to Bundy. What is claimed is this: That both the elements and actuating mechanism found in the structure of the defendant are mechanical equivalents for those found in the Bundy machine, and that they are combined in substantially the same way, so that the mechanical equivalent for each element performs substantially the same function of the corresponding element in the complainant's machine; and that the differences between the elements combined in the two machines, and in the mode of arrangement, are merely colorable according to the rule forbidding the use of known equivalents.

The learned judge who decided this case in the circuit court, after an elaborate consideration of the claims of the Bundy patent in the light of the history of the art and of the occurrences in the patent office, reached the conclusion that the Bundy patent was not entitled to a liberal construction, nor to the benefit of the doctrine of equivalents, but was limited to the specific device described and claimed by him, and that, thus construed, the defendant's structure did not infringe. In this interpretation of Bundy's invention we are unable to agree. Our inability to agree with the conclusions of the circuit court results from the view we take of the meritoriousness of Bundy's combination in producing a simple and accurate time recorder, capable of being used by a very large number of workmen in rapid succession, and without danger of confusion or error. The results attained by him were such as to distinctly mark the line between success and failure, and the rapid occupation of the field by his invention serves as evidence that the public for the first time realized that in his time recorder had been found a practical structure, which accomplished accurately and simply what no previous invention would do. It is manifest from the conditions under which such a mechanism must be operated, as well as from the results sought by its use, that to be efficient it must be capable of correctly recording in rapid succession, not only the time of arrival or departure, but some number or mark by which each of an indefinite number of employes may be distinguished from all of his associates in connection with the record of his time. But this record must be one which can be automatically made by the machine when set in motion by the workman. This condition makes it of the highest importance to the usefulness of the recorder that the act to be done by the workman shall be single and simple, so simple that employes of every grade of intelligence shall be capable of operating the machine without liability of mistake

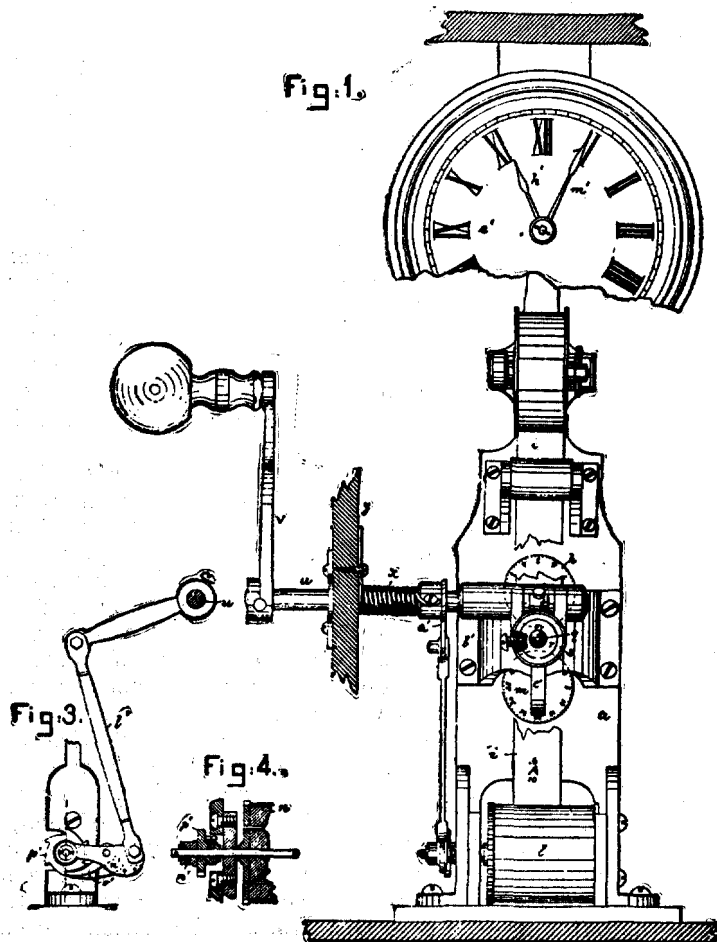
in the record or injury to the machine. This was the problem which required solution in order to produce a practical time recorder, and this problem is fully met in the invention of Bundy. But it is said that, if the claims of his patent are so broadly construed as to give him the benefit of a liberal application of the rule of equivalents, it will be found that he was anticipated; and for the purpose of limiting Bundy to the precise structure described by him the defendants have gone very deeply into the so-called "history of the art." For this purpose a series of patents for watchman's clocks have been introduced, including the following: J. E. Buerk, August 25, 1865; Anton Myers, No. 117,442, of 1871; L. Aldridge, of 1875; W. Imhauser, of 1876; and W. Bauer, No. 305,882. The general nature of the machines represented by the patents referred to, and their uses is fully discussed and explained in *Imhauser v. Buerk*, 101 U.S. 647. The learned counsel for defendant, in his brief, thus describes these clocks, and the limitation upon their usefulness, by saying:

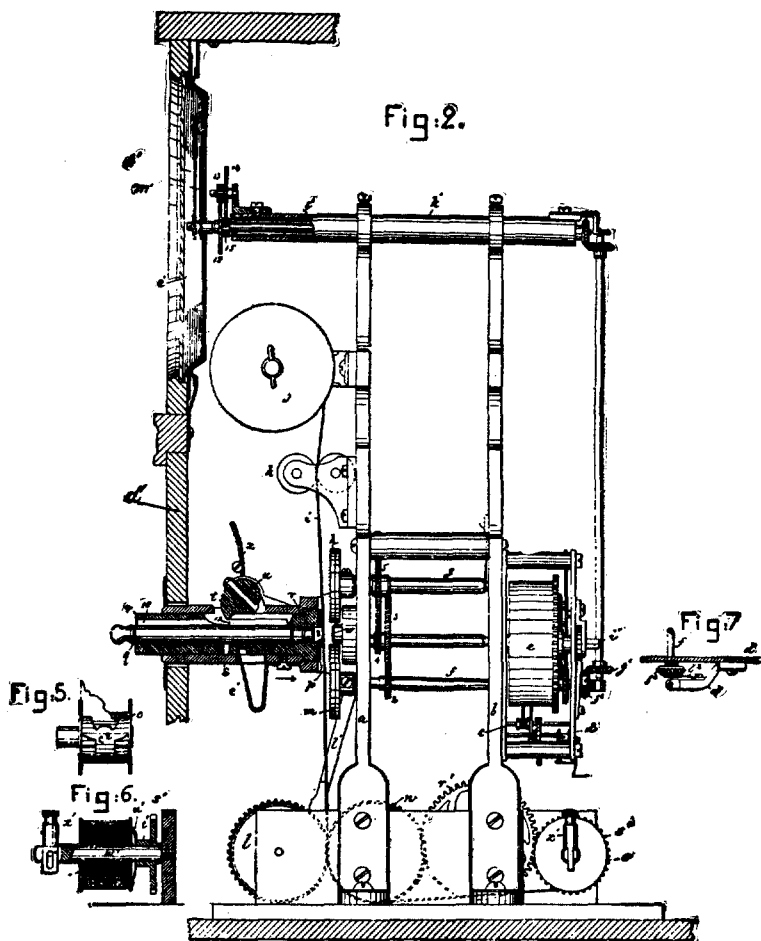
"In all these watchman clocks, however, the recording strip was moved by the clock, and was synchronized therewith, so that they were not adapted to be used by a large number of watchmen in quick succession, because if so used, they would print in the same place; but were rather intended for use by one or a few watchmen at different intervals of time. In other words, there was no paper feed after each operation."

It is true that in a patent to B. Bocklin, No. 199,181, for a tell-tale clock, there is found a feeding device by which the recording strip is fed forward with each operation. But Bocklin's invention, though embodying hour and minute recording wheels, synchronized with a clock, and a recording strip carried forward with each operation of the machine, was in fact intended only for use by watchmen who might record thereon the time of call at the station. There was no way by which the machine could be used by more than a very few watchmen, because no means for identifying a large number of employes was included in the invention. The problem was a distinct one. A watchman's clock, to be used by one or two or three watchmen, or possibly as high as seven, was well known. But such machines were not adapted for use as time recorders for an indefinite number of records made in quick succession. The evolution of a practical workman's time recorder out of the improved watchman's clock of either Bauer or Bocklin required the discovery and application of mechanism by means of which each of an indefinite number of employes of varying degrees of intelligence and care might, by a single and simple act, identify himself in association with a record of the exact time of doing that act. This involved invention. This is just what Bundy was the first to do, in a way which met all the conditions requisite to a time recorder which should rapidly, accurately, and without danger of mistake keep the time for a great number of men, who might arrive or depart in quick succession. A number of others sought to accomplish this end before Bundy made the invention now involved. Those which are regarded as the closest anticipations are the patents of Lane & Hill, No. 210,788, dated December,

1878; C. S. Haskell, No. 319,092, dated June 2, 1865; W. L. Bundy, No. 393,205, dated November, 1888; and of A. Dey, No. 411,586, dated September 24, 1889. The patent in suit to W. L. Bundy follows all of these, and is dated May 26, 1891. That which is the closest approximation to Bundy's patent is also the first in time of those mentioned, being the patent to Lane & Hill. This structure is shown in Figs. 1 to 7, inclusive, set out below.

It contains, like all patents for time recorders, a clock movement, hour and minute recording wheels, h and m, synchronous mechanism for actuating these wheels, a movable recording strip, i, and impression mechanism for pressing type on the recording wheels, h and m, and upon the end of the so-called "key," q, against the recording strip which runs between the type upon the registering time wheels, and the type recording the workman's number carried





on the end of the key, q. No inking ribbon is used, the record being embossed. The so-called "key," q, is not a key in any true sense, inasmuch as it does not set in motion or actuate any mechanism whatever. It is properly an elongated type, the type being carried on its inner head, 8. The type carried in this way represents the number distinguishing the workman carrying and using the particular key. This key is inserted in a slot in the plunger, r, in a sleeve, s, as shown in Fig. 2. The fin, 10, shown on the key in Fig. 2, performs no function in operating the mechanism, and serves only to keep the key in an upright position. This machine is operated by inserting the key, 9, in the plunger, r, and then grasping and turning the handle, v, shown in Fig. 1. The fin, 10, is notched, as shown by 11 in Fig. 2, "as is also the shank of the plunger, r, to permit the cam, t, or an arm or toe on the shaft, u,

when turned by the workman seizing the handle, v, to descend into an opening in the sleeve, s, and act against the shoulders of the key and of the plunger, force the key, plunger, and pad forward, and press the strip, i, against the registers, h, m, and emboss or imprint upon the strip the hour and minute of the day at which the movement took place. The head, 8, acts against the bed, w, placed opposite it, behind the strip, so that with each record of hours and minutes there also appears a letter, character or number to designate a person." This embossing, it will be noticed, occurs on both sides of the recording strip; that is, the number carried on the workman's key is embossed on one side, while the figures representing time are embossed upon the opposite side. This invention was never put into practical use, none being ever sold or made for purposes of sale. The mechanism of the Lane & Hill device is put in motion, not by the operation of any key, but by the handle, v. The key is merely an elongated type, and performs no function except to carry into proper position the type on its end, and to act in conjunction with the plunger into which it is inserted as a part of the impression mechanism by which the embossing is done. The handle, v, actuates the mechanism for feeding forward the recording strip as well as the impression mechanism by which the printing is done. The defect in this device as a practical workman's time recorder is that its operation requires two entirely distinct acts to be done by the workman: First, he must insert the key in the slot of the plunger far enough for the cam, t, to engage the notch, 11; and, second, he must grasp and turn the handle, v, with the requisite force to press the plunger forward and do the work of embossing. The necessity for doing two distinct things is in itself most objectionable in a device of this kind. The mechanism was liable to injury if the key is not inserted far enough to enable the cam to engage the key in its notch, and was liable to become jammed in the plunger. Excessive force, altogether likely when men are crowding and indifferent, applied to the crank handle, is likely to result in injury to the crank by loosening or detaching the handle from the shaft. All of these defects are pointed out by experts, in addition to the fact that the operation of the machine is necessarily much slower than that of one requiring only one simple act by the operator. This invention was never put into practical use, none having ever been made for the market.

The Haskell patent is wholly unlike the Bundy in material respects. Haskell attempted to solve the problem of identifying the workmen by requiring them to write their names or numbers upon the paper strip and then to print the time by revolving a handle. The Bundy patent of 1888 undertook to accomplish the desired result by placing numbers representing the different employes upon wheels called "operators' wheels" within the casing of the clock. The workman's number is brought into alignment with the type upon the time-recording wheels by lugs upon the key of different shapes and lengths, operating through a complicated and delicate mechanism to move the

operator's type wheel. The intricacy and delicacy of the mechanism necessary to bring the particular number desired into alignment was such as to make the machine unreliable; and of no practical value whatever. It was but a toy machine, and was worthless for actual use. The Dey machine was another which placed the workman's number upon an operator's type wheel inside the machine. These wheels were connected with indicators on certain index plates on the face of the recorder. The workman was first required to turn the indicator opposite to the desired number on the index plate, which brought the corresponding number on the operator's type wheel into alignment with the type-recording wheels. Then the workman is required to pull down a lever which sets in motion the mechanism which does the printing, and feeds forward the strip and inking ribbon. This constituted the state of the art when Bundy made the invention covered by his patent of 1891. There was no practical operative machine which fully met the conditions incident to the successful use of such a recorder, where both simplicity and accuracy were essentials to usefulness.

The Bundy time recorder is a structure which automatically records upon a movable recording strip the time of the arrival and departure of employes, and, opposite the time, records the individual mark or number distinguishing the different workmen, so that the precise time of the arrival of each workman is distinctly recorded. Each workman is furnished with a key, upon a bit or ward of which is a number in type, by which the particular workman is distinguished. The record is made by the simple operation of inserting and turning the key. The recording strip of the claims is a movable strip fed forward with each turning of the key, and with this strip the inking ribbon is also carried. The single and simple operation of turning the key not only brings the type printing the workman's number into alignment with the type on the time recording wheels, but by the same operation the ward of the key sets in motion mechanism within the machine by which the recording strip and inking ribbon are fed forward, and also actuates suitable impression mechanism by which the type carried on another ward of the key for printing the workman's number and the type upon the time-recording wheels for printing the time indicated by the clock, are brought into contact with the inking ribbon and recording strip and a printed record made. The very essence of this invention lies in Bundy's key and its functions, for by the simple and easy operation of that key the work of aligning, printing, and feeding is done. This structure is sufficiently illustrated by Figs. 1, 3, 4, 5, 10, 11, and 12 of the drawings of the patent, which are set out on following pages.

Fig. 1 is a front elevation of a clock, having its front broken away to show the recording mechanism. Fig. 3 is a side elevation of the recording mechanism, showing the impression hammer and helve in partly dotted lines. Fig. 4 is a top plan of the hour and minute recording wheels, 10 and 11, the mechanism for actuating them, inserted and turned into position in alignment with these wheels, ready for the making of the impression, as shown in Fig. 3. Fig. 7

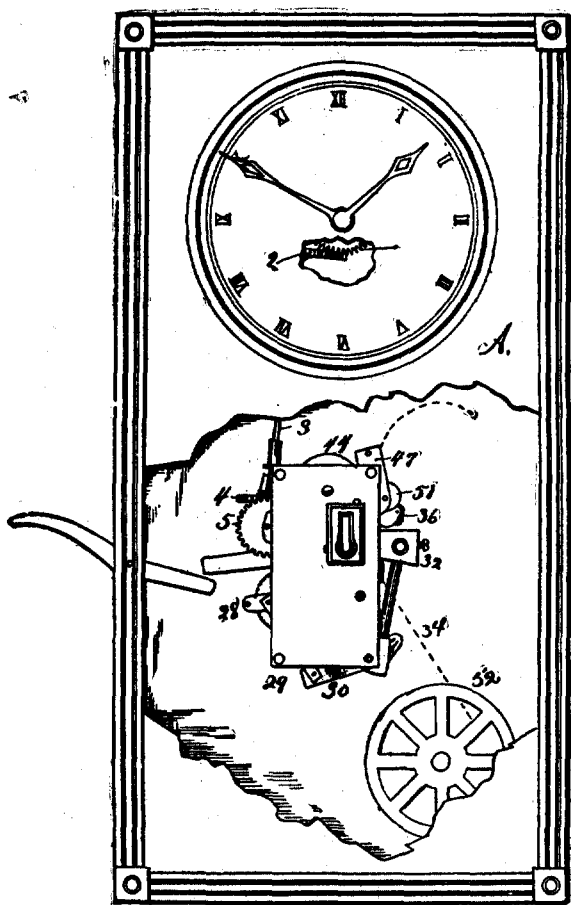


Fig. 1

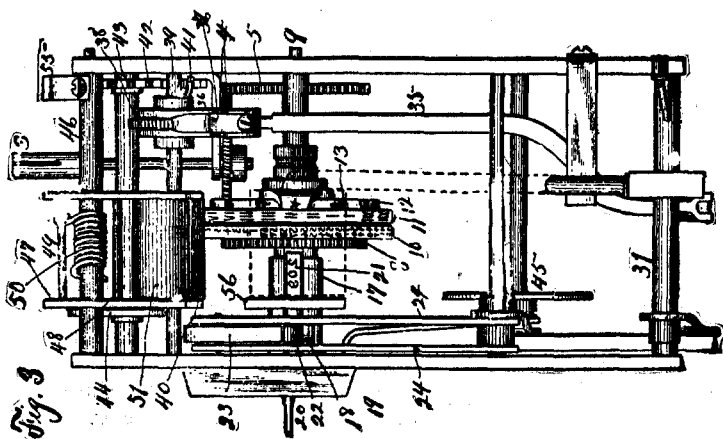
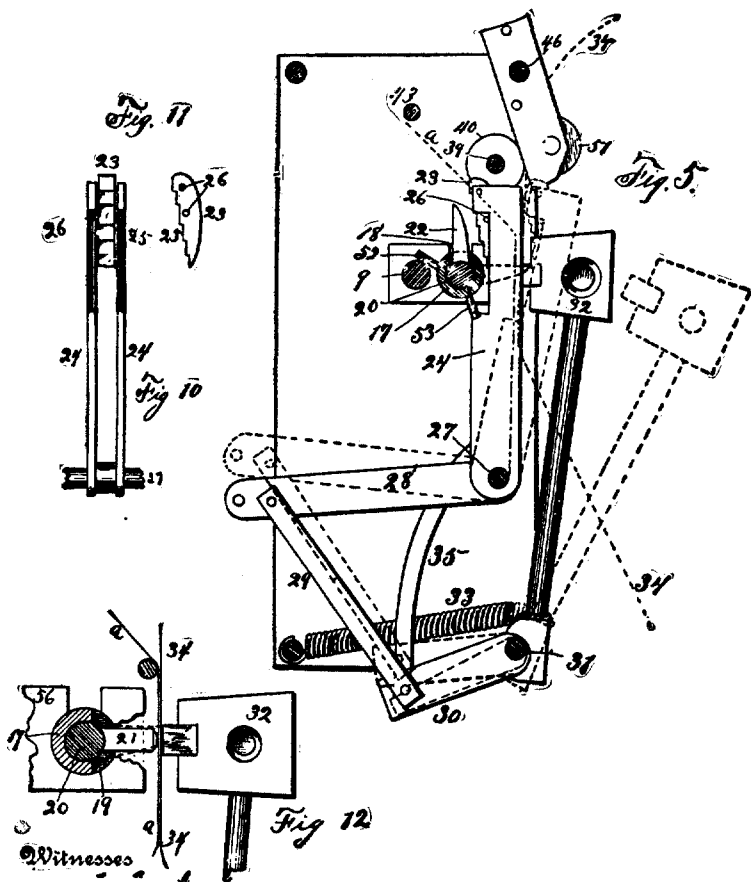
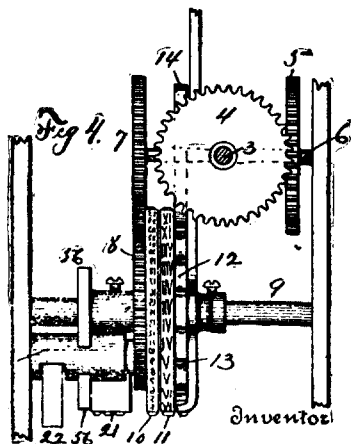
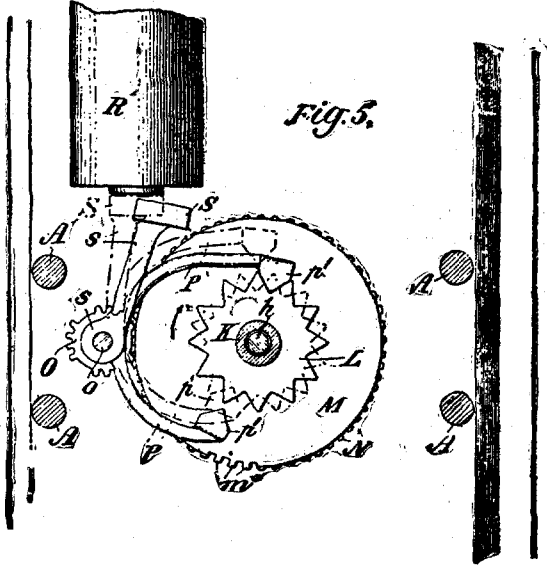
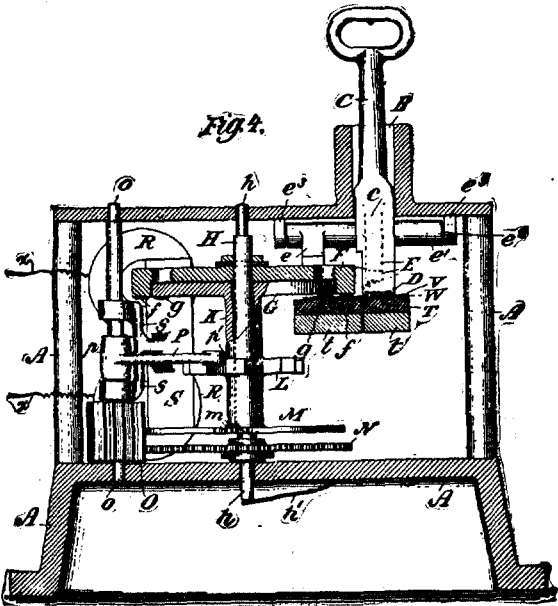


Fig. 2





The following are the material parts shown by these drawings: First. Hour and minute recording wheels, F and G, with type upon their peripheries representing the hours and minutes. Second. Synchronous mechanism between the clock movement, not shown, and the time-recording wheels, F and G, by which these wheels are actuated. Third. A recording strip, V, and an inking ribbon, W, which are fed forward by operation of the key each time it is inserted and pushed. Fourth. An impression mechanism consisting of the key, C, the arms, E, e, rocking bar, é, wheels, F and G, and the printing cushions, T, t. Fifth. The key, C, carrying the workman's number on its end, and having a fin or projection, c, on one side, as shown in Fig. 2. This key is inserted in keyhole, B, and is then pushed inward as far as it will go. This inward thrust of the key brings the workman's number on the key into alignment with the type upon the recording wheels, F and G. The same inward thrust causes the fin or ward, C, to strike arm, E, of rocking bar, e', and depresses it. Arm, e, being fixedly secured to rocking bar, e', is also depressed. In its downward course, arm, e, strikes against hour wheel, F, forcing it and the minute recording wheel, G, downward. The downward pressure upon the type-recording wheels being simultaneous with the thrust of the key, the workman's number and the type upon the time wheels are simultaneously pressed against the recording strip and inking ribbon and printing cushions, T, t, and effect the printing by force of the inward thrust given the key by the operator. The printing of the workman's number is done independently of the mechanism by which the type on the time wheels are made to print. The stem of the key, when pushed in, passes by the rim of the outer wheel until it strikes with its end against the recording strip and inking ribbon on the printing table or cushion, T. Were it not for the engagement by the projecting fin or ward of the key with the arm, E, the workman's number would alone be embossed or printed. The function of the fin, e, is, through connecting mechanism, to carry down the wheels, F and G, endwise, and press them against the same cushion simultaneously with the number on the end of the key. "Thus the key," says Mr. Barthel, the expert for defendant, "in defendant's machine not only makes the imprint of its own number by the pressure of the hand, but it also presses the hour and minute wheels against the recording strip and printing table to produce a record of the time in connection with that of the key." The pressure upon the key by the hand of the operator is, however, applied to the time-recording wheels only through the rock shaft and arms, E, e, for the key does not come into direct contact with those wheels. The hammer-like force of the inward thrust of the key is transmitted to the recording wheels by the interposition of the rock shaft and its arms, with which the fin or ward of the key engages as it is thrust inward. But the defendant contends that, although its structure greatly resembles that of the complainant, yet they do not infringe, for the following reasons: (1) Because defendant does not use a turning key; (2) defendant does not use a key which carries a number on its bit; (3) defendant does not use an impression hammer.

It is true that defendant does not use a turning key. It has sub-

stituted for a turning key one which, instead of turning, performs the same functions by an inward thrust. The so-called "fin" is the equivalent of the ward upon Bundy's key. It does the same work by a thrust, which, in Bundy's machine, is done by turning. The ward or projection in each engages with other mechanism, and transmits motion or sets other mechanism in motion. The defendant's key carries the workman's number upon the end of its stem, instead of upon a projecting piece of metal upon the side of its stem. The so-called "bit" of the complainant serves no other purpose than to carry the number so that, when the key is operated, the number will be in alignment with the time-recording wheels. The "bit" does not set in motion any other mechanism, and performs no function that is not performed by the end of the stem of defendant's key. The most insistent contention of the defendant is that it does not use the "impression hammer" of the Bundy patent. The fourth claim of the Bundy patent includes as an element "an impression hammer, operated by mechanism actuated by the ward of said key as it is turned." The contention is that Bundy is limited to an impression hammer operated by mechanism set in motion by the ward of a turning key, and that it is open to another to substitute for an impression hammer a different impression mechanism, and that it (the defendant) neither uses a hammer nor is its impression mechanism operated by mechanism actuated by the ward of a key "as it is turned." The difference between the two methods of printing is only this: First. Bundy prints by pressing his recording strip against the type, while defendant prints by pressing the type down upon the recording strip. That the printing is done by a blow delivered by Bundy's "hammer," and by pressure only in the device of defendant, is not material. Both methods of printing were well known, and one is the full equivalent of the other. The difference between the two methods is at last but of degree in force used. Both produce the contact necessary to make an impression. Second. The mechanism which operates the impression mechanism in Bundy's device is set in motion by a fin, ward, or projection of a key as it is thrust inward by the hand of the operator. The downward movement of the type-carrying recording wheels is transmitted to them through defendant's rock shaft and its arms which are engaged by the fin of its key as it is pushed in. It is true that this transmitted power only operates to print the hour and minute of the operation from the type carried by the type-recording wheels, for the number carried upon the stem of the operator's key is impressed upon the recording strip only as a result of the direct pressure of the operator's hand in pushing against the key. So far as the printing of the workman's number is done without the interposition of any other mechanism, the defendant possibly does not infringe. But so far as the key gives motion to other parts by which printing is done there is infringement, for to that extent defendant does use an impression mechanism actuated by the operation of the key. The complete impression mechanism of the defendant consists in the time-recording wheels, the rock shaft and its arms, E, e, and the key, C. The function of the impression hammer of the Bundy patent is to print upon the record-

ing strip the number of the workman and the time of the operation, and this it does by pressing together the recording strip, inking ribbon, and type. To produce this work, the impression mechanism is actuated by the key. The function of those parts of defendant's mechanism which have been substituted for Bundy's "impression hammer" is to do precisely the same thing by pressing together the strip, the inking ribbon, and the type. One presses the strip down upon the type, and the other presses the type down upon the strip. The instrumentalities by which the type and the paper are brought together are actuated in both cases by the key in the hands of the operator. In one case power is started by turning the key, and in the other by pushing against the key; but in both instances intervening mechanism is engaged and set in motion by metal projections upon the key. That the recording wheels constitute a part of the defendant's impression mechanism is not, in this case, material. One may not escape infringement by the mere joinder of two elements into one integral part. If the united part effects the same results, in substantially the same way as the separate parts before the union, the change is colorable. *McDonald v. Whitney*, 24 Fed. 600; *Ballard v. McCluskey*, 58 Fed. 880; *Oval Wood Dish Co. v. Sandy Creek, N. Y., Wood Mfg. Co.*, 60 Fed. 285. It is clear that, unless Bundy is limited to a key which is operated only by turning, and a key which carries the number of the workman only upon a projection upon its side, and to an impression hammer operated only by a ward of a key "as it is turned," the fourth claim of the patent is infringed by the recorder of the defendant. We find nothing in the old art which should limit the claims in suit to the precise structure he has described, or deprive the inventor of a reasonable application of the doctrine of equivalents. The Lane & Hill machine nearly approximated a practical and successful time recorder. But the failure to so arrange the combination as that by the single act of operating the key the work of aligning and printing and feeding might all be done made it an impractical machine for the purposes for which such a machine was useful. The change required in order to make a recorder operative by the single act of turning a key may seem simple, now that it has been done. But neither Haskell, nor Dey, nor Bundy in his 1888 patent, succeeded in supplying the mechanism needed, though they tried in different ways, and although they had before them all that the old watchman's clock art could teach, as well as all that taught by Lane & Hill. Their inventions were useless, because they did not meet the conditions under which a workman's time recorder must be used.

The ingenuity of Bundy in his patent of 1891 lies in his key and its functions as covered by his claims. Whether his key actuated the feeding and printing mechanisms by being turned or pushed is not of the essence of the invention. Pushing keys setting in motion bolts and other mechanism were old, and but the equivalent of keys which did the same thing by turning. The only function of the bit upon which the workman's number was embossed was to carry that number into alignment with the time-recording type. That bit actuated no mechanism. The same result was accomplish-

ed by placing the workman's number upon the inner end of a key, which sets in motion other mechanism by pushing in place of turning. Neither was it invention to cause the printing to be done by pressing the type down upon the paper strip instead of pressing the paper strip against the type. The one was the plain equivalent of the other. *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958. That defendant's impression mechanism is not in the form or shape of a hammer is of no consequence unless the form itself is of the essence of the invention. This it was not.

In *Winans v. Denmead*, 15 How. 330-342, the court, in upholding a claim which covered a railroad car made of sheet iron "in the form of a frustum of a cone" against an infringer who had used a different geometrical form without introducing any new mechanical principle or mode of operation, or attaining any new result, among other things, said:

"Undoubtedly there may be cases in which the letters patent do include only the particular form described and claimed. *Davis v. Palmer*, 2 Brock. 309, Fed. Cas. No. 3,645, seems to have been one of those cases. But they are in entire accordance with what is above stated. The reason why such a patent covers only one geometrical form is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention; and, consequently, if the form is not copied, the invention is not used. Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention,—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee. Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words. The exclusive right to the thing patented is not secured if the public are at liberty to make substantial copies of it, varying its form or proportions; and therefore the patentee, having described his invention, and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms."

So, in *Machine Co. v. Murphy*, 97 U. S. 120-125, the court said:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge of similarities or differences by the names of things, but are to look at the machines, or their several devices or elements, in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same manner, to obtain a like result, always bearing in mind that devices in a patented machine are different, in the sense of the patent law, when they perform different functions, or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines, organized to accomplish the same result, are different in shape or form, one from the other, as it is necessary in every special investigation to look at the mode of operation, or the way the device works, and at the result, as well as at the means by which the result is obtained."

We are not unaware of the principle that the mere fact that two machines produce the same effect does not establish that one is an infringement of the other. If it were so, it would operate as an admission that an inventor is entitled to patent his function. To be an infringement, "the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value." *Westinghouse v. Power-Brake Co.*, 170 U. S. 569, 18 Sup. Ct. 723. But, on the other hand, a charge of infringement is often made out, though the letter of the claim be avoided. *Machine Co. v. Murphy*, 97 U. S. 120-125; *Elizabeth v. Pavement Co.*, Id. 126-137; *Hoyt v. Horne*, 145 U. S. 302-308, 12 Sup. Ct. 922; *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 538, 18 Sup. Ct. 707. That Bundy is not, in a broad sense, a pioneer in this art, may be conceded. But his invention was such as to mark a distinct step in the progress of the art. Indeed, his mechanism was the first successful structure of its kind. To be entitled to the benefit of the doctrine of equivalents, it is not essential that the patent shall be for a pioneer invention in the broad sense of that term. If his invention is one which has marked a decided step in the art, and has proven of value to the public, he will be entitled to the benefit of the rule of equivalents, though not in so liberal a degree as if his invention was of a primary character. Mr. Justice Jackson, in *Miller v. Manufacturing Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310, 318, said, "The range of equivalents depends upon the extent and nature of the invention." The meritoriousness of an improvement depends—First, upon the extent to which the former art taught or suggested the step taken; and, second, upon the advance made in the usefulness of the machine as improved. In *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 37 U. S. App. 299, 16 C. C. A. 259, and 69 Fed. 371, this court said:

"Whether he specifically claims in his patent the benefit of equivalents or not, the law allows them to him according to the nature of his patent. If it is a mere improvement on a successful machine, a mere tributary invention, or a device the novelty of which is confined by the past art to the particular form shown, the range of the equivalents is narrowly restricted. It is a pioneer patent with a new result. The range is very wide, and is not restricted by the failure of the patentee to describe and claim combinations of equivalents. Nothing will restrict the pioneer patentee's rights in this regard save the use of language in his specifications and claims which permits no other reasonable construction than one attributing to the patentee a positive intention to limit the scope of his invention in some particular to the exact form of the device he shows, and a consequent willingness to abandon to the public any other form, should it be adopted and prove useful. Instances of such a limitation may be found in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274. and in *Brown v. Manufacturing Co.*, 6 U. S. App. 427, 16 U. S. App. 234, 6 C. C. A. 528, and 57 Fed. 731."

In the view we have of the step taken by Bundy, we think he is entitled to protect his real invention by a reasonable application of the rule of equivalents. We find in the structure of defendant all the elements of Bundy's combination, or their mechanical equivalents, combined in substantially the same way, and performing

substantially the same functions, and producing identically the same result as that effected by the same elements in Bundy's device.

Neither do we find anything in the proceedings in the patent office which, properly understood, should limit him to either a turning key or one carrying the operator's number on its bit. The circuit court fell into error in assuming that claim 3 of Bundy's patent was substituted for claim 2 of his original claims, the latter being canceled upon a reference to the patent of Lane & Hill. Bundy's claims 1 and 2, as originally filed, were as follows:

"(1) In a time-recording apparatus, hour and minute wheels, a rotating key provided with a number or character upon a bit thereof, to register the operators upon a strip, and an impression hammer. (2) In a time-recording apparatus, the combination with the impression hammer of hour and minute registering wheels, a key inserted and turned to bring the number or character upon the bit thereof into alignment with said wheels and a registering strip."

Claims 10 and 11 of his original application were as follows:

"(10) A clock movement, hour and minute registering wheels, synchronous mechanism actuating said wheels independently of each other and actuated by the clock movement, and a key provided with a bit carrying numbers brought into alignment with the hour and minute wheels by the turning of the key, a registering strip and an impression hammer, in combination as set forth. (11) A clock movement, hour and minute registering wheels, synchronous mechanism actuating said wheels independently of each other and actuated by the clock movement, a key provided with a bit carrying numbers brought into alignment with the hour and minute wheels by turning of the key, a ward upon the key, a registering strip, an impression hammer operated by mechanism actuated by the ward of said key as it is turned, in combination as set forth."

The other claims of his original application relate entirely to different subjects, and have no effect in the construction of those allowed and involved in this case. Claim 1 was rejected upon a reference to the Bauer watchman clock patent, No. 305,882, and because the elements were not claimed in combination. Claim 2 was rejected upon the statement that it was met in the Lane & Hill patent, No. 210,788. Claims 10 and 11 were rejected because it was "not seen that the wheels" are independent of each other, as stated. Claim 1 was amended so as to read as follows:

"(1) In a time-recording apparatus, the combination with the hour and minute wheels rotated synchronously with a clock movement of a key provided with a number or character upon a bit thereof, to be rotated to record the number or character upon a strip, and an impression hammer."

In respect to the reference to Bauer, Bundy replied to the ruling of the examiner that "the Bauer patent does not show the synchronous hour and minute wheels, and consequently this imparts novelty to the claim as amended." This claim, as amended, was again rejected, the examiner ruling that "the claim now presented is held to cover nothing patentable over what is shown in Bauer, before cited." Claim 2 was amended by changing "registering" to "recording," and again filed with the insistence that "this claim is not anticipated by the Lane & Hill patent, 210,788, for the reason that in that patent the key, when inserted, is in alignment for the printing. My device requires the turning of the key to

bring the number into alignment, and my claim is specific as to the turning of the key." The claim, as amended, was again rejected upon the ground that "the second claim as met in Lane & Hill, before given, in view of the fact that it does not make any difference, in a patentable sense; whether the key is turned, as in Bauer, or not turned, as in Lane & Hill." Claim 10 was amended by changing "registering" to "recording," and by striking out the words "independently of each other," thus meeting the only objection made to that claim. Claim 11 was amended in the same way to meet the same objection, and both 10 and 11, as thus amended, were allowed as claims 3 and 4 of the patent as issued.

It will thus be seen that neither of the claims here involved were ever rejected upon a reference to either Bauer or Lane & Hill, and were originally disallowed upon a ground in no wise affecting the question of infringement here involved, and, as allowed, include everything included as originally filed, except the clause as to the independent character of the two recording wheels. Both of these claims as originally presented concluded with the words, "in combination as set forth." Claims 1 and 2, as rejected, were manifestly unwarrantably broad claims. Neither contained the limiting words, "in combination as set forth." Both were subject to a construction which would include a key as an element which had no other function than to carry the workman's number into alignment with the recording wheels. This was the construction placed upon the claims by the examiner. Thus construed, it was manifestly a matter of no importance, in a patentable sense, whether such alignment was effected by a pushing or turning key, and hence the aptness of the reference to Bauer and Lane & Hill. Both claims were subject to a construction which would include recording strip and impression mechanism actuated by mechanism not set in motion by the operation of the key, but by a crank or handle as in Lane & Hill. The effect to be attached to the rejection of a claim by the patent office was thoroughly considered by this court in *Thomas v. Spring Co.*, 47 U. S. App. 125-145, 23 C. C. A. 211, 221, and 77 Fed. 420, 430, and the general rule stated to be that, "when the patent office rejects a claim covering a certain device on its merits, and such rejection is acquiesced in, and the patent issues, the applicant cannot afterwards be allowed a construction of the claims allowed wide enough to embrace the claim which was rejected." Bundy was not required to limit himself to a "turning key" in order to secure the allowance of his claims. When he called attention to the fact that his device required the turning of his key when inserted "in order to bring the number thereon into alignment," and then sought to sustain claims which would have included a device in which the feeding and printing mechanism might be set in motion by some means independent of the key, as in Lane & Hill, the examiner disposed of that distinction by saying that "it made no difference, in a patentable sense, whether the key is turned as in Bauer, or not turned, as in Lane & Hill." The essential difference between Lane & Hill and Bundy was in the fact that Bundy's key actuated his printing and feed-

ing mechanism, and also carried the operator's number into alignment with the type upon the type-recording wheels. The last function is the only function of the so-called "key" of Lane & Hill, the printing and feeding mechanism in that device being set in motion by other and independent means. Now, whether Bundy's key actuated his feeding and printing mechanism by being turned or by being thrust is not of the essence of his invention at all, and, to use the ruling of the patent office, "it makes no difference, in a patentable sense, whether the key is turned as in Bauer, or not turned as in Lane & Hill." Bundy did not, therefore, surrender every other mode of operating his key, and limit himself to a turning key, by any amendment which was forced upon him in the patent office. If he is limited to a turning key, and must stand by and see his real invention robbed by the mere change in the form of the key, whereby, by an inward thrust, it engages with and actuates mechanisms for printing and feeding which are but the equivalents of those actuated by his turning key, it must be the result of a strict interpretation of his claims by reason of the language he has voluntarily employed in them. This, we have already seen, is not the necessary legal result, and that he is entitled to a reasonable equivalent for a turning key. To be estopped by the action of the patent office, the patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed. That which he was required to surrender was the broad claims included in his original claims, numbered 1 and 2. When we limit him to a mechanism in which his printing and feeding devices are actuated by the operation of his key in the hands of the operator, we have given to the rejection of those claims every effect which is required.

The third and fourth claims should, as a consequence of the cancellation of claims 1 and 2, be so construed as not to include the broad claims of the rejected application. But this we have done independently of any effect resulting from the cancellation of claims by the patent office, and we have construed both claims 3 and 4 as including a recording strip and impression hammer actuated by mechanism set in motion by the operation of the key in the hands of the operator. True, we have not limited Bundy to impression mechanism in the shape or form of a hammer, nor to a key operated only by turning or carrying the workman's number only on a projection upon its side. To have done so would be to destroy his patent, and open his invention to the assaults of those who, with only colorable changes, could avail themselves of the very heart of his invention.

Complainant also owns the patent to Bauer of September 30, 1884, for a watchman's time detector, and it is claimed that defendant's key infringes the fourth claim of that patent. Bauer's patent expired July 26, 1896, the date of the expiration of his English patent. This bill was filed April 2, 1896, and therefore before the expiration of the patent. The fourth claim of Bauer is only for a key and a key "for a time detector." It is expressly limited to a key "having a bit or bits provided with projecting type to

make the impression on the slip substantially as set forth." If construed to cover a key which does not turn, and which carries type only on the end of its stem, it would be anticipated by the key in Lane & Hill. It must be limited to the key described, and, as thus limited, defendant does not infringe.

The decree must be reversed as to the third and fourth claims of the Bundy patent, and remanded, with directions to enter a decree finding defendant guilty of infringement of those claims, and for an injunction and an account. Appellee will pay the costs of this appeal.

THE EDWARD LUCKENBACK,

(District Court, S. D. New York. May 5, 1899.)

COSTS IN ADMIRALTY—ACTION FOR COLLISION—BOTH VESSELS IN FAULT.

Where, on a libel for collision, both vessels are held in fault, and, libellant's vessel alone having been injured, no cross libel is filed, and libellant recovers half his damages, each side will be allowed one-half its taxable costs.

In Admiralty. On application for taxation of costs.

Carpenter & Park, for libellant.

James J. Macklin, for respondent.

BROWN, District Judge. In this case the libellant's vessel and the claimants' vessel being both held in fault, the damages were directed to be divided. The claimants' vessel was not injured by the collision, so that there was no cross libel, nor any damages set up in the answer. The libellant claims an allowance of half his costs, without taking into consideration the costs of the respondent. The latter contends that the practice in this district, in cases of mutual fault, is that the costs of both sides shall be divided as well as the damages,—the same as if a cross libel had been filed for the recovery of damages to respondent's vessel.

The general subject was carefully reviewed by Blatchford, J., in *Vanderbilt v. Reynolds*, 16 Blatchf. 80, Fed. Cas. No. 16,839, from which it appears that in cases like the present, costs for the most part have been either refused to each side, or else the costs of both have been apportioned between them. The precise point afterwards arose before him on appeal in the case of *The Warren*, 25 Fed. 783, 784, where the libellant's vessel alone was damaged, but both being held in fault, the libellant recovered half damages; and on consideration it was held that "the costs of both parties should have been equally apportioned," and both having appealed the same rule was also applied to the costs of the appeal. It is noticeable, moreover, that in that decision, Mr. Justice Blatchford construed the case of *The America*, 92 U. S. 432, 438, as requiring the costs of both sides to be apportioned, and not the costs of the libellant alone in cases like the present. The case of *The Warren* was decided by Mr. Justice Blatchford in July, 1885, and the practice in this court has since then been in accordance with that decision. It was applied in the case of *The Max Morris*, 24 Fed. 860, where each side taxed one-half its costs, as appears on the face of the

decree, and the decree on both appeals was affirmed. *Id.*, 28 Fed. 881; *Id.*, 137 U. S. 1, 11 Sup. Ct. 29. The same disposition of costs was made in the case of *The Non Pareille*, 33 Fed. 524.

In the present case each side will be allowed one-half its taxable costs.

THE SAPPHO.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 291.

1. APPEAL IN ADMIRALTY—REVIEW OF QUESTIONS OF FACT.

Where the evidence in a suit in admiralty is taken before an examiner, the decision of the trial court on questions of fact is not entitled to the same controlling weight as where the judge saw and heard the witnesses testify, and will be more readily reviewed by an appellate court.

2. CONTRACT FOR REPAIR OF VESSEL—EXTRA WORK—WAIVER OF WRITTEN CONTRACT.

A provision of a written contract for the repair of a vessel, that no extra work should be done unless an estimate in writing was first made and submitted to and signed by an officer of the company owning the vessel, may be waived; and where, after the vessel was stripped to begin the work, it was found to be impossible to make the repairs specified in the contract without to a large extent rebuilding the hull, and after consultation with the officers of the company the contractor was told by the president to go on with the work, which he did, and under the direction of a superintendent employed by the company, and with the knowledge of its officers and directors, replaced all the rotten parts of the hull, and made the vessel sound and seaworthy, the company, having accepted the vessel, must be considered as having waived the written contract, and cannot invoke its provisions to defeat recovery for all work done not specified therein.

3. SAME—WAIVER BY CORPORATION.

The fact that the owner of the vessel was a corporation, and took no formal action in the matter by its board of directors, would not prevent its being bound by the action of its officers, and the acceptance of the benefit of the contractor's work without objection.

Appeal from the District Court of the United States for the District of South Carolina.

J. P. K. Bryan, for appellants.

J. N. Nathans and Henry Buist, for appellees.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

WADDILL, District Judge. These are two libels in rem against the steamer *Sappho*, her tackle, apparel, etc., owned by the respondent company, the Mt. Pleasant & Sullivan's Island Ferry Company, a corporation of South Carolina, conducting a ferry between the city of Charleston, Mt. Pleasant, and Sullivan's Island, in said state, the said steamer being employed in that service. The controversy arose out of a contract for repairs to be made upon the said steamer. The claim of Samuel J. Pregnall, libellant, contractor and shipwright, is for a balance due on account for repairs, labor, and supplies in the sum of \$2,230.82. The claim of William M. Bird & Co., libellants, merchants, is for \$867.43 for materials furnished for the steamer in mak-

ing such repairs. In the lower court all of the testimony was taken before a special examiner, appointed for the purpose, and upon the depositions so taken the two causes were heard together, and the district court, by order of the 30th of August, 1898, dismissed both libels. 89 Fed. 366. The libelant Samuel J. Pregnall, on the 25th day of February, 1897, entered into a written contract with the respondent company for making certain repairs to the said steamer Sappho, specifically set forth in said contract, and which work may be particularized as follows:

"Haul out the said steamer on the marine railway of said contractor; take out and renew all clamps; take out and renew main water-wheel beams; renew the guards, and also the mudsills all around the steamer; put in new breast hooks; put in two extra sister keelsons; put in two new extra standards, one in each side, with hog rods and one-half inch iron; strip off entire copper from bottom, reef out all old oakum, and recaulk entire vessel to deck; remetal with yellow metal or copper; straighten and plumb vessel while on railway, putting in 2,172 feet timber at \$1.00, putting in 3,901 feet planking at 60 cents, 820 feet ceiling at 20 cents."

At the prices fixed in the contract, these items amounted to \$6,676.60. Under this contract, the libelant Pregnall regularly entered upon the work to be performed by him, and, after getting the steamer on the railway of his yard, and stripping her, it was found that her condition was much worse than had been anticipated, so much so that it was impracticable to go on with the work according to the contract; and thereupon, after conference with the libelant, the master of the steamer, the president of the respondent company, and the government inspector, other work was done, much of it to the hull of the steamer itself, not stipulated for in the contract, amounting to the sum of \$2,539.17, made necessary by reason of the rotten, defective, and unsafe condition in which the same was found to be, in order to put said steamer in a proper and safe condition for service. No question was raised as to the performance of the work covered by the original contract, and the amount due thereon was fully paid, but the bill for the extra work was disputed as a whole, and the result was the filing of the libel herein; to which the respondents replied that all work set forth in the written contract had been fully paid for, and \$308.35 in addition, and denied further liability, upon the ground that the extra work was not embraced in the written contract, and was not authorized. They further alleged that the work on libelant's part was unskillfully performed, and that there was delay in the completion of the same, whereby damage accrued to them in the sum of \$2,200. No testimony was taken by claimant tending to maintain its defense, either as to the alleged unskillful manner in which the work was performed, or that there was any delay in its execution, and the case turned in the lower court solely upon the right of the libelant, under the circumstances, to recover for the extra work done. The written contract contained a clause that no new work of any kind done on the steamer, and no work of any kind, should be considered as extra work unless a separate estimate in writing should be made for the same before its commencement, and submitted by the contractor to the respondent company, and the signature of the chairman of the board of directors obtained thereto.

The learned judge, in the court below, while recognizing that this clause might be waived by the parties, and that they, either by their acquiescence in what was being done, or ratification of what had been done, might make themselves liable for extra work, was, nevertheless, of opinion that there was not sufficient evidence in the record to sustain the contention that the respondent company had ever formally abrogated the written contract, or, in view of the said clause as to extra work, had ever authorized the libelant to do the work as charged for by him, or acquiesced in or ratified what he did so as to become liable therefor. With these conclusions we do not agree, and think, under the circumstances, the libelant is entitled to recover for the amount of the extra work performed by him. The decision of the trial court upon questions of fact, where the judge saw and heard the witnesses testify, might have great and controlling weight; but here, where the evidence was taken by an examiner, this court will more readily examine the same, and reach its own conclusions thereon. *The Glendale*, 26 C. C. A. 500, 81 Fed. 633, 635; *Duncan v. Nicholls*, 44 Fed. 302; *The Ludvig Holberg*, 43 Fed. 120; *The Thomas Melville*, 37 Fed. 271. But we do not regard this as a case depending upon conflicting evidence, or the credibility of witnesses, but rather upon the legal effect of what it is admitted was said and done by those acting for the respondent corporation under circumstances not disputed. That there was a necessity for the extra work is apparent from the whole evidence, and without the extra work it would have been entirely impracticable to have carried out the written contract at all. The claimant's witness Cherry, the master of the steamer, and superintendent placed in charge of the repairs, thus described the condition of the steamer after she was stripped:

"I did not think she was in very bad shape after we got her on the railway until we ripped the lining off, and it was all gone underneath. The timbers would look good on top, but were all gone underneath, like the shell of an egg."

He also stated, in answer to the question of whether he had not stated to Mr. Bird, the secretary of the company, that they would have to make a new hull:

"Yes, I told him in these words: That I thought it cheaper to pay Mr. Pregnall to cancel the obligation, and build a new hull. I thought it would be cheaper in the end."

The United States inspector of hulls, W. H. Cannon, testified as follows:

"Question. What did she show after she was stripped? Answer. Very bad. Timbers completely gone, except eight or ten under the engine. It was necessary for them all to come out except ten or twelve. Question. Did you see any decayed knees? Answer. Some I did not count. More were there, but, when I found that Capt. Cherry had a disposition to repair the boat, I did not interfere with him."

Witnesses Seth Ferrara and John F. Cummen, both shipwrights, and who worked upon the steamer while the repairs were being made, say that the main keelson, fore and aft, and various portions of the hull, were in a rotten and charred condition; that it was dry rot from the heat and dampness, and would not hold anything, and that it was

knocked out with a maul; and that the steamer in her condition was utterly unseaworthy. The libellant S. J. Pregnall testified that he found her cross-beams nearly all rotten, the knees nearly all rotten, the keelson all rotten, the keelson under the boiler rotten, her plank sheers rotten, apron and deadwood rotten, stern posts defective, and, in short, that there was nine-tenths of her that had to be rebuilt; and that it was impossible for him to do the work covered by the agreement without renewing these rotten parts; that he could not fasten sound material to a rotten structure, and that there was nothing upon which to build. It is the controversy as to what occurred between the parties upon the discovery of this condition of the steamer, and was thereafter done, which gave rise to this litigation. Libellant's statement is that after he and Capt. Cherry, the master of the steamer, and superintendent of the work, consulted, they went down to see Mr. Witte, the president of the company, and told him that the steamer would have to be rebuilt; and, in answer to the question, "Did you describe the condition of affairs?" the libellant says:

"I did, and so did Captain Cherry. After consulting a time, he wanted to know if I could do the work in time to save the season. He then considered the costs of a new boat against rebuilding that one. I suggested that by taking out the machinery I could save four thousand or five thousand dollars. I did offer to build a new boat hull for \$11,000.00. They decided then that I should go on make the old hull new. Mr. Witte told me, 'All right, go ahead.' I told him that I did not have means to do that much work. He said he would furnish me with means every week to pay men, which he did, and I went along with the work, and completed it."

Capt. Cherry's statement is, in substance, that he informed President Witte of the wretched condition of the steamer, his surprise as to its condition, and that the latter said: "I am sorry that we did not know it sooner. We will try to do the best we can." That he went and told Mr. Pregnall that the vessel would have to be ripped up, and rebuilt, or, rather, retimbered. In answer to the question of whether he understood, at the time he accompanied libellant to see President Witte, the latter authorized libellant to do any work he pleased outside of the contract, he replied, "No," and in reply to the specific question, "Did President Witte authorize Mr. Pregnall to do any work outside of the contract?" replied, "Not as I know."

President Witte's account is as follows:

"I remember it distinctly. Captain Cherry and Mr. Pregnall came down to the office, as they said that the vessel was not in as bad condition as represented by some people, making mention of some certain parties at the time, and that she could be repaired, and be a stronger and stouter vessel than before, with some other expression, stating that putting these keelsons on, and which were in the contract, the vessel would be stouter and better than ever before. The question of about how much it would cost to build a new hull came up in this way: As some people said it would be cheaper to build a new than repair the old, this was reported to me that such had been said, and I asked Mr. Pregnall how much he could build a new hull for. He said \$11,000.00. I said, 'Well, I was told it could be done for \$8,000 or \$9,000.' He said his price was \$11,000.00. Q. Did you, in consequence of that conversation, say, 'All right; go ahead?' A. No; I told them after that that we concluded to go on with the contract. That was the result of the conversation, —and finish the vessel. * * * Q. When Captain Cherry reported to you on the first day that the vessel was worse than he thought, and that her condition was rotten, was it your desire to replace with sound all the rotten wood?

A. Certainly; that was the object in repairing the vessel. Q. Did you express to Captain Cherry that desire and intention when he spoke to you of the rotten condition of the vessel? A. No. The understanding was that Captain Cherry should be present for the purpose of seeing what wood was rotten taken out, and no wood put back except such as was sound. Q. After this rotten condition of affairs was reported by Captain Cherry, was it your wish and intention, with the work that went on after that, that all the rotten wood should come out, and be replaced by sound wood? A. Certainly. * * * Q. What was the object of the work being done on the vessel? A. Repairing her. Q. What for? A. Making her seaworthy. Q. To run her as a passenger boat in June and July? A. Yes. Q. Were you not hurrying to get the boat for the 1st of June? A. It was desired to have the vessel ready by the specified time. Q. You intended to run the boat the 1st of June as a passenger boat, without taking all the rotten wood out, and replacing it by sound wood? A. Of course not. * * * Q. And further, in July, didn't you run the boat? A. I suppose that was the time. * * * Q. Did you care? A. As a matter of course I cared. If I had known there was rotten wood in there, I would have taken it out. * * * Q. Did you see any knees that were rotten? A. Oh, yes; I saw some ribs,—knees, I suppose they were. I don't know what you call a rib or what you call a knee. Q. Did you see any of the deck that was rotten? A. Yes, I saw a portion of it. Q. What did you say about those knees? A. Nothing in the world. What should I have said? * * * Q. What did you expect Mr. Pregnall to do in the event of his having extra work outside of the written contract? A. I expected him to take the chances whether we would pay him or not. Q. If he did it? A. Yes, of course. If he did any, he did it at his own risk. He certainly didn't do it with my consent."

It will be observed that this statement of President Witte is not a denial of what the libelant Pregnall stated. The question under consideration was between building a new hull or repairing an old one, and they both agree that the offer of \$11,000 for the new hull was rejected, and Mr. Witte admits that he said, "Go on with the contract," which must have referred to repairing the old hull under its newly-discovered condition, and not to carrying out of the original contract of the 25th of February, 1897, to repair the steamer when the utter unseaworthiness of the hull was not known of. The execution of the written contract without change or modification on the part of libelant would have been impossible, and, so far as respondent is concerned, would have been to have done a vain and foolish thing, namely, to have expended nearly \$7,000 in repairing a ship without a hull. Libelant swears that the agreement was to repair the old hull, and that was what he proceeded to do, and President Witte's action in appointing Capt. Cherry to superintend the taking out of the rotten wood and supplying it with sound instead sustains this idea.

W. M. Bird, one of the directors and secretary of the respondent company, and the libelant in the second of these causes, testifies that Capt. Cherry talked with him about building a new hull to the boat, and explained that he had talked with Mr. Witte, and that the latter had told him to go ahead, and do what work was necessary,—to repair the boat, and put her in thorough order. This was done after the foregoing interview between libelant Pregnall and President Witte. Work was immediately begun on the hull, under the direction of Capt. Cherry as superintendent, who stayed at the work, and directed personally what rotten wood and timbers should be taken out and what work should be done, and how it should be done, until the steamer was completed; and, in the language of the United States inspector of hulls: "She was in first-class order. I never saw a boat

in better. * * * I think she was better than when she was brought here in 1876. I think she had better timbers in her." While this work was being done, President Witte was frequently at the steamer, and saw for himself what was being done; the evidence being that he would drive down about once a week. His own superintendent, specially designated by him for the purpose of looking after the work, was there all the time. The secretary of the company and its superintendent, Mr. Armine Witte, were frequently there, as were also Messrs. Lapan and Thompson, two directors of the company. In all, six officers of the company, several of whom had full knowledge of all that was being done, and all of them abundant opportunity to see what was done, and they one and all stood by and allowed the work charged for to be done and services performed, and the respondent company acquiesced therein by weekly supplying, according to the contract, sums necessary to pay off the employes for the labor performed. Under these circumstances, the work, in our opinion, should be paid for, and it will not do for President Witte to say that the contractor "did the work at his own risk," and that "I expected him to take the chance of whether we would pay him or not." Under such circumstances the law implies a contract, and a promise to pay. It is not in dispute that the services were properly and seasonably rendered, and it is equally clear that the work was necessary; and to allow, under the circumstances, the respondent company to have the benefit of libellant's money and labor without compensation, would be grossly unjust and inequitable. When the president of the company, upon being told that the contract could not be performed, so as to make the steamer seaworthy, without replacing the rotten material discovered in her hull, directed Pregnall to go on with the contract, and had his superintendent overlook and direct the replacing of the rotten knees and timbers, Pregnall, from his words and conduct, had a right to understand that the president consented to his doing the necessary extra work, no matter what the president may have had in his mind, undisclosed to Pregnall, with regard to the effect of the contract.

In what we have said we have not been unmindful of the clause in the written contract as to the conditions on which extra work could be done. This clause is carefully worded, and is sweeping in its terms, but, nevertheless, in our opinion, can be and was waived by what took place between the parties. Authorities to show that such clauses can be waived by the subsequent acts and conduct of the parties are abundant. *Wood v. City of Ft. Wayne*, 119 U. S. 320, 321, 7 Sup. Ct. 219; *West v. Platt*, 127 Mass. 367, 372; *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N. E. 747; *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549; *Cunningham v. Fourth Baptist Church*, 159 Pa. St. 620, 28 Atl. 490; *Bowe v. U. S.*, 42 Fed. 777.

The contention made, or, rather, suggested, that the liability should be escaped because the respondent is a corporation, and did not formally, by its board of directors, agree to the making of a new contract, or authorize, assent to, or acquiesce in the performance of the additional work in question, is equally without merit. Corporations only act by and through agents, and in *Pittsburgh, C. & St. L.*

Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371-381, 9 Sup. Ct. 773, it is said:

"When a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the contract of its agent. *Bank v. Patterson's Adm'r*, 7 Cranch, 299; *Bank v. Dandridge*, 12 Wheat. 64; *Zabriske v. Railroad Co.*, 23 How. 381; *Gold-Min. Co. v. National Bank*, 96 U. S. 640; *Gas Co. v. Berry*, 113 U. S. 322, 327, 5 Sup. Ct. 525. This doctrine was strongly stated by Mr. Justice Story, delivering the judgment of this court in each of the first two of the cases just cited."

The supreme court has passed upon this question in many instances. In *Railroad Co. v. Howard*, 7 Wall. 413, it is said:

"Corporations, as much as individuals, are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements, and then turn round and disavow their acts, and defeat the just expectations which their own conduct has superinduced."

The second case involves the question of whether libelants William M. Bird & Co. have a lien under the statute of South Carolina, enforceable by libel in rem in a court of admiralty against the steamer for materials furnished the general contractor, Pregnall, in making the repairs aforesaid to the steamer. The learned judge of the court below was of opinion that such lien existed, and was enforceable in a court of admiralty by libel in rem against a domestic vessel for materials and supplies, maritime in their nature, such as were furnished in this case (*The Planter*, 7 Pet. 343; *The Lottawanna*, 21 Wall. 568; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498; *The Kate*, 164 U. S. 470, 17 Sup. Ct. 135; *The Glide*, 167 U. S. 610, 17 Sup. Ct. 930), but held that it was necessary to prove that the debt was contracted upon the credit of the steamer, and not of the owner or contractor making repairs; and, believing that the libelants' claim was not one incurred on the faith of the ship, dismissed the libel. With our view of the evidence, we deem it unnecessary to do more than pass upon the question of fact involved in this decision. Our conclusion upon the whole evidence is that the materials were furnished upon the credit of the steamer, and not to the contractor individually. The libelants so testify. Many of the articles were ordered by the master of the steamer, placed in charge of the work thereon by the respondent company, and the others by the respondent's general contractor, who was himself without credit; and there is no claim but that the supplies were furnished to, and used in the repair of, the steamer, and that they have not been paid for, either to the libelants, who furnished them, or to the general contractor, who used them in rebuilding respondent company's vessel. 1 Rev. St. S. C. § 2504, is very comprehensive in its terms, and a lien is expressly given to any person for labor performed, materials used, or labor and materials furnished in the construction, launching, repairs of, or for provisions, stores, or other articles furnished for or on account of a ship or vessel by virtue of a contract, expressed or implied, with the owners of a ship or vessel, or with the agents, contractors, or subcontractors of such owners, or any of them, or with any person having been employed to construct, repair, or launch such ship, or to assist them.

We think the libelants William M. Bird & Co. have a lien upon the steamer for the supplies so furnished and used in its construction.

For these reasons, the decrees appealed from are reversed, and the causes remanded to the lower court, with instructions to enter a decree therein in favor of the libelants in the second-named libel for the sum of \$868, with interest at the rate of 6 per cent. per annum from the 22d day of May, 1897, until paid, with costs, and a like decree in favor of the libelant Samuel J. Pregnall for \$1,184.37, with interest from May 22, 1897, until paid, with costs. Reversed.

THE CLARA A. MCINTYRE.

(District Court, E. D. North Carolina. May 17, 1899.)

1. BILLS AND NOTES—COLLATERAL SECURITY—CONDITIONS—MORTGAGES.

Liability of one on a note to a bank secured by a mortgage conditioned that the mortgage should be and remain a continuing security for all notes, bills of exchange, drafts, checks, and other evidences of debt to a specified amount of said party or a corporation with which he was connected, is not established where it appears that he had neither signed nor indorsed such note, that no demand on him for its payment had been made, that he had not been notified of renewals and the bank books do not show that he had any connection with the renewal of the notes.

2. ADMIRALTY—RULES—INTERVENTION.

Adm. Rule 34, providing that one may intervene and be heard in his own interest if he shall propound the matter in suitable allegations, and be admitted by the court, requires the court to pass upon the claim of the intervener to give him a standing in court.

3. CHAMPERTY AND MAINTENANCE.

An agreement that the purchaser of a note and mortgage from receivers, for which he pays nothing, shall foreclose the mortgage, bring all necessary suits, and pay all necessary costs, and pay the receivers one-half of what he may recover, he to retain the balance, is champertous.

4. SAME—CONFLICT OF LAWS.

That the common-law doctrine of champerty does not obtain in New York except as brought forward under the statutes cannot be urged in an action on a contract made in New York, to be performed in North Carolina, which is brought by one who buys under an agreement to divide the amount recovered, it not appearing that the purchaser is an attorney, as the courts of New York hold that "an agreement by one who is not an attorney to aid in defending a suit is illegal and void for maintenance."

5. SAME—RULE IN NORTH CAROLINA.

There can be no recovery in North Carolina on a claim founded on a champertous contract.

6. ASSIGNMENT OF NOTE BY RECEIVER—EVIDENCE OF AUTHORITY.

Recovery on a note assigned by receivers cannot be had unless it is shown that the assignment was authorized by the court.

7. MARITIME LIENS—EVIDENCE TO SUPPORT.

A claim for a maritime lien for money advanced at the special instance and request of the master will be denied where the deposition of claimant does not show at whose request the money was advanced, and it does not appear that the advancement was necessary for the navigation of the vessel, and neither the master of the vessel nor the agent through whom the money was paid are examined as witnesses, and the only evidence is the unsatisfactory testimony of claimant, as such liens are stricti juris, and will not be extended by implication or construction.

8. SAME—SEAMEN'S WAGES—RIGHTS OF ASSIGNEES.

The assignee of a seaman's claim for wages has no lien.

9. SAME—REPAIRS OF VESSEL—MATERIALS.

Repairs to a vessel, and materials furnished in making the same, will sustain a maritime lien, though the owner of the vessel was absent and unknown, where the repairs were made on the credit of the vessel, and were necessary, and such as would have been made by a reasonably cautious business man under the circumstances.

In Admiralty.

E. F. Aydlett and Hughes & Little, for libellant.

W. D. Pruden, J. H. Sawyer, and W. W. Clark, for intervener.

F. H. Busbee, for owner.

PURNELL, District Judge. E. S. Willey and several others filed libels in admiralty against the steamer Clara A. McIntyre for materials furnished, seamen's wages, etc. It was admitted that all the claims filed by libellant were correct, and constituted maritime liens, except the claim of E. H. White and T. G. Lovegrove, which were contested by C. R. Johnson, an intervening petitioner, and the right of C. R. Johnson to intervene, and the claim of C. R. Johnson to the note and mortgage hereinafter referred to. A consent decree was therefore entered for a sale of the vessel, and commanding the United States marshal to pay the proceeds of sale into the registry of the court, subject to further order. On the 10th day of December, 1898, C. R. Johnson filed an intervening petition, which was subsequently abandoned, and which is now held insufficient, irrelevant, and untenable under the rules in admiralty. Again, on the 30th of November, 1898, the said C. R. Johnson filed an amended petition, in which he claimed to be the owner in his own right of a certain note in the sum of \$2,500 and interest, executed by F. F. Brown to the Bank of Commerce, of Buffalo, N. Y., and secured by a mortgage to said bank on the steamer Clara A. McIntyre, and that said note and mortgage were assigned to him by said bank through its receivers, duly authorized; no part of which has been paid, and the whole is now due, without offset or counterclaim. This intervening petition was verified by H. T. Greenleaf, and again sworn to by C. R. Johnson, on the 10th day of January, 1899. Again, on February 4, 1899, C. R. Johnson appeared, and asked to file an amended claim. This was objected to by counsel for libellant, and the objection overruled by the deputy clerk, the commissioner to take the depositions; and the said Johnson filed in evidence vessel mortgage on Clara A. McIntyre, dated September 4, 1889, and a note of the Acme Wood & Fiber Company, dated September 8, 1896, together with an assignment of said papers by H. H. Persons and J. H. Hazell, receivers, dated October 21, 1898. This was objected to, and objection overruled, and an exception. Testimony was then introduced which showed all the written part of the note was in the handwriting of Andrew Brown, including the signature of the Acme Wood & Fiber Company, by Andrew Brown, president. The \$2,500 note, signed as above, was first discounted by the Bank of Commerce September 10, 1889, and there was never any indorser on the note, which was renewed from time to time (every four months) without notice to or the consent of F. F. Brown, and no demand has ever been made on him for the payment of the note filed. At the time of the renewal of the said note, interest was

sometimes paid and sometimes not, and the bank accepted the renewal in place of the old note, and extended the time of payment in that way. The books of the bank do not show that F. F. Brown received credit for the note in question, and there is nothing on the books of the bank to show that F. F. Brown had any connection with or notice of the renewal note. The interest at the last renewal was charged to E. H. Kruger & Co., and on July 6, 1896, the discount on the Acme Wood & Fiber Company's note of \$2,500 was paid in the same way; also on May 6, 1896; the same as to renewal of March 7, 1896, and of the January, 1896, renewal of the note. Under the general custom of the bank, the note would not have been discounted for F. F. Brown without his indorsement, and this note was never indorsed by F. F. Brown, and the note was not discounted for him. The cashier of the bank testified that there was no other collateral security held by the bank for this note except the vessel mortgage; that an account was also opened with F. F. Brown at the bank shortly after the mortgage was made, and continued for two years, when the account was closed. The assignment by Persons and Hazell, receivers, and their proper handwriting, was proved by a witness who says he was familiar with their handwriting. F. F. Brown was treasurer of the Acme Wood & Fiber Company, and in 1890 \$20,850 of the paper of the Acme Wood & Fiber Company was credited to his account. About 1888, F. F. Brown purchased the tug McIntyre, and there is no evidence that he has ever parted with the ownership, except the mortgage of 1889. In answer to interrogatories propounded, C. R. Johnson answered that he purchased the note set out in his claim from the receivers of the Bank of Commerce of the City of Buffalo, N. Y.; that he paid nothing for said note, but agreed to pay therefor an amount equal to 50 per cent. of what he might recover by foreclosure proceeding; that the note was assigned to him by the receivers, and he purchased the same directly from them; that he first learned of the existence of the note from one of the receivers; that he has a written assignment of the note and mortgage, and files a copy; that there is no other agreement between himself and any other party regarding the note and mortgage than this: he bought the same, and had them assigned to him by the receivers, and holds the same for himself upon the agreement that he is to foreclose the mortgage, bring all necessary suits, and pay all necessary costs, and pay said receivers one-half of what he may recover, and retain the balance.

Thomas G. Lovegrove files several claims against the steamer McIntyre. Exhibit A, filed by him, amounting to \$150.14, is for work and materials furnished, repairing the steamer. Exhibit B, amounting to \$1,356.41, is for money advanced from March, 1897, to July, 1898, to pay the wages of the crew on the steamer. One claim of the Aetna Iron Works, of Norfolk, Va., amounting to \$352.32, assigned to Thomas G. Lovegrove January 25, 1898, is for material furnished in repairing the steamer McIntyre from December 1, 1897, to December 21, 1897, inclusive. The other claim of the same company, for \$421.03, is for work done and materials furnished the steamer from September 19, 1896, to October 10, 1896, and assigned to Thomas G. Lovegrove December 3, 1898. The claim of the North

Carolina Iron Works for material furnished and labor performed on the tug McIntyre, amounting to \$52.36, was assigned to T. G. Lovegrove January 29, 1898, by the proprietor of said iron works. The claim of E. S. Willey, amounting to \$73.54, for work done and material furnished in repairing said tug from March 23, 1897, to May 24, 1898, and assigned to T. G. Lovegrove August 30, 1898.

The claim of E. H. White is for \$40 for a pump furnished the steamer McIntyre on a telegram received from E. H. Kruger, dated October 15, 1896, and charged to the steamer McIntyre. The credit was given to the steamer, and the pump accepted by the master. This claim is contested on the ground that it does not constitute a maritime lien, though there is no denial of the fact that the pump was furnished as claimed, accepted by the master, and used on the steamer.

The foregoing finding of facts is all that is deemed necessary for a proper understanding and a decision of the case. Much of the argument is based on the idea, unsupported by proof, that Lovegrove was one and the same as the Buffalo City Mills; that the steamer Clara A. McIntyre was in the employment of the Buffalo City Mills; hence the assignments to Lovegrove were null, because assignments of debt for which he was primarily liable. This is legal argument and theory without evidence, for there is nothing in the depositions showing any contract between the steamer McIntyre, her owners or master, with the Buffalo City Mills, or that Lovegrove was the Buffalo City Mills, except that he was the proprietor of such mills from March until December, 1897. Much incompetent, irrelevant, and impertinent testimony, which was objected to, and objections overruled, in attempting to establish this theory, make the depositions voluminous and costly. This seems to be the only result of a futile attempt to get testimony in other litigation, which has no bearing, directly or indirectly, on the question at issue. The evidence is that the steamer McIntyre was doing business in the harbor of Elizabeth City, and employed by such persons as needed her services, and, among others, the Buffalo City Mills.

The note claimed and introduced by Johnson cannot be held to be secured by or connected with the mortgage given to secure a debt due by F. F. Brown by the words which appear in the condition thereof, as follows: "All notes, bills of exchange, drafts, checks, and other evidences of debt of the said Frank F. Brown, or the Acme Wood and Fiber Company, and for any sum or balance of any form of indebtedness by either of said parties to said bank, to amount not exceeding twenty five hundred dollars, the instrument to be and remain a continuing security for the amount," under the circumstances set forth in the finding of facts. It is not deemed necessary to state at length the reasons for thus holding, as a glance at the facts will be sufficient. The decision of the case does not rest solely on this ground. The admiralty rule under which C. R. Johnson claims a right to intervene provides he may do so, and be heard for his own interest, if he shall propound the matter in suitable allegations, and be admitted by the court (Adm. Rule 34; *The Two Marys*, 12 Fed. 152); hence the

court must pass upon the claim of the intervener to give him a standing in court. The action of a commissioner to take testimony only has no binding force, and must be confined to the duties prescribed in the order of court. The admission of the intervening petition and amendments by the deputy clerk overruling the objections thereto was merely, therefore, pro forma, and without authority. The court must, under the rule, pass upon the intervener's claim in all its phases, and it is only by permission of the court of admiralty that the intervener can be heard.

It was insisted in the argument that the contract under which the intervener, C. R. Johnson, claims to hold the note and mortgage is champertous, hence void, and he has no standing in court. It is contended contra that, while said contract may be champertous, it is only void inter partes, and the libellant and the owner of the vessel cannot avail themselves of it as a plea in bar of Johnson's right to intervene or recover. Champerty—a bargain to divide the thing sued for, whereupon the champertor is to carry on the suit at his own expense, purchasing a suit or right to sue—was so much abhorred at the common law that a chose in action was not assignable. Champertors are spoken of as pests of society, who were perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels. They were punished by a forfeiture of one-third of their goods and perpetual infamy. 4 Bl. Comm. 135; 4 Bouv. Law Dict. 236; Co. Litt. 368. The contract, as set forth in the answer of Johnson to interrogatories filed, is champertous under all the definitions. The difficulty in most of the reported cases was in deciding if a contract amounted to champerty, but no such difficulty arises in the present case. Johnson is a stranger, having no interest, direct or remote, as far as the evidence discloses, in the controversy. He secures by assignment, without paying a nominal consideration, on an agreement to pay expenses and divide what he recovers, a claim which the holders are not willing to prosecute. This is champerty. There is a marked tendency on the part of legislatures and courts to curtail the doctrine of champerty, and in many states it is held that the common-law doctrine does not obtain. A distinction is drawn between lawyers and laymen, generally on the ground that the former are authorized to prosecute and render professional services in this behalf in themselves valuable. It does not appear Johnson is a lawyer. He had no authority to conduct litigation, or render professional services, and his claim or contract must be considered wholly under those decisions applicable to laymen. The only apparent motive is to speculate in stale claims, and interfere in other men's business. It is almost universally held the courts will not give effect to such contracts. In North Carolina it is held, a contract in which the obligor engages to give the obligee (who was not authorized to appear for parties litigant and manage lawsuits) one-half of the land in dispute, or one-half its value, in case of recovery, as compensation for his services in the management of the suit, is against public policy, and void. *Munday v. Whissenhunt*, 90 N. C. 458, and cases cited. So that, if this contract was

made or to be performed in North Carolina, under the laws of the state it would be void. But it may be said that this was a New York contract, and would be governed by the laws of that state. While it is held that the common-law doctrine of champerty does not obtain in New York except such as brought forward in the Revised Statutes of the state (*Durgin v. Ireland*, 14 N. Y. 322; *Voorhees v. Dorr*, 57 Barb. 580; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169), it is also held "an agreement by one who is not an attorney nor counselor to aid in defending a suit is illegal and void for maintenance." *Burt v. Place*, 6 Cow. 431; *Ward v. Van Bokkelen*, 2 Paige, 289. The two terms "champerty" and "maintenance" are generally used together, and the cases in both states, the laws of which might affect the contract under consideration, were stronger in favor of sustaining the contract than the one at bar. It is not necessary to consider the many decisions in other states. In *Burnes v. Scott*, 117 U. S. 588, 6 Sup. Ct. 869, it was held a champertous contract between the plaintiff and his counsel could not be set up as a plea in bar of recovery on a note, but this suit was in the name of the real party in interest, the payee in the note, and in the opinion the following language of the vice chancellor, who delivered the opinion in *Hilton v. Woods*, L. R. 4 Eq. 432, is quoted with approval:

"I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that, whenever the right of the plaintiff in respect to which he sues is derived under a title founded on champerty or maintenance, his suit will, on that account, necessarily fail."

In the case at bar the foundation of the intervenor's claim is the champertous contract. If Johnson should recover, the contract is void, admittedly, between the parties, and the receivers may possibly elect to repudiate, and recover again on the note or mortgage. The contract, if illegal and void, can confer no rights, and, like a void judgment, may be taken advantage of by any one; hence, while, if the intervening petition had been filed in the name of the true owners of the note and mortgage, no advantage could be taken of a champertous contract with the attorney or solicitor of plaintiff, to hold that advantage cannot be taken of the title which he sets up as the basis of his claim and standing in court would be to give countenance to illegal and void contracts. This the court will not do. The intervening petition of Johnson must fail, based as it is upon champerty and maintenance.

Again, the assignment is made by receivers, who are officers of the court, and no authority of court is shown for the contract set out as entered into by them with C. R. Johnson. Hence it is ordered, adjudged, and decreed that the intervening petition of C. R. Johnson be, and the same is, dismissed, and the costs of such petition, and the costs incident thereto, including the process and expense of taking depositions, rendered necessary thereby, to be taxed against C. R. Johnson and the sureties on his stipulation. There are other objections which might be held against the intervening petitioner, but, as this view disposes of this branch of the case, it is not necessary to argue or decide them.

In the libel filed by T. G. Lovegrove (third allegation) he alleges

that at various times between March, 1897, and July 30, 1898, at the special instance and request of the master, he supplied and paid to said master \$1,356.51, as detailed in Exhibit B, in order to pay persons employed by said master on the steam tug, and it was so used; that the funds were furnished upon the credit of the vessel, and not the owner. This is denied generally, though F. F. Brown, the owner of the vessel, admits that, if the claims are just and true, a maritime lien exists. It is not upon the allegation, but upon the proof, that the claim set up by Lovegrove must be determined. The deposition of T. G. Lovegrove is indefinite and unsatisfactory. He does not say at whose request the money was advanced, and all that can be satisfactorily determined from his testimony is that he had claims against the vessel; thought her good for the amount; the money was advanced, by his authority, sometimes through Kruger, and he does not know to whom it was paid; afterwards he said it was money paid by him, or at his instance, to parties who had furnished labor and materials to the boat. It does not anywhere appear the advancement was necessary for the navigation of the vessel. She was doing a general towing business in the harbor, and probably earning more than enough to pay expenses. Neither the master of the vessel nor the agent through whom the money was paid are examined as witnesses, and the only evidence on the subject is the unsatisfactory testimony of Lovegrove. This is not definite and convincing, such as is required to establish a maritime contract or lien. Such liens are *stricti juris*, and will not be extended by implication or construction. *The Yankee Blade*, 19 How. 82; *Pratt v. Reed*, Id. 359; *The Sultana*, Id. 362. They must be founded upon contract or given by law. The claim of a seaman for wages would be a lien on the vessel (seamen are special wards of the admiralty court), but the assignee of a seaman's claim has no lien. *The Aeolian*, 1 Bond, 267, Fed. Cas. No. 8,465; *The Freestone*, 2 Bond, 234, Fed. Cas. No. 12,143; *The Patchin*, 12 Law Rep. 21, Fed. Cas. No. 10,794. In this instance there was no assignment even; there is no evidence of necessity; in short, there is nothing in the case upon which the claim for a maritime lien can properly be based. The burden of proof is upon the libellant to make out his claim. This he has failed to do; hence the claim of T. G. Lovegrove, as set forth above, is disallowed, and his libel in this behalf (the third allegation and Exhibit B) is dismissed.

The other claims as set forth in the libel of T. G. Lovegrove are for repairs to the steamer, and materials furnished in making such repairs. The owner of the vessel was absent and unknown; the repairs were made on the credit of the vessel, and they seem to have been necessary, and such as would have been made by a reasonable, cautious business man under the circumstances. These facts make these claims maritime liens. They were assigned for a valuable consideration, and in due form; hence T. G. Lovegrove, being the real party in interest, is entitled to have these claims thus assigned paid to him from the proceeds of the sale of the vessel after the payment of those claims having priority,—seamen's wages.

The claim of E. H. White is a maritime lien under the facts as found, and will be paid in its order as above stated.

A decree will be drawn and entered in accordance with this opinion. It is so ordered and adjudged.

THE MARTHA DAVIS.

(District Court, N. B. California. May 15, 1899.)

No. 1,571.

COLLISION—CONTRIBUTORY NEGLIGENCE—ANCHORED VESSEL.

A vessel cannot be held guilty of negligence contributing to a collision because her machinery was disconnected and her sails taken down while at anchor, for the purpose of making repairs, when she was properly anchored in a safe berth, where she remained; the collision being caused by the drifting against her in the night of another vessel, which was insecurely anchored.

An admiralty suit by the United States against the bark Martha Davis to recover damages for collision.

H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.
Page, McCutchen & Eells, for claimant.

DE HAVEN, District Judge. This is a libel filed by the United States to recover damages sustained by the United States steamship Patterson in a collision which the libel alleges was caused by the negligence of the master and crew of the bark Martha Davis. It appears from the evidence that on March 9, 1898, the Patterson was lying at a safe anchorage in the bay of San Francisco, undergoing repairs to her engines, which had been taken apart, and were still in that condition, and therefore at the time entirely useless as a means for propelling the steamer, but she was otherwise in seaworthy condition, and was properly manned and equipped. On the evening of the day named, the bark Martha Davis came into the port of San Francisco, and, dropping a single anchor, anchored at a distance of between two and three hundred yards from the Patterson, and further from the wharves than the latter. At that time there was only a light breeze blowing, and the one anchor used by the Martha Davis was sufficient to hold her. The Patterson also, at this time, had but one anchor out. About midnight the wind commenced blowing a strong gale from the north, and the master of the Patterson soon ascertained that the one anchor already out was not holding his vessel, and another was let go, but not until after the Patterson had drifted some distance further away from the Martha Davis, and nearer to the wharves. When the second anchor was dropped, the Patterson was so close to the schooner Ivy, also lying at anchor, that she was soon compelled to take in five fathoms of her anchor chain, in order to avoid a collision with that schooner. Between the hours of 4 and 5 o'clock on the morning of March 10th, the Martha Davis and the Patterson came into collision. There is a direct conflict in the evidence as to whether this collision was caused by the drifting of the Patterson into the berth of the Martha Davis,

or whether the Martha Davis dragged her anchor, and drifted onto the Patterson, in the berth of the latter. It would serve no useful purpose to state at length the testimony of the different witnesses relating to this disputed question of fact. It is sufficient to say that the testimony has all been carefully considered, and my conclusion is that the great preponderance of the evidence is in favor of the contention of the libellant upon this point. The Ivy did not change her position during the night, and the admitted fact that the collision occurred near this vessel tends strongly to show that, after casting her second anchor, the Patterson ceased to drift, and that the Martha Davis must have dragged her anchor in the direction of the Patterson; otherwise, she could not have come into collision with the latter in the vicinity of the Ivy. The conclusion that the collision occurred in the berth of the Patterson, and not in that of the Martha Davis, is further strengthened by a consideration of the direction of the wind and the relative positions of the vessels as they lay at anchor. I think, also, the evidence establishes the fact that the master of the Martha Davis was guilty of negligence in not letting go a second anchor. By so doing, it is reasonably certain the collision would have been avoided, and it is clear, from the evidence, that there was ample time to have done this after the bark began to drift, and before her collision with the Patterson; but, in any event, the strength of the gale, which commenced some three or four hours before the collision, was such as ought to have suggested to the master of the Martha Davis that it was not at all certain that one anchor would be sufficient to hold his vessel, and that, as a matter of ordinary prudence, he should let go a second for the purpose of properly guarding against the danger of drifting into collision with other vessels.

It is contended upon the part of the claimant that the Patterson was guilty of contributory negligence in being at anchor in a helpless condition, with engines disconnected and sails taken down. I do not think this contention can be sustained. The Patterson was properly anchored in a safe berth, and the fact that her engines and sails were not at the time in a condition for immediate use cannot be attributed to her as a fault. Her master was not bound to anticipate that there would be negligence on the part of the Martha Davis or other vessels at anchor in the harbor, and was therefore not required to have the engines and sails of his steamer in condition for immediate use, in order to avoid any collision which might result from such negligence.

It is lastly urged by the claimant that the Patterson was, in view of her own helpless condition, guilty of contributory negligence in not signaling for the assistance of a tugboat. The answer to this is that it was not known on the Patterson that the Martha Davis was not securely anchored, and, although she had been sheering during the night, it was not apparent, until shortly before the collision, that she was drifting onto the Patterson, and it was then too late to have obtained assistance from any of the tugs in the harbor. The libellant is entitled to a decree for the recovery of the damages sustained by the Patterson, and the case will be referred to United States Commissioner Manley, to ascertain and report the amount of such damages.

CARMICHAEL et ux. v. CITY OF TEXARKANA, ARK., et al.

(Circuit Court, W. D. Arkansas. May 8, 1899.)

1. NUISANCES CREATED BY CITY—LIABILITY OF INDIVIDUALS FOR DAMAGES.

Individual residents of a city, who, in compliance with law, have connected their premises with a sewer system constructed by the city, and deposited sewage therein, cannot be held liable for damages for the discharge of such sewage by the operation of the sewer system on or near the premises of a complainant, thereby creating a nuisance.

2. SAME—SUIT FOR ABATEMENT—PARTIES.

Nor are such residents proper parties to a suit against the city for the abatement of the nuisance.

3. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill against a city to abate a nuisance created by its sewer system, in which certain residents of the city as individuals are joined as defendants, but who, as such, have no legal interest in the suit, is multifarious.

4. MUNICIPAL CORPORATIONS—LIABILITY FOR CREATION OF NUISANCE.

A municipal corporation, though authorized by statute to construct sewers, has no right to so construct its system as to discharge sewage on the lands of an individual, or in such place that it flows on his lands, and pollutes a watercourse thereon, or otherwise creates a nuisance by which he suffers damage.

5. EQUITY JURISDICTION—SUIT TO ABATE NUISANCE.

A court of equity has jurisdiction of a suit by an individual to abate a nuisance caused by the construction by a city of its sewer system so as to discharge its contents on the complainant's lands, or near his residence, thereby invading his private rights, and causing him special injury.

6. NUISANCE—DAMAGES RECOVERABLE IN SUIT FOR ABATEMENT.

In a suit in equity to abate a nuisance and to recover damages caused thereby, such damages only as are proved to have been sustained up to the time of the decree are recoverable.

This is a suit in equity against a city and others for the abatement of a nuisance alleged to have been created by the discharge of sewage from the sewer system of the city on the premises of complainants, and to recover damages caused to complainants thereby. Heard on demurrers to bill.

The bill in this case alleges, in substance: That the plaintiffs are husband and wife, and citizens and residents of Bowie county, in the state of Texas. That the city of Texarkana, Ark., is a municipal corporation, duly incorporated under the laws of Arkansas, situate in Miller county, state of Arkansas, with J. W. Mullins as its mayor. That the Water Company of Texarkana, Ark., is duly incorporated and operated under and by virtue of the laws of the state of Arkansas, with R. A. Munson its superintendent and agent, and has its general office in Miller county, state of Arkansas; that F. W. Mullins, F. J. Ahern, R. J. O'Dwyer, Q. O. Turner, Joe Huckins, Sr., W. J. Burhman, J. W. Harris, and R. A. Munson are citizens of Miller county, state of Arkansas. That on July 1, 1888, the plaintiffs owned in their own right, in fee simple, and were in the possession and enjoyment of, a good homestead, consisting of 45 acres of land, situate in Bowie county, state of Texas, on the line of the state of Arkansas and state of Texas, said homestead consisting of block S, of 40 acres, and block P, of 5 acres, of the Jacob Carsen headright survey, according to the map of the Texas & Pacific Railway Company of Texarkana. That between July 1, 1888, and July 1, 1896, they made permanent and valuable improvements on their said homestead, consisting of dwelling houses, outhouses, barns, gardens, orchards, vineyards, and by clearing, fencing, and putting in a high state of cultivation nearly all of their said homestead, which was of great value, from which homestead they for eight years received and enjoyed the greatest comforts, pleasures, support, and maintenance, without hindrance. That there is

running through said homestead a branch or brook for a distance of 200 yards or over, fed by springs of pure water, which creek of living water contributed greatly to the pleasure, comfort, health, and support of their family from July 1, 1888, to July 1, 1896. That several years before the bill was filed they commenced to run a dairy on their said home. They bought, raised, and kept 33 cows, of high grade cattle, keeping them in a meadow through which said springs of pure living water flowed continually, contributing very greatly to the health, comfort, and maintenance of their family, and for the market of Texarkana, said dairy business being a source of comfort and profit. That before July 1, 1898, the city of Texarkana, Ark., through its duly-constituted authorities, created a sewer-improvement district within its limits for the construction and maintenance of a system of sewerage for said district. That the said sewers were constructed, consisting of main sewers, pipes, and connections with the main and lateral sewers, with one main sewer leading to a point immediately opposite plaintiffs' homestead, about eight feet from the state line, on the Arkansas side. That said sewers are connected with the residences, business houses, privies, and sinks of the said defendants F. W. Mullins, P. J. Ahern, R. J. O'Dwyer, Q. O. Turner, Joe Huckins, Sr., W. J. Burhman, J. W. Harris, and R. A. Munson, from which said sewers receive, and convey to its dumping ground, all the filth, slops, excrement, urine, and foul and offensive putrid matter collected from said privies and sinks connected with said sewers. That the said sewer system, when completed, was turned over to the said city of Texarkana, Ark., which said city is now and has maintained and kept up and operated said sewer system for the last two years in connection with the said Water Company of Texarkana, Ark. That the defendants, acting together, are now, and have been for the last two years, using the said sewer mains, laterals, and pipes of the said sewer plant to receive and convey to its dumping ground the said offensive and putrid matter hereinbefore mentioned. That said defendants, acting together, by means of said sewer plant, its mains and pipes, have created a great cesspool of foul and putrid matter and sewer gas at the end of the main sewer pipe leading out of the city of Texarkana, which open sewer empties into a little stream, known as "Nix's Creek," at a point about eight feet east of the state line, in Miller county, in the state of Arkansas, which cesspool has been maintained and kept alive by the said defendants, acting together with others, for the last two years, by means of said Texarkana sewer plant. That said defendants, acting together, are now maintaining and keeping alive the said cesspool from day to day, and month to month, and year to year by means of the said sewer plant, its mains and pipes, and threaten to maintain and keep alive the said cesspool perpetually. That the said cesspool is a great nuisance, because it fouls, pollutes, corrupts, contaminates, and poisons the water of said Nix's creek flowing from said cesspool along down said creek for a distance of several miles, which said creek runs through plaintiffs' land and homestead and premises just below the cesspool for a distance of over 200 yards, depositing the foul and offensive matter referred to in the bed of said creek on plaintiffs' land and homestead continuously from month to month and year to year, the said creek being too weak and small to carry away the amount of such deposit. That by reason of such deposits and of the sewer gas and poison air arising out of and from said cesspool and being carried by the winds and drawn by the sun on plaintiffs' homestead at a distance of 250 yards, and by the creation of the germs of disease in the cesspool, which are carried by the winds upon plaintiffs' said homestead, they are deprived of the pleasure, comforts, and enjoyment thereof, the same being a standing menace to their pleasure, comfort, health, and lives, and that of their family, keeping them in constant dread of sickness and disease, and depriving them of the use and benefit of said creek running through their land and premises in a pure and natural state as it was before the creation of said cesspool by means of said open sewer, for the use of their family, dairy cattle, and other domestic animals, fowls, and fish. That plaintiffs were compelled to cease and quit using the water running through said creek for their family, dairy cows, and other domestic animals, as they were accustomed to do from July 1, 1888, to July 1, 1896, the time said cesspool and nuisance was created. That plaintiffs have been compelled, by reason of said nuisance, to obtain water for the use of their family, cows, domestic animals, fowls, etc., from the Texarkana Water Company, at a cost to

them of \$500 for connecting their homestead and premises with its plant, and about \$200 in water tolls from July, 1896, to July, 1898. The plaintiffs further allege that their land, homestead, and premises, by reason of said nuisance, have been damaged and decreased in value in the sum of \$5,000, and in the sum of \$2,000 in being deprived of the pleasures, comforts, enjoyment, support, and maintenance of their land, homestead, and premises for two years, and \$2,000 by reason of the constant dread of disease and pestilence to themselves and family.

The plaintiffs further allege that the Water Company of Texarkana, Arkansas, acting by and through R. A. Munson, its superintendent and agent, on July 1, 1896, connected its water mains and pipes with the sewer mains, laterals, and pipes of the sewer plant of the defendant city of Texarkana, Ark.; that the said two defendant companies, acting together, connected said sewer mains, laterals, and pipes with the residences, business houses, privies, and sinks of all of the said defendants, as well as a great number of other inhabitants of the city of Texarkana, Ark.; and that they, the defendants, all acting together, have deposited a great amount of filth, slops, etc., in the said privies and sinks, and carried the same through the said sewer mains, laterals, and pipes by means of water furnished by the said defendant water company to the said dumping ground and open sewer,—the said cesspool hereinbefore mentioned,—from July 1, 1896, to the filing of the bill; and that all the defendants, acting together, are now carrying all of said filth and other putrid matter through said sewers onto plaintiffs' land, homestead, and premises, thereby creating and continuously maintaining the nuisance aforesaid. The plaintiffs further allege that there is no excuse for said open sewer, cesspool, and nuisance in the city of Texarkana, Ark., nor on the borders of the same, because the said open sewer could have been extended down the said creek valley underground to a safe distance from the city and from the inhabitants of the same, with small cost compared with the comfort, health, and lives of the plaintiffs and their family and the inhabitants of Texarkana. They allege that a judgment of a court of law would be inadequate for the damages sustained by them; that a court of law has no power to abate said nuisance, or to enjoin the defendants from keeping and maintaining the same; and that a court of equity alone has the power to abate said nuisance, and to enjoin and restrain the said defendants from keeping and maintaining the same. They further allege that they have dwelling houses, outhouses, and barns situated within 250 yards of the said open sewer, and a number of tenement houses within 150 yards of the same. They pray for a subpoena for all the defendants, and that they be required to answer the bill, an answer under oath being waived; (2) for an injunction pending the suit, and for judgment and decree against the defendants, abating the said open sewer, cesspool, and nuisance, and for an injunction perpetually enjoining and restraining said defendants from keeping and maintaining the same, and for the several sums of money specified as damages, and for all other further and proper relief.

No service has been had upon the defendant Huckins.

The defendant the Texarkana Water Company filed a special plea to the jurisdiction, upon which issue has been taken by the plaintiffs. Service being had upon the other defendants, each of them has filed separate demurrers. All the demurrers, except that of the city of Texarkana, Ark., are the same. These demurrers raise the questions as to whether the bill is not multifarious; and, second, whether there is not a misjoinder of defendants in the said bill; and, third, because the plaintiffs have an adequate remedy at law, and for want of equity in the bill. There are some other special grounds of demurrer which are not necessary to be noticed. The city of Texarkana, Ark., also interposes a separate demurrer, in which it raises the questions: (1) Of multifariousness, (2) Of misjoinder of defendants. (3) For the insufficiency of the bill. (4) An adequate remedy at law. (5) Defendant also interposes a special demurrer to the claim for \$5,000 damages because the plaintiffs are not entitled to full compensation as for permanent injury and at the same time for an injunction to remove the cause. (6) Defendant also demurs to the bill because it is inconsistent, in this: that the plaintiffs allege and pray for past and prospective damages by reason of the said nuisance, and at the same time state grounds and pray for an injunction against the matters and things for which they

would be compensated in said damages. (7) Defendant demurs to the item of \$5,000 by reason of the destruction of the plaintiffs' dairy business, and loss and benefit of the creek, because such damages are too remote, uncertain, and speculative. (8) Defendant demurs to the \$10,000 damages because of plaintiffs' deprivation of the pleasure, comfort, enjoyment, support, and maintenance of their land, for the reason that such damages are too remote, uncertain, and speculative. And, lastly, because all the allegations of damages in the bill and the prayer thereof show that the defendant, in using the sewer, acted independently of the other defendants, and in compliance with the laws of the state of Arkansas.

F. M. Henry, for plaintiffs.

Williams & Arnold, for defendants.

ROGERS, District Judge. By the general statutes of Arkansas (Sand. & H. Dig. c. 112, § 5321 et seq.) the authority is conferred on cities and towns to create improvement districts, among other things for the purpose of constructing and maintaining sewers. The construction is done by a board of improvement composed of three members appointed by the city or town creating the improvement district. When the sewers are completed, the city is authorized to compel inhabitants to connect their sinks and closets therewith. The same power is given to erect and maintain waterworks, and to enforce proper connections with the premises of the inhabitants and the sewers. This bill, fairly construed, amounts to about this: The city of Texarkana, Ark., under the authority of a general statute of the state, through its board of improvement, has constructed a system of sewerage for itself, and by proper ordinances compelled the inhabitants thereof to connect their residences therewith. The water company, a private corporation, constructed and operated under proper ordinances of the city, furnishes water to the city and to its inhabitants, and is also connected with the residences and sewer system. No complaint is made that said sewerage system, as constructed, was not authorized by public law, nor is any negligence or carelessness alleged with reference to the manner in which the sewer system was constructed. No complaint is made that the water company has improperly constructed its system, or that its connections, or those of the inhabitants, are unlawfully or improperly made. The real complaint is that the city, in constructing its sewer system, constructed it in such a way that in its operation the filth and putrid matter of the city was carried by the said sewer system and deposited in close proximity to plaintiff's home, in a stream which ran through their premises, polluting the water, and depositing sewage upon their land, and creating a cesspool which gave forth foul and offensive odors, creating germs of disease, and thereby inflicting serious damage to the plaintiffs' land and the health and comfort of his family. It is not the natural drainage of the lands in proximity to this stream of which the plaintiffs complain. It is the sewage of the city, conducted by artificial means, and deposited in the stream. The water company is made a party defendant because the plaintiffs allege that in July, 1896, the defendant water company connected its water mains and pipes with the sewer mains, laterals, and pipes of the sewer plant of the defendant the city of Texarkana, and that the foul and putrid matter from the sinks and privies of the said city is car-

ried through the sewer mains, laterals, and pipes by means of water furnished by the water company; in other words, that the water furnished by the water company was the vehicle by which the sewage was taken and deposited upon plaintiffs' land. The remaining defendants, except the city and the water company, are made parties defendant simply because they have connected their premises with the sewer system of the city, and thereby contributed to the nuisance. The pleader seems to have had in mind, in drafting the bill, that it was the operation of the sewer system that created the nuisance, and that as the defendants other than the city were using the sewers for depositing their drainage, they, in common with all others so using them, were alike liable for any damages sustained by plaintiffs by reason of the city carrying and depositing the sewage in the stream which ran through their premises. In a certain sense it is true that the use of the sewer by the people of the city creates a nuisance. If the sewer was never used, there would be no offensive matter deposited, and if the water was not furnished by the water company there would be no vehicle to convey and deposit the filth on plaintiffs' land; but the sewer system was created, in pursuance of public law, by the city, for the very purpose of carrying off its sewage. In its construction neither the water company nor the other defendants to the suit are shown to have had any control or interest. The city undertook to construct, manage, and operate the sewers in such a way as to dispose of whatever sewage was deposited in them, in pursuance to lawful authority. Neither those who use the sewers nor the water company had anything to do whatever with the operation, control, or management of the sewers.

The question therefore arises upon the demurrer as to whether or not any of the defendants other than the city can be held responsible for the creation of the nuisance referred to. The question is not a new one, nor is there any dearth of authority, either in text-books or the reports, with reference thereto. The decisions are uniform that "an ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act, for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must therefore see it is done in a safe and skillful manner." *City of Logansport v. Wright*, 25 Ind. 515; *City of Little Rock v. Willis*, 27 Ark. 577; 2 Wood, Nuis. § 787; *Washburn & Moen Mfg. Co. v. City of Worcester*, 116 Mass. 460; and numerous cases that might be readily cited. It must be conceded, in view of the facts stated in the bill, that the construction of the sewerage system of the defendant city was done in pursuance of public law, and it will not be assumed that it was negligently or improperly done, in the absence of allegations to that effect. It does not appear from the complaint that the connections made by the individual defendants with the defendant city's sewer system were made in violation of any city ordinance or statute of the state, nor will it be assumed in the absence of allegations to that effect. It must be assumed, therefore, that the connections so made were lawful, and in pursuance to the ordinances of the city. It would be an anomalous condition of things if the city, having the power to construct a sewer system, constructed it within the scope of its power, and in a proper way, and having the

power to compel its citizens to make connections therewith, if such citizens, when they had made such connections as they were compelled to do, should be held responsible in law for damages resulting therefrom; and still more anomalous if it were in the power of the plaintiffs to hold any one or more of such citizens as they might see fit to sue, responsible for the entire damages resulting from the nuisance created by all the people of the city. Such a result would be obviously unjust and inequitable, especially when the person so held responsible would have no action over against other persons who had contributed to the wrong.

Chipman v. Palmer, 77 N. Y. 51, is a case where the plaintiff kept a boarding house in Saratoga Springs, near a natural stream of water. The defendant kept a boarding house higher up the stream, the sewage therefrom running into the said stream. The sewage from a large number of hotels and other boarding houses also ran into the stream above the plaintiff's premises. The water of the stream thereby became corrupt and offensive, and some of the plaintiff's boarders left him on account of the stench. The plaintiff brought suit against the defendant, who kept a boarding house higher up the stream than his, for creating a nuisance, and undertook to hold him responsible for the act of all the others who were using the stream for the same purpose that he did. This case is distinguishable from the case at bar in this: that in this case none of the parties were acting in pursuance of any public law. At the same time they were all using the stream for exactly the same purpose, and each contributed to the causing of the nuisance. The court of appeals of New York held in this case that in an action of nuisance against several acting independently in polluting a stream by the passage of sewage from the premises of each, each is liable only to the extent of the separate injury committed by him. The court said:

"The defendant's act, being several when it was committed, cannot be made joint because of the consequences which follow in connection with others who had done the same or a similar act. It is true, it is difficult to separate the injury, but that furnishes no reason why one tortfeasor should be liable for the acts of others who have no association, and did not act in concert, with him. If the law was otherwise, the one who did the least might be made liable for the damages of others, far exceeding the amount for which he was reasonably chargeable, without means to enforce contribution or adjust the amount among different parties. So, also, proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law."

The court distinguishes this case from that class of cases where a direct personal injury is occasioned by the separate and concurring negligence of two parties at one and the same time, and proceeds to examine the cases cited by Wood on Nuisances, in paragraph 821, to show they do not support the text of the author. In support of the doctrine there laid down the court cite *Williams v. Sheldon*, 10 Wend. 654; *Guille v. Swan*, 19 Johns. 381; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217; *Coal Co. v. Richards' Adm'r*, 57 Pa. St. 142; *Seely v. Alden*, 61 Pa. St. 302; *Bard v. Yohn*, 26 Pa. St. 482. The same doctrine is laid down in 16 Am. & Eng. Enc. Law, 980, note 9, where a number of cases are cited, and 2 Wood, Nuis. par. 831, note 4, and cases cited; *Buddington v. Shearer*, 20 Pick. 477. It is true that contained in the bill in

the case at bar is an allegation to the effect that all the defendants were acting together, but the fair construction and interpretation of the bill is that the parties sued had simply connected their residences, business houses, privies, and sinks with the defendant city's sewer system, and were using said sewer system for depositing such sewage from their premises. It will be seen, therefore, that the act of each one of these defendants is his separate and independent act, and that, if he could be held liable at all, he could only be held to the extent that he had contributed to the nuisance, and that the difficulty of determining that is no reason why he should be held liable for the whole nuisance. The object of this bill is to restrain the city from continuing the use of its sewer system and dumping the sewage of the city on the premises of the plaintiff, and to recover such damages from the city and its co-defendants as plaintiffs have suffered by reason of the nuisance complained of. It is clear, in view of the decisions above quoted, that no judgment for damages can be recovered against the defendants other than the city for the reasons heretofore stated. Assuming, therefore, for the sake of the argument, that all of the defendants may be joined for the purpose of restraining further use of the sewer, and for the abatement of the nuisance complained of, it is nevertheless apparent that the other defendants joined with the city cannot be united in this suit for the purpose of recovering a judgment in damages against them, and for the reasons stated in the cases heretofore cited. But is it true that the allegations in the bill would authorize an injunction against any of the defendants except the city? They are not engaged in operating the sewer. They are not engaged in depositing sewage of the city in the stream which flows through the plaintiff's premises. They simply connect with the sewer, and deposit their sewage in it, which the city undertakes, independently of them, to convey away. The bill does not ask that they be enjoined from depositing their sewage in the city's sewerage system, nor does it allege any facts which would warrant such relief. It simply prays for an injunction against the said defendants, abating the said open sewer, cesspool, and nuisance, and for judgment for damages. But, as shown, the defendants other than the city neither constructed the sewer, nor do they manage, control, or operate it, nor have they created the cesspool or nuisance complained of, nor are they keeping or maintaining it. They are simply doing that which the law authorized and compelled them to do, namely, dumping their sewage into the sewer system of the city. No restraining order, therefore, could be had against them upon the allegations of the bill. If, therefore, the plaintiffs are entitled to an injunction, and for damages as against the city, it is for acts and doings wholly separate and distinct from that of the other defendants, and they are therefore improperly joined, and the bill itself multifarious, and for these reasons the separate demurrers of the defendants F. W. Mullins, R. A. Munson, F. J. Ahern, R. J. O'Dwyer, Q. O. Turner, W. J. Burhman, and J. W. Harris, should be sustained.

But again (as decided in *Chipman v. Palmer*, supra), if several defendants, without authority of law, each drain the sewage from his residence into a stream, the drainage from all the residences thereby polluting the stream and creating a nuisance to the injury of a ri-

parian owner lower down, can only be held liable for such acts in a separate action, each to the extent of the injury committed by himself, it ought not to require authorities to show that, where the acts complained of are not only done in pursuance of, but are enjoined by, law, one defendant cannot be held liable for the acts of the others. 2 Wood, Nuis. § 831, note 4, and cases cited; *Trowbridge v. Forepaugh*, 14 Minn. 133 (Gil. 100); *Thorpe v. Brumfitt*, 8 Ch. App. 654; *Blair v. Deakin* and *Eden v. Deakin*, 57 Law T. (N. S.) 522. To hold that the defendants other than the city, under the allegations of this bill, are liable for connecting their premises with, and depositing their drainage in, the said sewers, because the city, which constructed and operated them, conducted the sewage into a stream running through plaintiffs' land, thereby polluting its waters and creating a nuisance, is in effect to say that the city had no power to compel its citizens to make such connections or deposit said sewage. For surely it cannot be successfully maintained that a man can be enjoined from doing what the law compels him to do, or that he can be held liable in damages for doing in a lawful way that which in itself is lawful, or which is enjoined upon him by law.

The question now arises whether the demurrer of the city of *Texarkana* is well taken. In the case of *Washburn & Moen Mfg. Co. v. City of Worcester*, 116 Mass. 461, Gray, C. J., delivering the opinion of the court, said:

"Where a city or a board of municipal officers is authorized by the legislature to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to parties whose estates are thereby injured, the city is not liable to an action at law or bill in equity for injuries which are the necessary result of the exercise of the powers conferred by the legislature. But if, by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf of the public, or to suit by individuals suffering special damage. *Haskell v. City of New Bedford*, 108 Mass. 208; *Merrifield v. City of Worcester*, 110 Mass. 216; *Brayton v. City of Fall River*, 113 Mass. 218."

In *Gould v. City of Rochester*, 105 N. Y. 46, 12 N. E. 275, the statement of the case is as follows:

"The city of Rochester adjoins on the east the town of Brighton. It constructed sewers which discharged into ditches near the boundary between the city and town, which carried the sewage upon and over lands in Brighton, and ultimately into Thomas creek, a small stream running through the town, and having its outlet at Irondequoit bay. The ditches were constructed by the city under a general legislative authority to acquire land outside of the city limits and open ditches thereon to carry off the drainage of the city. It is found that the discharge of the sewage through the ditches and into Thomas creek created a nuisance in the town of Brighton, dangerous to the public health."

Much of the opinion is taken up in discussing the question whether the board of health of the town of Brighton were the proper parties to file the bill to restrain the nuisance, involving the construction of several statutes of New York, the case having been dismissed on that ground. The court of appeals reversed the lower court, and in the opinion said:

"The learned judge at special term, after asserting the proposition that the jurisdiction of the board of health of the town of Brighton over nuisances was

limited to nuisances existing within the territorial limits of the town, put his decision upon the ground that the order of regulation of August 1, 1884, was ineffectual, and in excess of the power conferred upon boards of health, because the nuisance in question was created and had its origin in the city of Rochester; and that the town board could make no valid regulation in respect thereto, because, in the language of the court, its powers 'are confined to the abatement of nuisances within the town, and the regulations they make have no force outside of the town lines.' It seems to us that this is quite too narrow a view of the situation. It is undoubtedly true that the authorities of Brighton could not go into the city of Rochester, and interfere with its sewers. But the collection of foul substances in the sewers was not the immediate cause of the nuisance. The immediate cause was the discharge by the city of the sewage, after it was collected in the sewers, into open drains constructed by the city across lands in the town of Brighton."

The court then say:

"We agree with the special term that the board could not execute its order by going within the city to close the sewers, but the fact that it had no power to enforce a summary jurisdiction of this kind does not justify the conclusion that it could not invoke the action of the court to enforce in an orderly way the abatement of the nuisance. * * * The objections to the maintenance of the action are quite technical, and ought not, we think, to prevail."

Stoddard v. Village of Saratoga Springs (Sup.) 4 N. Y. Supp. 745, is a case in which individuals sue in equity to restrain the city from the use of a sewer which emptied into a natural stream, causing a nuisance to plaintiffs' lands. The decision of the court is based upon exceptions to very elaborate findings of a referee granting a restraining order. The opinion sufficiently presents the facts, and is as follows:

"This is an action to restrain the defendant from discharging the contents of a sewer into a natural stream, which, after receiving such contents, passes through plaintiffs' land. There seems to be no dispute that the sewer does so discharge its contents, and that the result is injurious to plaintiffs' land. The defendant insists that the sewer is not a public sewer, does not belong to defendant, and that defendant is not responsible for its construction, or for the consequent damages. The sewer runs through Lawrence and Harrison streets to Division; thence through private grounds to Walworth, in which street it connects with the aforesaid stream (called 'Waterbury Brook'). That stream, passing along Walworth street, turns, and crosses plaintiffs' land. The sewer was built under a contract made by the defendant with one Adams in 1876, and the specification provides for the connection with the Waterbury brook. This contract purported to be made under Laws 1874, c. 271, §§ 3, 4. The defendant insists that the sewers therein provided for are private, because the expense is to be assessed on adjoining owners; and also that the petition was not in conformity with the act, because the sewer was partly on private property. As to the sewer being partly on private property, it may be that the owners of such property might have objected to its construction. But they have not, and the sewer has been built. The defendant, by this objection, says to plaintiff that it is not liable for injury to her land, because for the purpose of doing such injury the defendant trespassed on some other person's land. That is a poor excuse. Again, the contract for building the sewer was made by defendant. It is immaterial, then, so far as these plaintiffs are concerned, whether the defendant was or was not to be reimbursed by assessments on adjoining owners. The cost of improvements are often assessed on the land benefited, but yet the making of the improvement is the act of the municipality. If the whole of this sewer were on private land, then it might be improper to adjudge that the defendant should close or stop it, because they might have no right to enter on private land. But much of the sewer is in the street, and is therefore within defendant's control. When the defendant shall have done all in its power to prevent the injury which the plaintiffs suffer, it will then be time

to inquire whether any others are injuring her land. Nor can the defendant protect itself on the ground that the petition for this sewer was not such as to authorize defendant to construct it. If the defendant had no right to cause sewage to be discharged into a brook crossing plaintiffs' lot, it is no defense to say that the defendant had no right at all to construct the sewer. The defendant insists, further, that it is not liable, because the injury arises from the use of the sewer by third persons, who connect with it their privies and water-closets. But such was the very object of the sewer. A municipality does not (except from its own buildings) discharge sewage into a sewer, but it constructs the sewer that persons on its line may connect their houses with it, and discharge sewage into it; and it may not lawfully convey the foul material thus collected, and throw it on private property. The defendant further urges that the injunction is wrong because the defendant does not own, and has not control over, the 500 feet of the sewer which are on private property. We have above pointed out the answer to this. The defendant can control, stop up, or divert the sewer at Division street, or further up. The injunction only forbids the defendant to further allow the sewage and filth from Lawrence street sewer to flow on plaintiffs' land. Lawrence street is above Division. Nothing in the injunction requires defendant not to allow sewage, if any, which enters the sewer from the private property below Division street, to flow on plaintiffs' land. Whether the defendant would be liable in respect to such sewage we need not say. The referee has not held the defendant liable in respect to such sewage, and the subject is not before us. We think that the facts and the law sustain the referee's findings. The judgment is affirmed, with costs."

City of Jacksonville v. Lambert, 62 Ill. 520, is a case at law. The opinion sufficiently states the case, and is as follows:

"It is first insisted that the city is not liable to appellee for damages he may have sustained by reason of constructing the sewer so as to discharge the drainage from the city upon the premises of appellee; and it is said that cities have been compelled to construct such improvements for the preservation of the health of their citizens, and for the promotion of their comfort; and it is urged that the work was skillfully and well done. This may all be conceded, and still it does not follow that liability would not attach. It may be true that a city is liable to be compelled to afford sufficient drainage for the health and comfort of the people, but that would not authorize them to so construct the work as to destroy or seriously impair the value of the property of an individual. No one would suppose that the city would have the right by drainage and sewerage to collect all of the dirty water, swill, putrid matter, and garbage of the city, or any portion thereof, and lead it to and discharge it in the door yards of a portion of the inhabitants. That would be an invasion of private rights; that would be a violation of every rule of law, and shock the sense of justice entertained by every fair-minded man. Nor would it be in the slightest degree either a defense or excuse, to show that such a sewer or drain was constructed of the best material, and the work performed in the most skillful manner, and the plan on the most approved model. In performing such duties, they are required to construct such improvements in such a manner as to avoid injury to individual property. They have no right to concentrate the offal and filth of a city, which is a nuisance to the public, and discharge it upon the premises of an individual. If a public nuisance, and there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, make compensation. Every principle of justice and the dictates of reason would say that it is wholly wrong to impose the burden of the nuisance on one or a few citizens. This precise question has not been before us, but in *Nevins v. City of Peoria*, 41 Ill. 507, and *City of Aurora v. Reed*, 57 Ill. 29, the same principle has been announced. In those cases it was held that the city had no right to so construct the drainage over the surface as to concentrate it on individual property, and, if they should, they would be liable for the damages thus inflicted. And the rule must apply with more force when all of the filth of various kinds accumulated and produced in a particular portion of the city is confined to a large sewer, and carried and discharged on private property, its concentrated gases and offensive odors produced by putrefaction. The

city had no right to impose such a burden upon one individual, and in doing so, if injury was sustained, it must be held liable to make compensation."

The case of *Byrnes v. City of Cohoes*, 67 N. Y. 205, is a suit brought to recover damages for the flooding of plaintiff's house and premises, alleged to have been occasioned by the neglect of defendant to provide a sewer or outlet to carry off the water from the street gutter in front of plaintiff's premises. The court said:

"The facts established at the trial, as stated by the court at general term, and assumed on the argument here, were that the defendant made a gutter and curb on Main street (on which street the plaintiff's lot was situated), and conducted the water of the Fourth ward of the city of Cohoes down that street; that the curb and gutter ended opposite plaintiff's lot; that before the curbing was made there was a natural course, which took off the water another way; that the curbing brought it to the plaintiff's lot; that the gutter was not complete in front of plaintiff's place; that the water came down Main street and down the gutter, and had no outlet, and flooded plaintiff's house, and did the damage complained of; that the water flowed direct from the gutter on the premises; that a drain could have been built so as to carry off the water, and that a well hole was afterwards fixed so as to carry off the water. We are of opinion that on this state of facts the plaintiff was entitled to recover. Diverting the water from its natural course so as to throw it upon the plaintiff's premises, without providing any outlet, and thus injuring his building, was a wrong for which he was entitled to redress. The cases cited on the part of the appellant to the effect that a municipal corporation is not liable for an omission to supply drainage or sewerage do not apply to a case where the necessity for the drainage or outlet is caused by the act of the corporation itself."

In *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. 88, a bill was filed to restrain the defendant from polluting a natural stream flowing through plaintiff's premises, and recovery of damages caused thereby. A judgment for \$1,200 and a restraining order were granted. The court of appeals of New York, in deciding the case, said:

"The plaintiff was the owner and occupant of certain premises, containing more than four acres of land, in the town of Brighton, adjoining the city of Rochester, and watered by a stream known as 'Thomas Creek,' which, rising in that city, and fed by springs of pure water, ran northwardly and across the plaintiff's premises into Irondequoit Bay. He collected its water into an artificial basin, making it serve as well for domestic uses as the propagation of fish, and from it, in due season, he also procured a supply of ice. The defendant thereafter constructed sewers, and through them discharged not only surface water, but the sewerage from houses and contents of a large number of water-closets, into Thomas creek, above the plaintiff's land, with such effect as to render its water unfit for use, and cover its banks with filthy and unwholesome sediment. These and other facts well warranted the conclusion of the trial court that the act of the defendant in thus emptying its sewers constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled, not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid v. Commissioners*, L. R. 1 Eq. 161, 1 Ch. App. 348. In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its system of sewerage. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any

act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or a corporation who causes that pollution."

See, also, *City of Atlanta v. Warnock* (Ga.) 23 Lawy. Rep. Ann. 301, and notes (s. c. 18 S. E. 135), where many cases are cited. See, also, cases cited in note to *Chapman v. City of Rochester* (N. Y. App.) 1 Lawy. Rep. Ann. 296 (s. c. 18 N. E. 88).

The following propositions may be taken as established by an almost unbroken line of authorities: It is immaterial, as affecting the liability of the city, whether the contents of the sewer are discharged directly on the property of an individual or at such point that the sewage and other refuse taken along with it must necessarily be carried there by a conduit or gravitation. *Chapman v. City of Rochester*, supra. If a municipal corporation, by its system of constructing sewers, renders an outlet necessary, it must provide one. *City of Evansville v. Decker*, 84 Ind. 325; *City of Crawfordsville v. Bond*, 96 Ind. 236; *Van Pelt v. City of Davenport*, 42 Iowa, 308; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743. It cannot discharge its sewers on private property, and, if it does so, it is prima facie liable. *O'Brien v. City of St. Paul*, 18 Minn. 176 (Gil. 163); 2 Dill. Mun. Corp. 987. Where the city has emptied one of its sewers on private land, it is a direct violation of the owner's rights, a continual trespass on his property, and the city is liable, just as any private person would be. *Beach v. City of Elmira*, 22 Hun, 158; *Bradt v. City of Albany*, 5 Hun, 591. A municipal corporation has no right to collect the sewage of a large portion of a city, and, by artificial channels, cast it up on the lands of another; and for such acts it is liable in damages, whether or not they be done in conformity to a plan adopted by its officers, judicial or otherwise. *Noonan v. City of Albany*, 79 N. Y. 475; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Richardson v. City of Boston*, 19 How. 263; *Sleight v. City of Kingston*, 11 Hun, 594; *Barton v. City of Syracuse*, 36 N. Y. 54; *Bastable v. Same*, 8 Hun, 587; *Beach v. City of Elmira*, 22 Hun, 158; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 466; *Perry v. City of Worcester*, 6 Gray, 544; *Ashley v. City of Port Huron*, 35 Mich. 296; *Story v. Railway Co.*, 90 N. Y. 122; *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321. A city is liable if it undertakes to collect water in one channel and wrongfully pours it upon another's land. *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, and 4 N. E. 160; *City of Evansville v. Decker*, 84 Ind. 325; *Weis v. City of Madison*, 75 Ind. 241; *Railroad Co. v. Stevens*, 73 Ind. 278; *Templeton v. Voshloe*, 72 Ind. 134; *Rice v. City of Evansville*, 108 Ind. 7, 9 N. E. 139; *Barrett v. Association* (Ill. Sup.) 42 N. E. 891. This principle has been uniformly applied to the acts of such corporations in constructing sewers, drains, and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body, and was precipitated upon the premises of an individual, occasioning dam-

ages thereto. A court of equity has jurisdiction, in a proper case, not only to determine the question whether a nuisance in fact exists, but to make a decree that it be abated; but in such case it must clearly appear that the complainant has title to the water course or the land under it (if it be a water course that is complained of), and that the nuisance is made out. *Earl v. De Hart*, 12 N. J. Eq. 280; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *Hammond v. Fuller*, 1 Paige, 197. The right of an individual citizen to abate a public nuisance arises only when it becomes an obstruction to the exercise of his private rights, or when he receives some special or peculiar injury therefrom, distinct from what he suffers in common with the public. *Bigelow v. Bridge Co.*, 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *Irwin v. Dixon*, 9 How. 10; *Draper v. Mackey*, 35 Ark. 497; *Railroad Co. v. Ward*, 2 Black, 485; 1 *Suth. Dam.* 766; and the numerous cases cited in the footnote to *South Carolina Steamboat Co. v. South Carolina R. Co.* (S. C.) 4 *Lawy. Rep. Ann.* 209 (s. c. 9 S. E. 650).

In 2 *Add. Torts*, § 1085, the author lays down the general rule that:

"Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural water courses, the power must be exercised so as not to create a nuisance, or interfere with the private rights of individuals. If a riparian proprietor has a right to enjoy a river so far unpolluted that fish can live in it and cattle drink of it, and the town council of a neighboring borough, professing to act under statutory powers, pour their house drainage and the filth from water-closets into the river in such quantities that the water becomes corrupt and stinks, and fish will no longer live in it, nor cattle drink it, the court will grant an injunction to prevent the continued defilement of the stream, and to relieve the riparian proprietor from the necessity of bringing a series of actions for the daily annoyance. In deciding the right of a single proprietor to an injunction, the court cannot take into consideration the circumstance that a vast population will suffer by reason of its interference. 'There are cases at law,' observes Sir W. P. Wood, V. C., 'in which it has been held that, where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected, the question simply is whether he has those rights, and not whether a large population will be inconvenienced by measures taken for their protection.'"

The same author (section 1049), says:

"Generally speaking, where local boards are authorized and required to execute drainage works in a particular district, and to make compensation to parties sustaining injury therefrom, they have no power to collect together the sewage, and pour it into streams which were previously pure, so as to create a nuisance, and deteriorate the value of the adjoining land. A power to take possession of streams and to cover over open water courses for drainage purposes, and to give compensation therefor, gives to the board no power by implication to pollute water which was previously substantially pure.

The rule is laid down in this circuit, in *Emigration Co. v. Gallegos*, 32 C. C. A. 475, 89 Fed. 773, that:

"A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more

vexatious and expensive than effective. 2 Beach, Inj. §§ 1129, 1146; Tallman v. Railroad Co., 121 N. Y. 119, 123, 23 N. E. 1134; Uline v. Railroad Co., 101 N. Y. 98, 122, 4 N. E. 536; Galway v. Railroad Co., 128 N. Y. 132, 145, 28 N. E. 479; Evans v. Ross (Cal.) 8 Pac. 88."

It is said in *Barrett v. Association* (Ill. Sup.) 42 N. E. 891, 892:

"But it is a well-recognized branch of equity jurisdiction to restrain by injunction the fouling of running streams that pass over the lands of others by connecting sewers therewith, or by other means, so as to endanger the comfort and health of others, or to cause irreparable injury to their property rights. 2 High, Inj. p. 508, §§ 794, 795; *People v. City of St. Louis*, 5 Gilman, 351; *Wahle v. Reinbach*, 76 Ill. 322; *Metropolitan City Ry. Co. v. City of Chicago*, 96 Ill. 620; *Minke v. Hopeman*, 87 Ill. 450; *Catlin v. Valentine*, 9 Paige, 575; *Lyon v. McLaughlin*, 32 Vt. 423; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218."

"By an 'irreparable injury' is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor, necessarily, great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other, and which, because it is so large on the one hand and so small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court at law." 2 Wood, Nuis. § 778.

In footnote 4 to that section is reported the case of *Clowes v. Waterworks Co.*, 8 Ch. App. 125. The opinion was delivered by Lord Chief Justice Mellish, and is instructive, because it lays down the rule with reference to injuries of the character alleged here which has commended itself to the courts of England. He quotes approvingly from an opinion delivered by Vice Chancellor Bruce, in *Attorney General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 648, as follows: "It seems to me that even slight infringements of rights respecting real estate require to be watched with a careful eye and repressed with a strict hand by a court of equity, where it can exercise jurisdiction," and adds that this rule has since become the rule which governs the English courts in all such cases.

I have failed to find a single well-considered case where the American courts have not granted relief under circumstances such as are alleged in this bill against the city, and the most careful research has failed to disclose a single case where defendants depositing their drainage in a system of sewers erected by a city under authority of law have been held responsible for a nuisance created by a city in depositing such sewage so as to create a nuisance, and inflict damage upon others.

Separate demurrers have been sustained to the bill in favor of each of the defendants except the water company, Joe Huckins, Sr., and the city. No service has been made on Huckins, Sr., and he has not appeared. The water company stands on a plea to the jurisdiction, which has not been heard. On the demurrer of the city, in view of the authorities quoted, the court is of opinion that:

1. The bill is multifarious, because the allegations thereof do not authorize any relief against any of the defendants except the city, but do warrant relief against the city. In the case of *Barcus v. Gates*, 32 C. C. A. 345, 89 Fed. 791, Judge Morris says:

"Multifariousness arises from the fact either that the transactions which form the subject-matter of the suit are so dissimilar and separate that they

cannot definitely be tried together in one record, or that some defendant is able to say that as to a large part of the transaction set out in the bill he has no interest or connection whatever."

The court is of opinion that all the defendants except the city can truthfully say that they have no interest or connection whatever with the transaction set out in the bill. The demurrer, therefore, is sustained on the ground that the bill is multifarious.

2. The demurrer is sustained because there is a misjoinder of parties in this suit. None of the defendants should be joined with the city in this action.

3. The demurrer is sustained on the ground that the plaintiffs in this suit can only recover against the city such damage as they show they have sustained up to the time the decree is rendered, and not for prospective damages, for the reason that, if an injunction is granted, it cannot be assumed it will be violated, and that other damages will be sustained, and for the reason, if a restraining order is finally refused, then the bill should be dismissed for want of jurisdiction in the court, and the plaintiffs remitted to a court of law for such damages as they may have sustained. In short, the jurisdiction of the court in this case rests upon the fact that the plaintiffs are suffering from a continuing nuisance created by the city.

4. The court is of opinion that the sixth ground of demurrer—that the city was acting under the laws of the state—is not well taken. The state cannot authorize such a nuisance as this, and, in the opinion of the court, has not done so. *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9. On this ground, therefore, the demurrer is overruled.

5. The seventh ground of demurrer, namely, that the plaintiffs have an adequate remedy at law, is not well taken, and the demurrer is overruled as to that ground.

6. The eighth ground of demurrer, namely, that the plaintiffs are not entitled to equitable relief, is not well taken. The bill states a good cause of action against the city if sued alone, and the demurrer on this ground is overruled.

ANDRUSS et ux. v. PEOPLE'S BUILDING, LOAN & SAVING ASS'N.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 787.

1. BUILDING AND LOAN ASSOCIATIONS—USURY—WHAT LAW GOVERNS.

Where the by-laws of a building and loan association provide that all payments shall be made to its secretary at the office of the association in the state in which it is incorporated, and a bond and mortgage executed to the association by a borrowing stockholder each contain a stipulation that it is to be governed by the laws of such state, the contract will not be held usurious, if not so by the laws of such state where it is to be performed.

2. JUDICIAL NOTICE—FEDERAL COURTS—STATUTES OF ANOTHER STATE.

A federal court sitting in one state will take judicial notice of the public statutes of another state.

3. BUILDING AND LOAN ASSOCIATIONS—USURY—NEW YORK STATUTES.

Under the statutes of New York, the taking of premiums for loans made by building and loan associations does not render them usurious, under the general usury statutes.

4. SAME—BORROWING STOCKHOLDERS—FORFEITURE OF STOCK.

A borrowing stockholder in a building and loan association, whose stock has been forfeited by the association, in accordance with its rules, for default in payment of dues, is not entitled to credit on his loan for the amount paid thereon.

5. HOMESTEAD—EXECUTION OF DISCLAIMER.

The execution and recording of a disclaimer of homestead rights by a husband and wife, in property not at the time occupied as a homestead, for the purpose of procuring a loan on such property, will be given effect as an abandonment in favor of the mortgagee.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This is a bill in equity to foreclose a mortgage. It is filed by the People's Building, Loan & Saving Association, a corporation organized under the laws of the state of New York, against George W. Andruss and Hannah Andruss, residents and citizens of Texas. The material facts, as agreed on between the parties, are as follows: "That on the 3d day of March, 1893, the defendants, George W. Andruss and his wife, Hannah Andruss, entered into and executed and duly acknowledged a certain contract in writing with R. H. Andruss, a contractor, wherein and whereby the said contractor obligated himself to build on the premises hereinafter described, for the defendants in said cause, a certain two-story rock and brick house, 25 by 100 feet, within a period of three months from the date of said contract, and said contractor obligated himself by the terms of said contract to furnish all materials, and in a good, workmanlike manner to build and finish said house for said defendants; and, as a consideration therefor, by the terms of said contract said defendants agreed to pay said contractor the sum of \$4,000. That thereafter said house was built and finished as above specified, and that whatever lien was acquired on said house and premises by the said R. H. Andruss was duly assigned and transferred by him on, to wit, the 3d day of March, 1893, to plaintiff, and that plaintiff is now the owner of whatever lien is so acquired as aforesaid to secure the payment of the bond sued upon. That defendant George W. Andruss applied to plaintiff for the advance of the money in question for the purpose of enabling him to build said house in accordance with said contract. That on, to wit, the 18th day of March, 1893, the plaintiff loaned to the defendants the sum of \$3,000, less \$300, which was reserved by the plaintiff as a bonus or premium on said loan, as especially provided for in the charter and by-laws of plaintiff. That in consideration therefor said defendants executed and delivered to plaintiff the bond sued upon, bearing said last-named date, and fully described in plaintiff's bill. That said bond is hereto attached, and hereby referred to and made a part hereof. It is hereby agreed that ten per cent. of the amount due on said bond is a reasonable attorney's fee for bringing suit on said bond in foreclosing the said lien. That on the 18th day of March said defendants, for the purpose of further securing the payment of said sums of money in said bond according to its legal tenor and effect, also executed, acknowledged, and delivered to plaintiff their certain deed of trust in writing, sued upon, fully described in plaintiff's bill, wherein and whereby the defendants conveyed to E. A. Walton, as trustee for plaintiff, lot No. 10, block No. 6, in Bishop's addition to the city of Dublin, in Erath county, state of Texas. Said deed of trust is hereto attached, and hereby referred to and made a part hereof. It is admitted that the plaintiff is a building and loan association, with its domicile, principal office, and headquarters in the city of Syracuse, state of New York; that its principal office and domicile was at Geneva, state of New York, at the time said contracts were executed, and that on the 11th day of September, 1890, it procured a permit from the state of Texas, through the secretary of state of Texas, to do business in the state of Texas, as a building and loan association, for the period of ten years next

after said date; that a copy of the articles of association and by-laws of said association are attached to the statement of facts in case of Plaintiff v. W. T. Leggett in this court, and hereby referred to and made a part hereof; that upon the 1st day of February, 1893, the defendant George W. Andruss, upon written application, procured thirty shares of stock of plaintiff company in series or class A, evidenced by certificate No. 5,841, to be paid for as provided in said certificate, which certificate is hereto attached, and hereby referred to and made a part hereof. Said stock was procured by said Andruss with a view of borrowing said money evidenced by said bond for \$6,000. That at the time the defendant procured said loan the said George W. Andruss transferred said stock to plaintiff to further secure the payment of said bond. It is admitted that said defendants paid on said stock the sum, in accordance with the terms thereof, of \$30 per month for the month of February, 1893, and for each and every month thereafter up to and including the month of August, 1896, aggregating the sum of \$1,290; that the defendants paid the interest and premium stipulated in said bond for the month of June, 1893, and for each and every month thereafter up to and including the month of August, 1896, aggregating the sum of, to wit, \$975; that also the defendants paid the quarterly dues on said stock, in accordance with the charter and by-laws and the terms of said certificate, up to August, 1896, to wit, the sum of \$7.50 each quarter, aggregating the sum of \$105; that the defendant George W. Andruss was fined the sum of \$18 for failure to pay the installments on said stock promptly, as required by the charter and by-laws of plaintiff, all of which payments are evidenced by defendants' pass book, which is hereto attached, and hereby referred to and made a part hereof. It is further admitted that neither the defendants nor any other person has paid any installment on said stock, or any monthly installment, interest, or premium on said bond, since the month of August, 1896; that on, to wit, the 28th day of May, 1897, the defendants having failed to insure the house on said premises for the benefit of plaintiff, on said day the plaintiff was compelled to insure said house against damage or loss by fire, for its own protection, in the Scottish Union & National Insurance Company, for the period of one year, and was compelled to pay the sum of \$33.75; that plaintiff made demand in writing of defendants in the months of September, October, November, and December, 1896, and January, February, March, April, May, and June, 1897, for said monthly installments of stock dues which defendants owed plaintiff on said stock for each month named above; that the defendants were fined ten cents on each share of stock held by him, by the directors of plaintiff, for his failure to pay the said stock dues for the months of September and October, 1896, and were fined twenty cents on each share of said stock for the months of November and December, 1896, and January, February, March, April, May, and June, 1897, all of said fines aggregating the sum of \$54; that by reason of the failure to pay said stock dues as aforesaid, and said fines, the said thirty shares of stock, and all moneys paid thereon, were forfeited by the directors of plaintiff company in accordance with article 12 of plaintiff's articles of association, and in accordance with the law of the state of New York which authorizes such forfeiture."

The bond referred to in the agreed statement of facts is as follows:

"Know all men by these presents, that we, George W. Andruss and Hannah Andruss (his wife), of Dublin, in the county of Erath, and state of Texas, are held and firmly bound unto the People's Building, Loan and Saving Association, a body corporate, created and duly incorporated under and in compliance with the laws of the state of New York, located at Geneva, in the county of Ontario, and state of New York, in the sum of six thousand (\$6,000) dollars, lawful money of the United States, to be paid to the association aforesaid, or to its certain attorneys, successors, or assigns, for which payment, well and truly to be made, we do bind ourselves and our heirs, executors, administrators, and assigns, and every of them, firmly, jointly, and severally, by these presents. Witness our hand and seals this 18th day of March in the year of our Lord one thousand eight hundred and ninety-three. Whereas, the above-bounden George W. Andruss is a member and stockholder of the People's Building, Loan and Saving Association, and has received from it, as such member, under the articles of incorporation, by-laws,

and regulations of said association, an advance to him of \$100 per share upon the value of thirty (30) shares of stock; in anticipation of their par value at the time when such shares shall mature: Now, the condition of this obligation is such that if the above-bounden George W. Andruss, his heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid unto the said the People's Building, Loan and Saving Association, or its certain attorney, successors, or assigns, the just and full sum of three thousand dollars (\$3,000) in the manner following, that is to say, thirty (30) dollars contribution of principal, and twelve (12) dollars and fifty (50) cents interest, and twelve (12) dollars and fifty (50) cents premium, each and every month from the date hereof, for such term as will secure to the said the People's Building, Loan and Saving Association the payment of the full sum of one hundred dollars on each and every one of the said thirty shares hereby secured to be paid, such payments to commence on or before Saturday, March 25, 1893, and to be continued and made on or before the last Saturday in each month thereafter until the expiration of said term, and also pay all dues, fines, and penalties that may be imposed upon the said George W. Andruss as a member of said association, pursuant to the articles of association and by-laws thereof, all of which are to be paid unto the treasurer of said association at Geneva, N. Y., and keep the obligations hereinafter contained, without fraud or delay, then this obligation to be void, otherwise to remain in full force and virtue. And it is hereby expressly agreed that should any default be made in the payment of any installment of principal, or any part thereof, or any interest or premium moneys, or any part thereof, hereby secured to be paid, or any dues, fines, or penalties imposed as aforesaid, or in the payment of the taxes, assessments, and insurance as hereinafter provided, and should the same remain unpaid and in arrears for the space of three months after the same shall have become due and payable, that then and in that case the whole principal sum hereby secured to be paid, together with the interest and premium thereon, shall become due and payable immediately thereafter, although the period above limited for payment thereof may not have expired, anything herein contained to the contrary notwithstanding; and it is further agreed that the said parties of the first part shall pay a reasonable attorney's fee in case suit is brought to enforce the conditions of this instrument. And it is further agreed by and between the parties to these presents that the said parties of the first part shall and will keep the buildings erected and to be erected on the lands described in the trust deed herewith executed, and collateral hereto, insured against loss or damage by fire, by solvent insurers, and in an amount of at least three thousand (\$3,000) dollars, and approved by said party of the second part, and assign the policy and certificate thereof to said party of the second part, its successors or assigns, and in default thereof it shall be lawful for said party of the second part to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on said premises, added to the amount secured by these presents, and payable on demand, with interest at the rate of six per cent. per annum. * * * It is further agreed by and between the parties to these presents that this instrument is made under and controlled by the laws of the state of New York. In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

George W. Andruss. [Seal.]
 "Hannah Andruss. [Seal.]"

The deed of trust referred to in the bond was offered in evidence. It is dated March 18, 1893, executed by said defendants Andruss and wife, and E. A. Walton is made trustee. It conveys the property described in the decree. It refers to the real estate conveyed as being the "same premises conveyed to George W. Andruss by T. C. Hill, agent." It contains clauses "releasing and waiving all rights under and by virtue of the homestead exemption laws of the state of Texas, and all rights of dower." It states the loan of \$3,000, the payments to be made, and states that "they are to be paid unto the treasurer of said association, at Geneva, New York, according to the conditions of a bond this day executed and delivered by the said George W. Andruss and Hannah Andruss. * * * The deed of trust also contains this provision: "And it is expressly

agreed and understood that this instrument is made under and controlled by the laws of the state of New York."

The by-laws of the appellee were in evidence. Article 16 is as follows: "All remittances for admission, monthly and quarterly installments, fines, penalties, interests, and premiums, and all other payments, shall be made to the secretary of the association, at their principal office, in Geneva, N. Y."

The circuit court rendered the following decree:

"April 18, 1898.

"On this day came on said cause to be heard before the United States circuit [court], at a regular term thereof, at Waco, Texas, and the solicitors for plaintiff and for each of the defendants in said cause being present and having announced 'Ready for trial,' and it appearing to the court that at a former day of the present term of this court the case of Hannah Andruss and George W. Andruss v. The People's Building, Loan & Saving Association (No. 43 in equity) in this court was by motion consolidated with the above-entitled cause (No. 28 in Equity),—People's Building, Loan & Saving Association v. G. W. Andruss et al.,—and the issues and the parties in said two suits Nos. 43 and 28 being identical, after hearing the evidence and argument of counsel, are disposed of as follows: The court orders and decrees that the plaintiff, the People's Building, Loan & Saving Association, a corporation, do have and recover of and from the defendant George W. Andruss the sum of \$3,828.75, amount of principal, interest, premium, and attorney's fees due on the bond sued on, and \$33.75 paid as insurance premium with interest thereon at the rate of 5 per cent. per annum from the date hereof, together with all costs of suit. It is further ordered and decreed by the court that plaintiff's deed of trust lien executed by defendants, George W. Andruss and wife, Hannah Andruss, on the 18th day of March, 1893, to secure said sums of money, on the north half of lot ten (10) in block six (6) of Bishop's addition to the town of Dublin, in Erath county, Texas (and for a further description of said premises reference is hereby made to said deed of trust, which is duly recorded upon the Deed of Trust Records of Erath County, Texas, in volume H, at pages 487 to 494, filed for record March 18, 1893), be, and the same is hereby, foreclosed on said premises, against all the right, title, or interest of each and all of said defendants, George W. Andruss and Hannah Andruss, in and to said premises. It is further ordered that unless the defendants pay to the clerk of this court for the satisfaction of this decree the full amount of said decree, and all interest due thereon, within thirty days from the date hereof, it is ordered that said property be sold under an order of sale issued by this court as herein directed at public vendue at the courthouse door of Erath county, Texas, to the highest bidder, for cash, for the satisfaction of said decree in favor of plaintiff, and the court hereby appoints Thomas P. Martin commissioner to sell said property. And it is ordered that said commissioner shall give public notice of the date and place of such sale of said property by causing notice of such sale to be published once a week for at least four weeks prior to such sale in at least one newspaper, printed regularly, issued and having a general circulation in the county of Erath, and said state of Texas; that such notice shall describe said property, and give the date and place of such sale. And said commissioner is ordered to make a written report of such sale, at the earliest time practicable thereafter, to this court. And, upon confirmation of said sale by this court, the proceeds of such sale, or so much thereof as may be necessary, shall be applied to the satisfaction of said decree in favor of plaintiff as aforesaid, and the balance, if any, shall be paid over to defendant Hannah Andruss; and, should said property fail to sell for sufficient to pay off said decree, and all costs in this behalf incurred, then it is ordered that, after the confirmation of such sale, execution shall issue against said George W. Andruss for the balance due plaintiff on said decree, and after confirmation of said sale the said commissioner shall convey said premises, by warranty deed, to the purchaser thereof, and said purchaser shall have his writ of assistance at once to get possession thereof."

The other facts necessary to an understanding of the case are stated in the opinion.

George W. Andruss and Hannah Andruss appealed from the decree of the circuit court. The assignments of error are based on the said decree.

F. E. Dycus and W. S. Essex, for appellants.
Drew Pruitt, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. 1. The debt which is the subject of this suit is proved by a bond which is secured by a mortgage. The appellants, who are the obligors in the bond and the mortgagors in the mortgage, are citizens of Texas. The appellee, who is the obligee in the bond and the mortgagee in the mortgage, is a New York corporation. Both the bond and the mortgage are made payable at Geneva, in the state of New York. The by-laws of the appellee corporation provide that all payments shall be made to the secretary of the association, at Geneva, N. Y. The appellee corporation is a building and loan association organized pursuant to statutes of the state of New York, and both the bond and the mortgage contain a stipulation that it is to be governed by the laws of that state. In view of all these facts, we hold that the contracts in question are not usurious, if they are valid under the laws of the state of New York, the place of performance. *Andrews v. Pond*, 13 Pet. 65-78; *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Miller v. Tiffany*, 1 Wall. 298; *Sturdivant v. Bank*, 9 C. C. A. 256, 60 Fed. 730; *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024; *Association v. Tinsley (Va.)* 31 S. E. 508.

2. It is not necessary, as claimed by the appellants, to offer evidence of the public statutes of another state. The United States courts sitting in Texas will take judicial notice of the public statutes of New York. *Owings v. Hull*, 9 Pet. 607; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453.

3. While it is true, as claimed by appellants, as a general proposition, that contracts in New York for more than 6 per cent. interest are usurious and void, yet an exception is made by statute of building and loan associations, or at least it is provided that premiums for loans may be paid such associations without a violation of the usury laws. The following is the statute:

"No holder of redeemed shares shall claim to be exempt from making the monthly payments provided in the articles of association, upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association, or of any premium for loans made to members be deemed a violation of the provisions of any statute against usury." 1 Rev. St. N. Y. (4th Ed.) p. 1290; Laws N. Y. 1851, c. 122, § 7.

This statute prevents the contracts between the parties from being usurious under the general statutes. *Association v. Read*, 93 N. Y. 474.

4. The claim of the appellant George W. Andruss, that he is entitled to credit on his bond for borrowed money on account of the payments he made on his subscription for stock, cannot be sustained. He was a subscriber for stock in the association, and he was under contract to pay for it, just as any other stockholder.

Payments on the stock, his stock being forfeited under the rules of the association, cannot be applied to his debt on account of the loan. *Blakeley v. Association* (Tex. Civ. App.) 26 S. W. 292; *Association v. Logan* (Tex. Civ. App.) 33 S. W. 1088.

5. On the 3d day of March, 1893, the appellants both signed a writing designating certain real estate as a homestead, and concluding with this statement:

"And we do hereby exempt from the operation of the homestead law, and do disclaim any homestead right in and to, the north half of lot number ten in block number six of Bishop's addition to the town of Dublin."

This instrument was duly recorded.

George W. Andruss testifies that:

"The purpose of executing said instrument was to enable me to procure the loan on said property. * * * My purpose in getting the money was for the purpose of improving said property."

He admits that he vacated the property, but he says this was only temporary, for the purpose of allowing the building to be erected. He further testifies:

"Myself and wife executed and recorded the instrument [the homestead disclaimer] in good faith, and it was our intention to relinquish our homestead right in the north half of lot ten, in said instrument."

Having executed this relinquishment to secure the money, the defendants offer to repudiate it in defense of a suit to collect the money. This cannot be permitted. In the case of *Jacobs v. Hawkins*, 63 Tex. 3, the supreme court of Texas said:

"In cases in which property has not been used as a homestead, or is not so used, the declarations of a husband would seem to be admissible for the purpose of showing that there was no intention so to use it as to make it the homestead; and this would seem to be true where a place formerly used as a homestead is not longer occupied, and so for the purpose of indicating an intention never again to use it, which, coupled with the act of removal, would amount to an abandonment."

Another case which is analogous to the one at bar is *Kempner v. Comer*, 73 Tex. 202, 11 S. W. 196. The owners were improving the property for the purpose of making the same the business homestead, but had not sufficient means to complete the improvements; and, in order to procure a loan on the property to make the improvements already begun, the husband and wife executed a renunciation, renouncing all homestead interest in the property. The supreme court said:

"But the parties claiming homestead expressly abandoned and renounced their intention to occupy and use the premises as a homestead before it was so used, and this renunciation was made, not by mere declarations, but in the solemn form of a deed, the wife joining; and all this was done in order to include the property in the deed of trust then being made to secure advances and borrowed money. In such case the law will give effect to the renunciation. There was in fact no homestead in the premises when renounced."

The renunciation, as this case shows, would have no effect if the premises had really been occupied as a homestead, and if the renunciation had only been made to avoid the effects of the homestead laws. But here the appellant Andruss testifies that the relinquishment was in good faith, and the evidence shows an actual abandon-

ment of the lot as a business homestead. The money having been lent on the representation that the property was abandoned as a homestead, and having been used to build a house on the lot, it would be manifestly inequitable to allow the claim of homestead to be now used to defeat the deed of trust. The judgment of the circuit court is affirmed.

COOPER et al. v. HILL.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1899.)

No. 1,145.

1. **LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.**

A cause of action against the directors of a bank for fraudulently diverting its funds for their own benefit accrues as soon as the diversion is complete, in the absence of concealment of the facts on their part; and where such facts are shown upon the records of the bank, and become known to a cashier who succeeds the one involved in the transaction, and who has no interest in the matter adverse to the bank, his knowledge is notice to the bank.

2. **NATIONAL BANKS—REPAIRS OF PROPERTY ACQUIRED—PERSONAL LIABILITY OF DIRECTORS.**

A national bank which has lawfully acquired the title to property in payment of a debt has implied authority to make reasonable repairs thereon for the purpose of putting it in salable condition, and its directors cannot be held personally liable for money so expended in good faith.

3. **SAME—PROSECUTION OF OUTSIDE BUSINESS.**

A national bank, however, has no power to prosecute a mining business on property which it has acquired,—much less, to expend its funds in prospecting for mineral on such property; and directors who authorize such expenditure are personally liable therefor to the bank or its receiver.

4. **SAME—SUIT AGAINST DIRECTORS—JURISDICTION OF EQUITY.**

A suit by the receiver of an insolvent national bank against its officers and directors to compel restitution of funds unlawfully diverted by them is one to execute a trust, and involves an accounting as to trust funds, and hence is of equitable cognizance.

5. **SAME—JOINT LIABILITY.**

When a loss has been caused to a national bank by the appropriation of its funds to a purpose unauthorized by law, or by culpable negligence or conversion of its funds, the officers who participated in or consented to the act are jointly and severally liable for the entire amount.

6. **SAME—FAILURE TO PROVE ALLEGATION OF FRAUD.**

A bill by the receiver of a national bank against its officers and directors for the unlawful diversion of funds of the bank is sufficient to support a recovery, when the diversion is proved, although a further allegation that such diversion was fraudulent is not proved. The gravamen of the bill is the fact of unlawful diversion.

7. **SAME—INTEREST.**

When the directors and officers of a bank have misappropriated its funds, they are liable for interest on the amount from the date of the misappropriation, as damages; and no statute is necessary to authorize the allowance of such interest by a court of equity.

8. **SAME—SUIT AGAINST DIRECTORS—LACHES.**

The directors of a national bank are not trustees of an express trust, with respect to the property or funds of the bank, but of an implied or resulting trust created by the operation of the law upon their official relation to the bank; and the statute of limitations and the doctrine of laches may be invoked in their defense, when sued for a breach of such trust. Such an action is maintainable either at law or in equity, and a court of equity

will follow the statute of limitations, unless unusual or extraordinary circumstances render its application inequitable in a particular case.

9. SAME.

The officers and directors of a national bank without authority of law used its funds in prospecting and attempting to develop mining property which had been acquired by the bank. Their action was not fraudulent, but was taken in good faith for the benefit of the bank, but resulted in the loss of the funds so diverted. They subsequently sold their interests in the bank, and retired from its management, leaving it solvent and prosperous. Under the new management it subsequently became insolvent, and its receiver brought a suit in equity against the former directors to recover the amount so diverted by them. Such suit was not brought until more than six years after the last of the expenditures in the mining venture had been made, which was the limit of time, under the statutes of the state, within which an action at law for the recovery of the money could be maintained; but subsequently, and within the six years, the defendants, as directors, had repaid to themselves from the funds of the bank certain advances made by them individually in aid of such venture. *Held*, that the court would follow the statute, and as to the amounts originally expended the suit was barred by laches, but was maintainable for the recovery of the amounts subsequently withdrawn without legal authority.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal from a decree for the payment of the sum of \$35,093.45, interest thereon, and costs, by John J. Reithmann, George Tritch, Job A. Cooper, D. C. Dodge, and John Good, to the appellee, Zeph. T. Hill, as receiver of the German National Bank of Denver, on account of the misappropriation of the funds of that bank in 1888 and 1889. All the parties against whom this decree was rendered have appealed to this court except Reithmann, who appears to be content with the result below. The decree rests upon this state of facts: In the years 1888 and 1889 Reithmann, Tritch, Cooper, Dodge, and Good were directors of the bank. Tritch was its president, and Cooper was its cashier. The bank had acquired the ownership of certain mining claims under an execution sale upon a judgment in its favor of about \$4,500, and by virtue of certain conveyances which it had procured to be made to Cooper, its cashier, in an endeavor to collect its judgment. The legal title to this property was in Cooper, but he held it for the benefit of the bank. Upon the property was some mining machinery. A shaft had been sunk upon it more than 100 feet, and some drifts had been made from this shaft in an endeavor to discover and mine ore. But the former owners had abandoned the undertaking, the machinery was still, and the shaft and drifts were full of water. In February, 1888, the five directors of this bank against whom the decree below was rendered caused a corporation called the Cassandra Consolidated Mining Company to be organized for the purpose of acquiring, developing, and operating mines. They had the certificates of all the stock of this corporation, except a few qualifying shares which were written to its officers, written to themselves, on July 11, 1888, but they never took them out of the stock book of the company. On July 12, 1888, Cooper made a deed of the mining property which he held for the bank to the Cassandra Company. The latter company procured money from the bank, and used it to pump water out of the mine, to sink the shaft deeper, and to prospect for ore, between February 1, 1888, and April 11, 1889, until it had used, in all, \$20,864.82 of the funds of the bank. Upon the books of the bank this money, with the usual interest, was charged as an overdraft against the Cassandra Company. In June, 1888, this overdraft had become \$6,800, and each of these five directors deposited \$1,200 in the bank to the credit of the Cassandra Company, and thus diminished its apparent overdraft by the sum of \$6,000. On October 26, 1889, this mining property had become worthless; and the board of directors on that day passed a resolution to the effect that it should be reconveyed to the bank, that the bank should refund to the five members of the board the \$6,000 which they had deposited to the credit of the Cassandra Company, and that the bank should assume that company's over-

draft. Pursuant to this resolution, Cooper, who claimed that his deed to the Cassandra Company had never been delivered, although it appeared upon the records of the county, made a deed of this property to John J. Reithmann, who had then acquired a controlling interest in the bank, for the benefit of the bank; and in December, 1889, the bank paid back to each of the five directors the \$1,200 which he had deposited with the bank for the Cassandra Company in June or July, 1888. During all the time when these transactions were going on the bank was solvent and prosperous, and the appellants owned a majority of its stock, and controlled and managed it. The stock was selling in October, 1889, when the resolution to return this mining property to the bank was passed, at the rate of \$325 for a share, which was of the par value of \$100. About this time the appellants sold their stock in the bank, and the control and management of it was turned over to Reithmann and his friends. On July 6, 1894, the bank became insolvent, and the appellee, Hill, was appointed its receiver. This suit was commenced by this receiver on October 25, 1895. In his bill he alleged the facts we have stated, averred that the moneys of the bank used through the Cassandra Company were misappropriated and lost by the five directors in a futile attempt to develop and explore this mining property, and that this was done by them for their own benefit, and for the purpose of speculation. He alleged that the Cassandra Company was organized and owned by the five directors, that they caused the mining property to be conveyed to it, and that they intended to take the benefit of any advance in its value if paying ore was discovered and meant to charge the bank with any loss they sustained if their speculation was unfortunate. He alleged that their speculation was disastrous, and in pursuance of their intention they charged the bank with their loss, and escaped without harm. The appellants answered that the mining property was at all times owned by the bank, that the Cassandra Company was organized and operated by them in the interest of the bank, that the purpose of its organization was to form a conduit through which the mining property might be conveyed to a purchaser, and that this was done because they thought that the bank could realize more by a sale of the stock of the Cassandra Company as the owner of the mining property than it could by a direct sale of the property as the property of the bank. They alleged that in 1888 the mine was full of water, so that it could not be examined by a purchaser or sold; that they authorized the expenditure of the money used through the Cassandra Company for the purpose of pumping out the water, clearing out the shaft and drifts, and putting the property in presentable shape for examination, in the hope and belief that in that way they might secure a purchaser of it for the bank. They averred that they advanced the \$6,000 which they deposited to the credit of the Cassandra Company in the summer of 1888 to the bank, as an accommodation to it, for the purpose of reducing the apparent overdraft of the Cassandra Company. It appeared at the trial that there were seven directors of this bank; that one Clinton, who prior to that time was the assistant cashier, succeeded Cooper as cashier of the bank in August, 1889, and held that office until September, 1893; that Cooper ceased to be a director of the bank on July 1, 1890; that Tritch ceased to be a member of the directory at the annual meeting in January, 1890; and that Dodge ceased to be a member on January 12, 1892. No complaint of the acts of the appellants was ever made until after the bank became insolvent under the management of their successors, nor until after a receiver was appointed for it in the year 1894. Upon this state of facts a decree was rendered in the court below against the five directors for the entire amount of money expended upon this mining property during the years 1888 and 1889, with interest from December 23d in the latter year.

Charles J. Hughes, Jr., for appellants.

John S. Macbeth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The bill in this suit contains averments sufficient to warrant a recovery on the ground of an unauthorized use of the funds of the

bank to prospect for and to develop a mine on its property, and also on the ground of a willful misappropriation of its funds for the use and benefit of the appellants. We dismiss the latter ground on the threshold of this discussion, because the evidence fails to satisfy us that any of the appellants ever intended to obtain any pecuniary advantage or to make any personal gain out of the transactions under consideration at the expense of the bank, and because, if they did, a suit against them for such a fraud was barred in three years from December 23, 1889, and this suit was not commenced until October 25, 1895. Mills' Ann. St. Colo. §§ 2911, 2909. The contention of the appellee that the cause of action for fraud is not barred by this statute, because the time under it does not commence to run until the discovery of the facts constituting the fraud, has been considered. But the salient facts of this case were spread upon the books of the bank. They were all known in October, 1889, to the cashier, Clinton, who succeeded Cooper when he made the record of the resolution for the reconveyance of the mining property; and Clinton had no interest in this matter adverse to the bank, and he was its chief officer and agent. Notice to him was notice to his principal, the bank. There was no concealment, no secrecy, no deceit, in the acts of the appellant; and the time, under this section of the statute, commenced to run when the diversion of the fund was complete. In this state of the facts the receiver and the creditors and stockholders of the bank, whom he represents, stand in its shoes. Their rights here are merely those of assignees of the bank, and as such they have acquired no cause of action which the bank did not have before the receiver was appointed.

The record discloses a case in which the president, the cashier, and the majority of the directors of a bank commenced to expend money upon an abandoned mining property which it owned for the purpose of preparing it for sale, in order that the bank might dispose of it and convert it into money. The shaft and the drifts upon the property were full of water. The machinery had been silent for months. The tools had been stolen, and others were necessary to place the machinery in successful operation. When a national bank has lawfully acquired real estate or other property, it may sell that property and convert it into money; and, in order to do so, it may clean it, make reasonable repairs upon it, and put it in presentable condition to attract purchasers, in the same way that an individual of sound judgment and prudence would do if he desired to make a sale of the property. The authority to do these things is one of the incidental powers vested in the corporation under section 5136 of the Revised Statutes, which provides that a national bank shall have authority:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

The duty of exercising this power is imposed upon the directors and officers of such a bank, and the authority to determine in the first instance when and to what extent it shall be exercised is necessarily intrusted to their judgment. Moreover, they cannot escape the discharge of this duty. They are bound to consider and decide the question at their peril. It follows that, when they have honestly and carefully considered and decided it, they ought not to suffer because, in the light of subsequent events, which could not be foreseen, it turns out that their decision was unfortunate. This mining property was unsalable with the shaft and drifts filled with water, the machinery silent, and the tools gone. It is common knowledge that a mine or a prospect for a mine is much more likely to find a purchaser, and much more likely to realize a fair price, when work is in active progress upon it, than when it is still and desolate. The officers of this bank decided to pump the water out of the shaft and drifts of this property, to put it in condition in which it could be examined by a purchaser, to start the machinery, and to do all this in the hope that by so doing they might find a purchaser for property that was unproductive and worthless in its then condition. An examination of the evidence discloses the fact that the necessary expense of placing this property in condition for examination and sale was at least \$1,000, and perhaps \$2,000. The directors failed to find a purchaser for the property, and the bank lost this money. But in view of the fact that the management and sale of the property was intrusted to their discretion, and that the burden of deciding whether or not this expenditure should be made was imposed upon them, we are unwilling to say that their action in expending \$2,000 for this purpose was either unauthorized, wrongful, or culpably negligent. We are of the opinion that an expenditure of this amount may be said to have been properly made, in the honest exercise of a discretion vested in them, and that they ought not to be personally liable because the use of this money did not secure the purchaser they sought and expected to obtain. The unfortunate part of this case is that they did not stop here. When the shaft had been cleared of water and the machinery had been put in operation, when the property was in proper condition for examination and for sale, and when no purchaser was found, they proceeded to expend \$18,864.82 more in prospecting for paying ore upon property in which none has ever been discovered. It was not only beyond their authority as officers of the bank, but ultra vires of the bank itself, to carry on ordinary mining, manufacturing, or trading business,—much more, to expend its money in such a speculative venture as prospecting for ore where none of value ever had been found. The statutes of the United States are the measure of the powers of national banks, and these corporations can lawfully exercise none but those there expressly granted, and those fairly incidental thereto. *Omaha Bridge Cases*, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, and 51 Fed. 309, 316; *Bank v. Townsend*, 139 U. S. 67, 73, 11 Sup. Ct. 496; *Bank v. Kennedy*, 167 U. S. 362, 366, 17 Sup. Ct. 831; *Bank v. Smith's Ex'r*, 40 U. S. App. 690, 704, 23 C. C. A. 80,

87, and 77 Fed. 129, 137. The officers of these banks are bound to know they are charged by the law with the knowledge of the extent and limitations of the powers of the corporations for which they act, and of their own authority as the agents of these corporations. It is said that they are not technically trustees of express trusts, but they are the agents of the bank, charged, under the national banking laws, with an implied trust to use the funds of the bank for the purposes specified in these laws, only, and to preserve them for their creditors and stockholders. Every agent incurs a personal liability to his principal for losses occasioned by his unauthorized acts under the general law, and the officers of corporations are no exception to the rule. Upon this principle the directors and the other officers of a national bank become personally liable to the bank and its successor in interest, its receiver, for losses caused by their use of its funds for unauthorized purposes, as well as for culpable negligence in their use and for their fraudulent appropriation. *Williams v. McKay*, 40 N. J. Eq. 189, 200; *Mor. Corp.* §§ 555, 556; *Bank v. Wilcox*, 60 Cal. 126, 141.

It is insisted, however, that there can be no recovery of the appellants in this suit on account of the diversion of the funds of this bank to the business of prospecting for ore upon its property (1) because there is a complete remedy for the appellee at law, and therefore there is no jurisdiction of this suit in equity; (2) because the liability of the appellants is several, and not joint; (3) because the appellee pleaded that the appellants fraudulently misappropriated this money for their own benefit; and (4) because the suit is barred by the statute of limitations and by laches. We will consider these objections in their order.

1. This is a suit to compel the restoration to a trust fund of \$20,864.82 which the appellants unlawfully diverted from that fund, and it involves an accounting of the money diverted between the receiver and the appellants. It is therefore a suit against officers of a bank to execute a trust and to compel an accounting, and it avoids a multiplicity of suits at law. This court has repeatedly held, for reasons which now seem to us obvious, and which are stated at length in our opinions, that equity has jurisdiction of such a suit. *Hayden v. Thompson*, 36 U. S. App. 362, 367, 17 C. C. A. 592, 594, and 71 Fed. 60, 62; *Cockrill v. Cooper*, 57 U. S. App. 576, 29 C. C. A. 529, 535, 538, and 86 Fed. 7, 12, 16.

2. Are the appellants jointly liable for the misappropriation? All the appellants knew of the misappropriation while this diversion was going on. Some of them directed, and all of them consented to, it. No objection or protest or endeavor to prevent or stop it was made by any of them, and, when the amount used reached \$6,800, each of them contributed \$1,200 to replace a portion of the misappropriated money, and subsequently reimbursed himself for this contribution out of the funds of the bank. Each of these officers was therefore at fault, and hence liable for the entire amount diverted. When a loss has been caused by the appropriation of the funds of a corporation to a purpose unauthorized by its charter, or by culpable negligence, or by a conversion of its

funds, all the officers of the corporation who are chargeable with the fault which has occasioned the loss are liable for the entire misappropriation, without regard to the degree of dereliction of which each is guilty. 2 Lewin, Trusts, p. 1220; Williams v. McKay, 46 N. J. Eq. 25, 39, 18 Atl. 824. The appellants cannot escape here on the ground that each is separately liable for the amount which he misappropriated only, because they are all both jointly and separately liable for the entire amount diverted.

3. Must the decree be reversed because the appellee pleaded that the diversion was made with a fraudulent intent? The facts set forth in the bill are ample to warrant a recovery for the unauthorized use and loss by the appellants of the money in question in the business of prospecting for ore on the property of the bank, and these facts have been proved. But the bill contains other allegations to the effect that the appellants used and lost this money fraudulently, with the intent to get gain for themselves by causing the property on which it was expended to be conveyed to the Cassandra Company for the purpose of subsequently selling it at a profit for their individual benefit if paying ore was discovered, while they meant to saddle the loss upon the bank if the speculation proved disastrous. The appellee failed to prove these averments of fraud, and it is contended that this failure is fatal to a recovery on any ground under this bill. But the gravamen of the bill was the wrongful diversion of the trust fund. If the cause of action for the fraudulent diversion of the fund to the purpose of prospecting on this mining property for their own benefit were inconsistent with the cause of action for its diversion for the unauthorized purpose of prospecting upon it for the benefit of the bank, this objection of the appellants might be worthy of consideration. But there is no inconsistency between these two causes of action as they are stated in the bill. On the other hand, the latter cause necessarily inheres in the former, and warrants the same relief. The effect of the bill is to plead the unlawful diversion of the fund by the appellants, and then to plead that it was diverted with a fraudulent intent. If the fund was diverted to the unauthorized purpose, the cause of action was complete, whether the officers intended to appropriate the expected benefit of the speculation to their own use, or to give it to the bank, and a complainant is entitled to any relief which the facts that he pleads in his bill and establishes on the trial justify. When the ultimate facts requisite to entitle him to the relief he prays are pleaded and proved, he cannot be defeated because he also pleaded other facts not essential to his recovery, which he did not prove. Espey v. Lake, 10 Hare, 260, 264.

Another objection to the decree is that the court below allowed interest on the amount misappropriated, and it is contended that this was erroneous, because this case does not fall among those in which interest is expressly allowed by the statutes of Colorado (Mills' Ann. St. § 2252). But this is a suit in equity, and no statute is necessary to give a court of equity power to allow interest on moneys unjustly detained or misappropriated. When interest is reserved in a contract, or is implied from the nature of the promise, it becomes a part of the debt, and is recoverable as of right. When

money has been misappropriated or converted to his own use by a defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion; but it is a general rule, both at law and in equity, that, whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate from the date of the misappropriation or from the beginning of the detention. *Swinisen v. Scawen*, 1 *Dickens*, 117; *Redfield v. Iron Co.*, 110 U. S. 174, 176, 3 Sup. Ct. 570; *United States v. North Carolina*, 136 U. S. 211, 218, 10 Sup. Ct. 920; *Jourolmon v. Ewing*, 47 U. S. App. 679, 686, 26 C. C. A. 23, 27, and 80 Fed. 604, 607; *Filmore v. Reithman*, 6 Colo. 120, 131; 1 *Sedg. Dam.* §§ 301, 303.

4. Finally it is claimed that this cause of action is barred by the statute of limitations and by laches, and sections 2900, 2909, 2911, and 2912 of *Mills' Annotated Statutes of Colorado* are invoked to sustain this contention. Section 2900 provides that all actions of assumpsit or on the case, founded on any contract or liability, express or implied, shall be commenced within six years next after the cause of action shall accrue, and not afterwards. Section 2909 declares that, in cases of concurrent jurisdiction in the courts of common law and the courts of equity, the same limitations shall apply to suits in equity and to actions at law. Section 2911 limits the time for the commencement of suits for relief on the ground of fraud to three years after the discovery of the facts constituting the fraud. Section 2912 provides that bills of relief, in case of the existence of a trust not cognizable by the courts of common law, shall be filed within five years after the cause of action accrues, and not later. The last section does not govern the cause of action here in suit, because that cause is based on the disregard of their powers by the agents and implied trustees of a corporation, and this cause of action, as well as the trust relation from which it springs, is cognizable at law as well as in equity. It does not fall under section 2911, because fraud was not essential to its maintenance and was not proved, and the decree stands upon the simple diversion of the funds of the bank to an unauthorized purpose. It rests on the implied liability created under the law by the relation of the appellants, as its officers, to the bank. Why does it not fall under section 2900? The appropriate action at law to enforce the implied liability upon which it rests is an action on the case, and this section provides that the time for the commencement of such an action is limited to six years from the time when its cause accrued. The conclusion is inevitable that an action at law for the cause upon which this decree is based would have been governed by section 2900, and could not have been maintained six years after its cause accrued. The natural result of this conclusion is that this suit ought to be governed by the same rule, both on the ground that courts of equity usually apply the doctrine of laches in analogy to the statute of limitations relative to actions at law of like character, and on the ground that section 2909, *supra*, expressly requires it to be so applied.

The appellee endeavors to escape from this limitation on the

ground that these appellants were trustees of an express trust, and that consequently no time runs in their favor. It must be conceded that express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the cestui que trust. But lapse of time is a complete bar to a constructive or implied trust, both in equity and at law, unless there has been a fraudulent concealment of the cause of action, or other extraordinary circumstances which make the application of the doctrine of laches inequitable. *Hayden v. Thompson*, 36 U. S. App. 362, 377, 17 C. C. A. 592, 601, and 71 Fed. 60, 69. The question presented then is, are the officers of a national bank the trustees of an express trust for its creditors and stockholders, within the meaning of this rule? They are not parties or privies to any express contract or agreement to hold and use the funds of the bank for the purposes prescribed by the acts of congress. They are not parties or privies to any express declaration of trust or agreement with the stockholders or creditors of their bank which sets forth the terms on which they hold its funds for their benefit. They are the mere agents of the bank to discharge the duties imposed upon it and upon them by the law of its being, by the statutes of the United States, and the common law of the land. Their liability arises from no express agreement, but from their violation of their duties as such agents. They unquestionably stand in a fiduciary relation to the bank, to its stockholders, and its creditors, and they hold its assets in trust for these beneficiaries. But there is no express agreement or declaration of this trust to be found, and they cannot be truthfully said to be trustees of an express trust. The trust with which the property of the bank is impressed in their hands arises from the law, and from their acceptance of the office they hold. It is not an express trust arising from contract or privity, but an implied or resulting trust created by the operation of the law upon their official relation to the bank. The result is that the officers of a national bank are not the trustees of an express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense. *Hayden v. Thompson*, supra; *Briggs v. Spaulding*, 141 U. S. 132, 147, 11 Sup. Ct. 924; *Mor. Corp.* § 516; *Spering's Appeal*, 71 Pa. St. 11; *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448. The controversy thus narrows itself to this question: Has the bank or its receiver been guilty of such laches that they ought not to be permitted to maintain this action? Ordinarily laches runs *pari passu* with the statute of limitations. If the latter has barred the analogous action at law, laches has stayed the corresponding suit in equity. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 56 U. S. App. 363, 375, 29 C. C. A. 14, 21, and 85 Fed. 55, 62. If the acts of the appellants upon which this suit is founded had been parts of

a continuous and persistent course of action which had wrecked this bank and robbed its creditors and stockholders, if they had been accompanied with intentional misrepresentations, if they had been purposely or negligently concealed from the other officers and employés of the bank or from its stockholders and creditors, these facts might well induce a court of equity to permit this suit to be maintained notwithstanding the statute. The case at bar presents a very different state of facts. When this money was diverted the bank was solvent and prosperous. Its management by the appellants appears to have been beneficial and successful. Its stock was selling at \$325 per share of the par value of \$100. The appellants sold their stock and turned over the control of the bank to others. The diversion and use of this money appeared on the books of the bank, and was known to the cashier, Clinton, who succeeded Cooper, as early as August, 1889. The bank continued in business until 1894. No complaint of the acts of the appellants was made until after its failure, and no suit was instituted until October 25, 1895. There is certainly nothing in this state of facts to warrant a refusal to permit the doctrine of laches to have its accustomed effect; nothing to induce us to suspend its application at the end of six years after the cause of action accrued when the statute of Colorado barred the analogous action at law at that time. The bank and the receiver were too late to maintain this action at the expiration of six years from the time its cause accrued.

An application of the principles and rules that have been considered will quickly dispose of this case. The appellants commenced to use the funds of the bank to clear out the shaft and prepare the property in question for sale in February, 1888. They began to divert the moneys of the bank to prospect for ore at some time before July 1, 1888; for at that date they had used \$6,800 upon this property, when only \$2,000 was necessary to make it presentable to purchasers. They completed their misappropriation of the moneys on April 10, 1889. The wrong was then done, the cause of action was complete, and the statute of limitations and laches would have prevented the maintenance of any suit upon it which was commenced more than six years after that date, if the operations of the appellants had stopped here. Unfortunately for the appellants, they did not. In June or July, 1888, they and Reithmann had refunded to the bank \$6,000 of the \$6,800 which had then been expended on the mining property, and on or about December 23, 1889, they caused the bank to repay to them this \$6,000. We have already held that they were authorized to expend \$2,000 to put this property in salable condition, and as this \$2,000 was refunded to the bank, in the \$6,000 paid to it by them in the summer of 1888, they were entitled to a return of this money in December, 1889. To that extent the repayment in that month may be sustained. But \$4,000 of the \$6,000 which they then received was repaid to them on account of money which they had wrongfully diverted from the funds of the bank, and for which they were personally liable. The bank did not owe them this \$4,000, and they took it from its funds without lawful authority, and in violation of their trust. All their other misappropriations were made

more than six years before the commencement of this suit, and their recovery is barred by laches. But this was within the six years, and the appellee is entitled to a decree for its recovery. The decree below is accordingly reversed, and the case is remanded to the court below, with instructions to enter a decree in favor of the appellee and against the appellants for the recovery of \$4,000, and interest from December 23, 1889.

BOWMAN et al. v. FOSTER & LOGAN HARDWARE CO. et al.

(Circuit Court, W. D. Arkansas, Texarkana Division. May 8, 1899.)

1. CORPORATIONS—CONTRACTS ULTRA VIRES—ESTOPPEL.

A private corporation, which becomes a stockholder in and a borrower from a building and loan association, although its act in becoming a stockholder was ultra vires, is estopped by receiving and retaining the proceeds of the loan from pleading its want of power as a defense to a suit to enforce the security given.

2. ESTOPPEL—ASSUMPTION OF DEBT BY GRANTEE—MORTGAGES.

A grantee of the property of a corporation, who, by the terms of the deed, assumed and agreed to pay the debts of the corporation, is estopped by his contract to set up as a defense to a suit to foreclose a mortgage given to secure such a debt that the act of the corporation by which the debt was created was ultra vires, and creditors of such grantee stand in no better position.

3. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—ADJUSTMENT OF ACCOUNTS WITH BORROWING STOCKHOLDERS.

The plan of business of a building and loan association required a borrowing stockholder to carry and pay dues upon stock to twice the amount of his loan, the excess being in fact a premium for the loan. *Held* that, on the insolvency of the association, in adjusting the accounts of a borrowing stockholder, who had kept up his payments until the failure, the dues and fines paid on account of such premium stock would be credited as payments on his loan, and the stock canceled, while the aggregate dues paid on the remainder or loan stock would constitute the amount of paid-up stock on which he would be entitled to dividends at the same rate paid on other paid-up stock; that he would be charged with the amount of the loan actually received, with interest at the contract rate, and credited with interest paid.

This was a suit by the receiver of an insolvent building and loan association to foreclose a mortgage executed by one of its stockholders, in which the receivers of a corporation which had become the owner of the mortgaged property, and was also insolvent, and certain subsequent lienholders and grantees, were made parties or intervened.

The Southern Building & Loan Association, of Knoxville, Tenn., is a corporation chartered under the laws of that state, and is what is known as a building and loan association. J. A. Bowman is an ancillary receiver, appointed by this court; the corporation being in the hands of a receiver in the state of Tennessee. The Foster & Logan Hardware Company and the Logan Hardware Company are corporations chartered under the laws of the state of Arkansas. The charter of the Foster & Logan Hardware Company recites: "The purposes for which said corporation is organized are to establish, own, and carry on and do a general hardware business; to purchase and sell as its own, and to sell on commissions for others, all kinds of merchandise, goods, machinery, iron, cutlery, stoves, tinware, tools, wagon and carriage material, wagons, buggies, plows, and farming implements, and all other merchandise, goods, and articles usually kept for sale at hardware stores and agencies for machinery; to

purchase and sell for others and as its own lime, cement, plaster, lumber, lath, shingles, doors, sash, glass, and blinds; to establish, own, and manage and control a general agency for the sale of all kinds of machinery, farming implements, and other articles;" and designates its place of business at Prescott, Nevada county, Ark. This corporation was organized, and its articles of incorporation filed, on the 23d of April, 1883. The charter of the Logan Hardware Company recites that its place of business is at Prescott, Nevada county, Ark., and that "the general nature of the business proposed to be transacted by this corporation is to manufacture, deal in, buy, and sell, at wholesale and retail, hardware, furniture, agricultural implements, wagons, buggies, and tinware, and to do and perform all things necessary for carrying on a wholesale and retail hardware and furniture business." Its articles were filed January 1, 1891. On December 12, 1889, the Foster & Logan Hardware Company, being the holder of 40 shares of stock in the plaintiff association, borrowed of said association the sum of \$2,000, and agreed to pay therefor 6 per cent. interest, and, in addition thereto, to mature the said 40 shares of stock, and out of the proceeds thereof to repay said loan; the said 40 shares of stock being for \$100 each, and the same being payable in monthly calls or assessments of 60 cents per share; and to secure the payment of said calls and the payment of said interest the said Foster & Logan Hardware Company executed and delivered to the said building and loan association an obligation in writing, and also a mortgage, which was duly recorded in Nevada county, Ark., on the following described real estate: "That certain lot or parcel of land situate in the county of Nevada, in the state of Arkansas, and thus described: Part of lot four in block twenty in the Railway survey of Prescott, Arkansas, described as follows: Beginning at the western corner of said lot, and running northwardly parallel with West Second street one hundred and forty-two feet; thence in a southeast direction, at right angles with said Second street, forty-six feet; thence in a southwest direction, parallel with said Second street, forty-two feet; thence in a northwest direction, at right angles with said street, twenty-one feet; thence in a southwest direction, parallel with said street, to Main street; thence with Main street to place of beginning." The mortgage recites that this conveyance is in trust, and for the following uses and purposes; that is to say: "That the Foster & Logan Hardware Company, of the first part, is a member of the said Southern Building & Loan Association, and owns forty shares of the seventh series of stock therein, and has obtained a loan of four thousand dollars thereon, for which it has executed its note or obligation of even date herewith, payable to said association at its home office on or before nine years from date, with interest at the rate of six per cent. on the sum of two thousand dollars, payable monthly, and in which note are the following stipulations and conditions: 'Now, if we pay promptly the monthly interest on the said sum of two thousand dollars, and the monthly payments on said shares of stock, and any fines assessed under the rules of said association, and the taxes accruing on the lot of land described in the mortgage securing this obligation, and the premiums necessary to keep the house on said lot insured in such sum as such association may require (not exceeding two thousand dollars), until the said stock becomes fully paid in, and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said association this note shall be deemed fully paid and canceled; but, if we fail to pay promptly, when due and payable, the said taxes and insurance premiums, or default in the payment of said monthly interest, fines, and monthly payments on said stock for a period of six months after the same are, or any installment thereof is, due, then, at the option of said association, the whole indebtedness evidenced by this obligation (including any taxes or insurance premiums due or paid by said association) shall at once become and be due and collectible, and a foreclosure of said mortgage in the manner therein provided may be made. Now, if the said Foster & Logan Hardware Company shall comply with its undertakings in said obligation until the same be paid or canceled, as therein provided, then this conveyance shall become and be void; but, if default be made in all or in one of the particulars mentioned in said note, which shall make the same due, then foreclosure thereof may be had upon the following terms.' " Afterwards, on the 30th day of December, 1891, the Foster & Logan Hardware Company, by deed, which is made an exhibit to the bill, conveyed "all of its goods, chattels,

moneys, credits, and effects, also the real estate and property of every kind, real, personal, and mixed," including the real estate above described, to the Logan Hardware Company, which deed was, on the 11th day of January, 1892, duly filed for record and recorded in the proper office in Nevada county, Ark., and the Foster & Logan Hardware Company thereby became, to all intents and purposes, extinct. By the terms of said deed it is recited, among other things: "Whereas, the Logan Hardware Company has, on the 30th day of December, 1891, become incorporated, and all stockholders in the Foster & Logan Hardware Company have taken stock in the same to the same amount that they held stock for in the original corporation; and whereas, the Logan Hardware Company has assumed, and does hereby assume, all the debts and liabilities of the Foster & Logan Hardware Company; and whereas, at a meeting of all of the stockholders of the Foster & Logan Hardware Company, held on the 30th day of December, 1891, it was unanimously agreed to merge the Foster & Logan Hardware Company into the Logan Hardware Company, and all the stockholders in both companies assented thereto." Then follows a granting clause in the deed, after which follows this recital: "To have and to hold the same unto the said Logan Hardware Company, its successors and assigns, forever; and that the Logan Hardware Company hereby assumes and agrees to pay all the debts and liabilities of the Foster & Logan Hardware Company in full." On April 9, 1895, the Logan Hardware Company conveyed by deed to defendants Samuel W. White and Watson W. White the following portion of said land heretofore described, and the buildings thereon, to wit: "An undivided half interest in the southeastern wall of the Logan Hardware Company Building on the west half of said lot, and also a parcel of land bounded by a line beginning twenty-five feet southeast from the northwest corner of said lot No. 4, on the alley, and running thence in a southeasterly direction parallel with Second street forty-two feet; thence easterly, at right angles, 21 feet; thence northerly, at right angles, 42 feet, to the alley; thence along the alley 21 feet, to the point of beginning." On August 8, 1896, the Logan Hardware Company conveyed the land heretofore described to M. W. Greeson, in trust to secure the payment of a debt to the Nevada County Bank. The land is described in the deed as follows: "Part of lot four, block twenty-one, of the Railroad survey to Prescott, Arkansas, it being that half of said lot lying along West Second street, facing twenty-five feet on West Main street, and sixty-five feet off the southeast ends of lots seven and eight, block thirteen, of the Railroad survey to Prescott, Arkansas, facing sixty-five feet on West Main street and one hundred feet on West Second street; and the said Logan Hardware Company, party of the first part, do hereby covenant and agree with the said M. W. Greeson, of the second part, that the said property, both real and personal, is wholly and entirely its own, and free from all incumbrances except a mortgage to a B. & L. association, and not subject to any previous liens whatever." On the 1st day of October, 1896, the Logan Hardware Company became insolvent, and in a suit brought in the chancery court of Nevada county, Ark., by C. D. McSwain against said hardware company, to wind up the affairs thereof, the defendant O. R. McDaniel was appointed receiver, and as such was put in possession of all of its assets. Afterwards, on intervention filed by said bank in said suit of C. D. McSwain against the Logan Hardware Company, a decree of foreclosure was rendered foreclosing said mortgage to Greeson in trust for said Nevada County Bank. One half—that is to say, 20 shares—of the said building and loan association stock was intended and agreed to be a premium for said loan of \$2,000. Monthly payments were made on said stock for 82 months, commencing at the date of said mortgage, to the said building and loan association, and interest at the rate of \$10 per month on said sum of \$2,000 was paid monthly for 77 months. No other payments have been made on said loan or said stock. The Foster & Logan Hardware Company were owners of five additional shares of stock in said building and loan association, on which said five shares monthly payments of 60 cents per share for a period of 82 months, ending on the 30th day of May, 1896, were made, and said building and loan association, by agreement, has a lien on all of said stock for the payment of said loan of \$2,000. That about the 1st of February, 1897, the building and loan association became insolvent, and upon a suit brought in the United States circuit court for the Eastern district of Arkansas, at Little Rock, of Lida Johnson, plaintiff, against said building

and loan association, the said J. A. Bowman was appointed receiver of said building and loan association by said court, and was shortly afterwards appointed ancillary receiver by this court, and as such receiver has in his hands and custody for collection, among other assets of said building and loan association, the note and mortgage executed by the said Foster & Logan Hardware Company. Special leave was obtained from the Nevada chancery court to join the receiver of the Logan Hardware Company as a defendant in this suit. The \$2,000 borrowed by the Foster & Logan Hardware Company was used in constructing a building on the property hereinbefore described, in which it subsequently carried on its business. The Nevada County Bank, in its answer, admits the facts above stated, but insists that the monthly payments of interest according to the contract have been more than paid by the \$2 payments of 62 cents each on the 45 shares of stock. It also urges that the Foster & Logan Hardware Company acted without legal authority in subscribing for the said 45 shares of building and loan stock of the said building and loan association, and that its attempt to make the Foster & Logan Hardware Company a member of said building and loan association was ultra vires and void, and that the only legal relation created by the issue of said stock and the execution of said mortgage between the said Southern Building & Loan Association and the Foster & Logan Hardware Company, or its successors, the Logan Hardware Company, was that of debtor and creditor; and insists that the Southern Building & Loan Association, at the time of the appointment of the receiver, was justly indebted to the Logan Hardware Company in the sum of \$214,—that being the excess of the amount paid by the Logan Hardware Company over the amount borrowed from said building and loan association, exclusive of interest. It insists, further, that the Nevada County Bank is now the owner of the property described in the plaintiff's complaint, having become the purchaser under foreclosure of said deed of trust to the Nevada County Bank, and exhibits as evidence its deed, which is made a part of its answer. It insists that the mortgage is a cloud upon its title, and should be satisfied and canceled. The said O. R. McDaniel, as receiver of the Logan Hardware Company, files a separate answer, substantially the same as that of the Nevada County Bank. Samuel T. White and Watson W. White, a firm known as White Bros., also file a joint answer, in which they say that by deed dated the 9th of April, 1895, the Logan Hardware Company conveyed to them, by warranty deed, with special covenants to warrant and defend the title in said lands against all claims whatever. The land is described in that deed as follows: "Beginning twenty-five feet southeast from the northwest corner of lot four, block twenty, of the Railroad survey to Prescott, Arkansas, on the alley, and running thence in a southerly direction, parallel with West Second street, forty-two feet; thence at right angles, in an easterly direction, twenty-one feet; thence in a northerly direction forty-two feet, to the alley; thence along the alley, in a westerly direction, twenty-one feet, to the beginning,—being that part of the southeast half of said lot four now owned by said Logan Hardware Company; and also an undivided half interest in the southeastern wall of the Logan Hardware Company's building on said lot." It further appears that after the White Brothers had purchased the interest in the eastern wall on that part of the said eastern half of said lot that was owned by the said hardware company, they also procured title to the remainder of the eastern half of said lot 4 in block 20, and erected an adjoining one-story brick building, using the said brick wall as one of the side walls for their building, which they now occupy as a storehouse. It is alleged in their answer that the value of the west half of said lot and the building thereon is greatly in excess of the sum due the plaintiff, and that to secure payment of the amount due on the mortgage it is not necessary to sell the part of the said lot sold to them, and that their rights and interest in the wall should be protected by proper order. They insist that, if any judgment of foreclosure is rendered, or order of sale made herein, the court direct in its decree that the western half of said lot 4, block 20, and the two-story brick building thereon, and the association stock held by plaintiff, be first sold, and the proceeds arising from the same applied to whatever balance may be ascertained and found to be due plaintiff; and that, if it is sufficient to pay the same, that the part of the eastern half of said lot, being 21 by 42 feet, now owned by them, be not sold, but, if it becomes necessary to sell it, that it be sold separately. This case was

submitted on the pleadings, exhibits, and the statement of facts as herein set forth, including the commissioner's deed to the Nevada County Bank for the lands sold under the decree of foreclosure of the Nevada chancery court, which deed is filed and made a part of the record.

Cockrill & Cockrill and McCain & Son, for receiver.
Thomas C. McRae, for defendants.

ROGERS, District Judge. It is contended that, in subscribing for stock in the plaintiff building and loan association the Foster & Logan Hardware Company exceeded its charter powers, and the act was therefore ultra vires and void. Cases are found to that effect. *Franklin Co. v. Lewiston Inst. for Savings*, 28 Am. Rep. 9, and cases cited in note on page 15; *End. Bldg. Ass'ns*, § 323. Whether it be true that an ordinary corporation, authorized by its charter to do a general merchandise business, can become a shareholder in a building and loan association, in order to borrow money to carry on its business, in the opinion of the court is not decisive of this case; indeed, the question is not necessary to its decision. If it be admitted that it cannot, still, underlying this question, is another, about which there cannot be much doubt in the light and trend of modern decisions. The Foster & Logan Hardware Company complied with the rules and regulations required by the plaintiff building and loan association in order to become a borrower, and executed the note and mortgage sued on, and accepted the stock. It used the money so borrowed in constructing its business house. So far as the plaintiff building and loan association was concerned, the contract was an executed contract. All the plaintiff building and loan association could do was done. Can the Foster & Logan Hardware Company, after having received and used the plaintiff's money under this executed contract, be heard to say that it had no power to become a member of the association, and that its act was therefore ultra vires? I think not. This subject is fully discussed in 5 *Thomp. Corp.* §§ 6015-6042, inclusive. The author says (section 6016):

"The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."

See note 3, where a great number of cases are cited supporting the text. See, also, *Railroad Co. v. Johnson* (Kan. Sup.) 48 Pac. 847. In that case the court say:

"While an executory contract made by a corporation without authority cannot be enforced, yet where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."

Blue Rapids Opera-House Co. v. Mercantile Building & Loan Ass'n (Kan. Sup.) 53 Pac. 761, is a case precisely in point. In that case the opera-house company had taken stock in the building and loan association, and made a loan to finish the construction of the opera house. It got the money, and gave its bond and mortgage. When sued on the bond and mortgage, the opera-house company set up want of power to become a shareholder and to make the loan. The court say:

"Whatever may have been the powers of the officers of the opera-house company in this respect, the defense of ultra vires is not available to the company. The contract has been, in good faith, fully performed by the other party, the money has been paid, and the opera-house company has had the full benefit of the payment and the performance of the contract. The law now interposes an estoppel, and will not permit the validity of the loan contract to be questioned."

See, also, *Illinois Trust & Savings Bank v. Pacific Ry. Co.* (Cal.) 49 Pac. 197. *Franklin Co. v. Lewiston Inst. for Savings*, supra, cited by defendants' counsel, is not in conflict with the cases cited. In that case the contract sued on was executory, and that fact is distinctly recognized by the court in the last paragraph of the opinion. *Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n of New Haven v. Meriden Agency Co.* (decided in 1855) 24 Conn. 159, seems to support defendants' construction, and there are doubtless other cases to the same effect; but they must yield to the weight of modern judicial authority. I am aware that quasi public corporations—as, for instance, railroad corporations—which owe important duties to the public are governed by a different rule. They will not be allowed to do any ultra vires act which, in effect, disqualifies them from discharging their duties to the public; and, if they do, they are not estopped to invoke the doctrine of ultra vires. *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478; *Id.*, 171 U. S. 150, 18 Sup. Ct. 808. The supreme court do not extend this rule, however, so as to do injustice. *Hitchcock v. Galveston*, 96 U. S. 341; *Railway Co. v. McCarthy*, *Id.* 258; *Arms Co. v. Barlow*, 63 N. Y. 62; *Railway Co. v. Sidell*, 35 U. S. App. 160, 14 C. C. A. 477, and 67 Fed. 464. The cases cited, 139 U. S. 24, 11 Sup. Ct. 478, and 171 U. S. 150, 18 Sup. Ct. 808, supra, are distinguishable from cases like that under consideration, and the different United States circuit courts of appeals have recognized that distinction, and, I think, have settled the law in accordance with right and justice and the trend and weight of modern judicial authority. In *Gorrell v. Insurance Co.*, 24 U. S. App. 198, 11 C. C. A. 240, and 63 Fed. 371, the court said: "In New York, however, as elsewhere, the rule is established that the contracts of corporations, made in excess of their rightful powers, but free from any other vice, are not illegal in the sense of the maxim, 'Ex turpi causa,' etc.,"—in support of which is cited a large number of authorities, including several cases by the supreme court of the United States. See, also, *Bensiek v. Thomas*, 27 U. S. App. 765, 13 C. C. A. 457, and 66 Fed. 104; *Coffin v. Kearney Co.*, 12 U. S. App. 562, 6 C. C. A. 288, and 57 Fed. 137; *Railway Co. v. Sidell*, 35 U. S. App. 152, 14 C. C. A. 477, and 67 Fed. 464. The court is of opinion that the Foster & Logan Hardware Company, if in existence, and a defendant, could not avail itself of the plea of ultra vires, and, if it could not, neither can its vendees, assignees, or mortgagees. They cannot acquire any stronger position than the Foster & Logan Hardware Company, under which they claim, held. But it is not necessary to rest the opinion upon the point decided supra. By the terms of the deed from the Foster & Logan Hardware Company to the Logan Hardware Company, the latter expressly assumed and agreed to pay all the debts and liabilities of the Foster & Logan Hard-

ware Company in full. The mortgage and note sued on was a liability of the Foster & Logan Hardware Company, and the defense of ultra vires now interposed, if available at all, could only be invoked by the Foster & Logan Hardware Company, or by some stockholder or creditor thereof. 27 Am. & Eng. Enc. Law, p. 396 et seq., and notes; Railroad Co. v. Ellerman, 105 U. S. 166. None of the defendants were either creditors or stockholders of the Foster & Logan Hardware Company, and the Foster & Logan Hardware Company itself passed out of existence when it sold its entire assets to the Logan Hardware Company. The Logan Hardware Company could not, therefore, interpose the defense of ultra vires, and, having assumed to pay the debt, is estopped now to deny either its validity or question its liability to pay it. Millington v. Hill, 47 Ark. 311, 1 S. W. 547; Freeman v. Auld, 44 N. Y. 50; Cramer v. Lepper, 26 Ohio St. 59; Hough v. Horsey, 36 Md. 181; Pickett v. Bank, 32 Ark. 346.

The instrument sued on was a very peculiar one. The Foster & Logan Hardware Company only borrowed \$2,000 from the plaintiff corporation. To get it, it had to and did become a shareholder of 40 shares of \$100 each, amounting, in the aggregate, to \$4,000. To secure said loan and the premiums to be paid on the stock, it executed a mortgage, by which it obligated itself to mature the \$4,000 in stock by paying the monthly dues thereon. It also obligated itself to pay 6 per cent. interest on the loan of \$2,000. Evidently, \$2,000 of this stock covered the \$2,000 borrowed, and may be, for convenience, called "loan stock." The other \$2,000 in stock, for convenience, may be called "premium stock." The full dues required on the \$4,000 stock and 6 per cent. interest was paid up to the time the plaintiff building and loan association became insolvent, which was in January, 1897; and on the 1st of February, 1897, the receiver was appointed by this court. It will be seen on the fifth page of the pamphlet which is made an exhibit to the answer of O. R. McDaniel, receiver, that all dues were payable on the last Saturday in each month, so that, at the time the receiver was appointed, the dues and interest for the month of January, 1897, had not been paid. The plaintiff corporation had, by becoming insolvent, become incapable of carrying out its part of the contract, and the settlement of its business remitted to a court of equity.

In view of the facts, by what rule should a court of equity adjust the rights of the parties under this contract? The question has been decided differently by different courts, and it is not certain that exact justice has been reached by any of them. Indeed, I am not sure that any arbitrary rule which can be stated would accomplish that end in every case. After the most careful consideration in a former case, presenting the same question, I concluded to follow the Pennsylvania and Tennessee decisions (Rogers v. Hargo [Tenn. Sup.] 20 S. W. 430, and Strohen v. Association [Pa. Sup.] 8 Atl. 843), and in that case laid down the following rule as the correct rule of settlement in this district: (1) All loans in arrears prior to January 1, 1897, shall be charged with dues to that date on the actual amount received by the borrower from the association. (2) Charge the borrower with the cash loan obtained, and 6 per cent. per annum inter-

est thereon. (3) Credit the loan with all interest paid and one-half of all fines and one-half of the stock dues paid, with interest on the same at 6 per cent. per annum; also credit the borrower with full amount of stock dues paid since January 1, 1897, if such payments have been made, with interest at 6 per cent. per annum. Make all calculations according to the partial payment plan. After deducting the aggregate of credits, supra, the remainder will constitute the sum due on the mortgage. (4) The aggregate of stock dues paid in on the stock, which represents the actual cash loan, will constitute the amount of paid-up stock upon which the borrower will draw dividends from the association, and the balance of the stock will be canceled. (5) In foreclosures, if the borrower and receiver can agree upon the present cash value of such paid-up stock, such value will be allowed as a credit on the mortgage debt, and all the stock of the borrower be canceled. It will be seen by this rule that all dues paid on the premium stock and all interest are treated as credits on the note, and the stock representing the loan is treated as loan stock, and remains as stock paid up, to the aggregate amount of the dues, upon which the holder might draw dividends like any other creditor upon the winding up of the estate of the plaintiff association by the receiver thereof. The five shares of stock, not covered by the mortgage, held by the Foster & Logan Hardware Company, and conveyed by deed with its other assets to the Logan Hardware Company, it is conceded by the pleadings are subject to a lien in favor of the plaintiff corporation for the payment of the loan of \$2,000; but it should not be subjected to sale for the payment of said debt until the \$2,000 of stock representing the loan has been sold, and, in the event the receiver of the Logan Hardware Company should pay off the debt due the plaintiff corporation, that stock would remain the property of said company in the hands of the receiver as paid-up stock to the aggregate amount of the dues paid thereon, upon which that company would be entitled to draw dividends like other creditors of the plaintiff corporation upon settlement of its affairs by the receivers thereof. In this case, however, the rights of third persons have intervened, and render it necessary, in foreclosing the mortgage or obligation sued on, to have regard for their rights. No portion of the real estate covered by the mortgage should be sold until the stock, including the five shares of premium stock held by the Logan Hardware Company, has been sold, and that portion of the real estate held by White Bros. should not be sold until the property covered by the Nevada County Bank has been sold. The stocks must also be sold at public auction, unless a price therefor should be agreed upon by all the parties to the suit, in which event such price should be credited on the debt before any portion of the real estate is sold. Applying the rule above stated, I find that there is due the plaintiff building and loan association, after allowing all just credits, principal and interest, the sum of \$——, and that the same is a first lien on all the real property covered by the mortgage, and upon the \$2,000 stock of the Logan Hardware Company representing the loan of \$2,000, and also on the five shares still held by it. The Nevada County Bank, under the trust deed and the decree rendered

thereon, under which it purchased, took subject to the plaintiff's mortgage, and therefore acquired no title as against the plaintiff corporation. In the event the debt found due is not paid, and a sale is made, the "loan stock" shall first be sold and appropriated to the payment of the debt, and, if not sufficient to pay the debt, the property not purchased by White Bros. will be sold, and, in the event it is insufficient to pay the debt, then the property purchased by White Bros. shall be sold, and sufficient thereof appropriated to satisfy this decree, and the residue thereof brought into court for further disposition. The decree of the court therefore will be for the foreclosure of the mortgage on all the property, and an order for the sale, the property to be sold in the order stated, and in conformity with this opinion.

LEDoux v. FORESTER et al.

(Circuit Court, D. Washington, E. D. May 22, 1899.)

1. MINING CLAIMS—VALIDITY OF LOCATION—PRIOR DISCOVERY OF VEIN OR LODE.

The provisions of Rev. St. § 2320, that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located, is mandatory; and, to sustain an adverse claim filed against an application for a patent on a mining claim on the ground of a prior conflicting location, there must be evidence reasonably tending to show such discovery before the prior location was made.

2. SAME—MARKING BOUNDARIES OF LOCATION.

Under Rev. St. § 2324, requiring a mining location to be distinctly marked on the ground so that its boundaries can be readily traced, in marking a claim regard must be had to the topography of the ground, and the markings be so placed that they can be readily followed from one to another, and that a person accustomed to tracing the lines of mining claims can, after reading the description of the claim in the posted notice of location, by a reasonable and bona fide effort, find all the stakes.

This is a suit in equity brought by the complainant, under section 2326, Rev. St. U. S., in support of the adverse claim filed by him in the United States land office at Spokane against the application of the defendants for a patent to the Ben Tillman lode mining claim, situated in Eureka mining district, Ferry county, state of Washington; the complainant claiming title to the same ground under a mining location, called the "Minnie Lode Mining Claim."

Heyburn, Price, Heyburn & Doherty, for complainants.
Albert Allen, for defendants.

HANFORD, District Judge. The complainant asserts that he has a superior title to the mining ground in controversy, as the purchaser from one George W. Elliott of the Minnie lode mining claim, which was located by said Elliott, through an agent named McCann, on the 22d day of April, 1896, and that he is in possession of said ground, and has made large expenditures in prospecting and developing the claim; the date of said location being about three weeks prior to the location of the Ben Tillman claim by the defendants, covering part of the same ground. The validity of the complainant's title is disputed on two grounds, viz.: (1) The loca-

tion of the Minnie claim was contrary to section 2320, Rev. St. U. S., because no discovery of a vein or lode of quartz or other rock in place, bearing any of the precious metals, had been made within the boundary of the claim at the time of the location thereof, or at any time previous to the location of the Ben Tillman claim; (2) the locator of the Minnie claim failed to comply with the requirements of section 2324, Rev. St. U. S., in this: that said claim was not so marked upon the ground that the boundaries thereof could be readily traced.

The sections of the Revised Statutes referred to contain, among other provisions, the following:

"Sec. 2320. * * * A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * *

"Sec. 2324. The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. * * *

It is admitted that whatever was done in the matter of locating the Minnie claim was prior in point of time to the initiation of any rights claimed by the defendants, and no question is raised as to compliance with the laws and regulations as to notices and recording, and other steps necessary to the valid location of a quartz mining claim, except in the particulars above specified; and there is no question as to the right of the defendants to prevail in this case, and to have a patent issued to them for the ground which they claim, in case it shall be determined that the location of the Minnie claim was void for either or both of the above-specified reasons.

Mr. McCann, who represented Mr. Elliott, the complainant's vendor, in locating the Minnie claim, has not been called as a witness, and it is impossible to ascertain from the evidence what he may have discovered prior to locating said claim. However, there is no evidence tending to prove that he did discover any vein or lode of quartz or other rock in place, bearing any of the precious metals, within the boundary of said claim. The testimony of a majority in numbers of the witnesses, corroborated by photographic views of a considerable area surrounding the discovery stake, shows that there was no outcropping of quartz or other rock above ground in that vicinity which he could have discovered. There is testimony to the effect that, at a point about 40 feet from the discovery post, McCann dug a small hole in porphyry, of the character peculiar to that section; and there is evidence to the effect that samples of porphyry rock taken from said hole more than a year after the location of the Minnie claim were assayed, and an appreciable amount of gold was found in every sample; but the evidence introduced by the complainant fails to prove that there is anything like a continuous vein or lode of quartz or rock extending in any direction

from this hole, or that any mineral was found to justify the location at any time prior to the location of the Ben Tillman claim. Discoveries made after that time can avail nothing, since the law is mandatory in requiring that a discovery of a vein or lode must be made within the boundaries of the claim before it can be located. The law is equally mandatory in requiring that mining claims must be so marked upon the ground that the boundaries thereof can be readily traced. This requirement is not fulfilled by simply setting a post at or near the place of discovery, and setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground is such that a person accustomed to tracing the lines of mining claims can, after reading the description of the claim in the posted notice of location, by a reasonable and bona fide effort to do so, find all of the stakes, and thereby trace the lines. Where the country is broken, and the view from one corner to another is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush, or set more stakes at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines so that the boundaries may be readily traced. The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area considerably greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim. I admit the rule that a location which is made in other respects in conformity to law, but which is greater in length or width than the law permits to be taken in one claim, is not, for a mere error in that respect, void, except as to the excess; but when, as in this case, the validity of the location is disputed for alleged failure to fulfill the requirements of the law with reference to marking the claim upon the ground so that the boundaries can be readily traced, the length of the lines and the distances between stakes must be taken into account, in connection with the other facts proved, for the purpose of determining this question. It is obvious that, if a person, measuring from the stakes at one end of the claim the required distance in the direction indicated by the notice of location, does not find the other end stakes, nor anything else to guide him to where the stakes may be found, he may reasonably conclude that such other corner stakes have not been set, and that the location is void. In such a case the excessive distance between the corner stakes is misleading, and a locator who has committed such an error has failed to comply with the law. The evidence in this case shows that the locators of the Ben Tillman claim, before deciding to make said location, searched long and diligently for the north end stakes of the Minnie claim, but failed to find them. When Mr. Elliott first went upon the claim, McCann showed him the stakes at the south end, and pointed towards the vicinity where he claimed to have set stakes at the north end; but said north end stakes were never seen by Mr. Elliott, nor by any of the defendants, until more than a year after the location of the Ben Tillman claim, and then they seem to have been discovered by a person looking for

something else, and were found to be situated several hundred feet further north than the proper distance from the south end stakes, and on the side of a gulch and creek, and one of the corner stakes is hidden behind the upturned roots of a fallen tree. Only one witness has testified to having seen all of the stakes marking the Minnie claim prior to the location of the Ben Tillman claim, and I feel obliged to reject his evidence on this point for the reason that there is uncontradicted evidence that said witness participated in the search for these stakes at the time the locators of the Ben Tillman claim were looking for them, and if he saw them then, or knew where they were situated, he concealed his knowledge from said locators.

From consideration of all the evidence, I am led to the conclusion that the location of the Minnie claim is void for both the reasons assigned by the defendants. In accordance with this opinion, a decree will be given denying the right of the complainant and sustaining the claim of the defendants.

GASSMAN v. JARVIS.

(Circuit Court, D. Indiana. May 27, 1899.)

1. FEDERAL COURTS—STATE PRACTICE.

Whether a plaintiff in a federal court may dismiss a case without prejudice is governed by the state statutes.

2. RIGHT TO DISMISS—TIME OF DISMISSAL.

The announcement by the court of its intention to give a binding instruction for defendant does not bar plaintiff's right to dismiss, under 1 Burns' Rev. St. 1894, § 336, which provides that an action may be dismissed by plaintiff before the jury retires.

Motion to Set Aside the Verdict and Dismiss the Cause.

Bennet H. Young, Tuley & Hester, and Miller & Elam, for plaintiff.

J. D. Wellman and W. L. Taylor, for defendant.

BAKER, District Judge. This is an action for the recovery of damages for a personal injury. The case was tried to a jury. At the close of the plaintiff's testimony, counsel for the defendant gave notice that he desired the court to give to the jury a binding instruction to find for the defendant, and stated that he desired to be heard on that question. Thereupon the court directed the jury to withdraw from the court room, and the question whether or not such an instruction should be given was argued by counsel for the respective parties. At the close of the argument the court reviewed the testimony in the case, and at its conclusion announced that it would direct the jury to find a verdict for the defendant. The court then directed the bailiff to bring the jury into the court room, and have them take their seats in the jury box, for the purpose of giving them an instruction to find for the defendant. While the jury were returning to their box, and before they had all done so, the plaintiff, by counsel, notified the court that he would dis-

miss the case, and asked leave to do so. Counsel for the defendant objected to such dismissal, and insisted on the right to a verdict. The court refused to permit a dismissal of the case, to which plaintiff, by counsel, excepted, and the jury were then instructed by the court to return a verdict for the defendant, which they did. The plaintiff now moves the court to set aside the verdict, and to dismiss the cause pursuant to his motion.

The statute of this state rules the question. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 40, 11 Sup. Ct. 478. The statute reads: "An action may be dismissed without prejudice, first, by the plaintiff before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced." 1 Burns' Rev. St. 1894, § 336. A careful examination of the authorities has convinced me that the announcement by the court of its intention to give a binding instruction to the jury to find for the defendant was not such a submission of the case as to bar the plaintiff's right to dismiss before the jury had retired. Even after such an instruction had been given to the jury, it would not be too late to dismiss. The actual withdrawal of the jury from their seats to consider of their verdict would not be necessary to constitute a retirement, within the meaning of the statute. If the court has given the cause in charge to the jury for their consideration, even though they remain in their box, this would constitute a retirement, within the meaning of the statute, and would toll the plaintiff's right to dismiss. *Burns v. Reigelsberger*, 70 Ind. 522; *Beard v. Becker*, 69 Ind. 498; *Crafton v. Mitchell*, 134 Ind. 320, 33 N. E. 1032; *Mitchell v. Friedley*, 126 Ind. 545, 26 N. E. 391; *Cohn v. Rumely*, 74 Ind. 120; *Dunning v. Galloway*, 47 Ind. 182; *Beals v. W. U. Tel. Co. (Neb.)* 74 N. W. 54; *Banking Co. v. Ball (Kan. Sup.)* 48 Pac. 137; *Hensley v. Peck*, 13 Mo. 587; *Templeton v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492; *Mullen v. Peck*, 57 Iowa, 430, 10 N. W. 829; *Harris v. Beam*, 46 Iowa, 118; *Vertress v. Railroad Co. (Ky.)* 25 S. W. 1; *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411; *Wolcott v. Studebaker*, 34 Fed. 8; *Pleasants v. Fant*, 22 Wall. 116, 122. Here the jury had not been instructed, and the only thing which the court had done was to announce to the parties and their counsel what instruction the court would give. The motion to dismiss, having been made before the jury had been instructed, and before their retirement, was seasonably made, and it ought to have been sustained. This conclusion is supported by the authorities above cited, and is in conformity with the practice of Drummond, circuit judge, and Blodgett and Dyer, district judges, in this circuit, as appears from the case of *Wolcott v. Studebaker*, 34 Fed. 8, 13. After the trial has actually begun, the plaintiff, at common law, has no absolute right to a dismissal, and whether a dismissal will be permitted rests in the sound discretion of the court. *Stewart v. Gray*, Fed. Cas. No. 13,428a; *Johnson v. Bailey*, 59 Fed. 670. The verdict of the jury is set aside, and the motion of the plaintiff to dismiss the cause is sustained. The clerk will enter an order accordingly.

STATE NAT. BANK OF FT. WORTH, TEX., v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 794.

1. TRIAL—FINDINGS OF FACT—REQUISITES.

Where a jury is waived by a stipulation in writing, in a circuit court, in an action at law, the court cannot be required to make special findings of fact, but may make either a special or general finding, and should not make both. Such finding must state the ultimate facts of the case, and not be a recital of evidential facts or circumstances which may tend to prove the ultimate facts, or from which they may be inferred.

2. REVIEW—FINDINGS OF FACT.

As to the weight and effect of the evidence, the finding of a circuit court, where a jury is waived by stipulation in writing, is as conclusive on a writ of error as the verdict of a jury.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This action was brought by John P. Smith, receiver of the City National Bank of Ft. Worth, Tex., to recover of the State National Bank of Ft. Worth and John C. Harrison the sum of \$6,000 and 10 per cent. interest per annum thereon from July 10, 1896. The petition alleged, in substance, that the State National Bank of Ft. Worth was, at the date of the failure of the City National Bank, the legal and equitable owner and holder of 60 shares of the capital stock of said bank; that said City National Bank became insolvent on the 4th day of April, 1895, and on said date a national bank examiner, by order of the comptroller of the currency of the United States, took charge of the bank; that defendant in error, John P. Smith, was appointed receiver of said insolvent bank on the 12th day of April, 1895; that on the 10th day of July, 1896, the comptroller of the currency made an assessment on the shareholders of said bank of \$100 per share for each and every share of the capital stock held and owned by them respectively at the time of its failure; that said 60 shares of stock were issued to said John C. Harrison, as trustee, in two certificates, of date, respectively, June 28 and November 2, 1894, numbered 86c, for 50 shares, and 96c, for 10 shares; that said stock was so issued to said Harrison for the use, benefit, and advantage of said State National Bank, plaintiff in error, and he took the same in his name, as trustee for said bank; and that all said stock and certificates for same appeared on the books of the City National Bank in the name of John C. Harrison, trustee. The petition contained all proper allegations to entitle plaintiff to a recovery against the State National Bank if the ownership of the stock was as alleged in it at the date of the failure of the other bank. The defendants in the court below, John C. Harrison and the State National Bank, by their answer, denied ownership of the stock mentioned, and alleged substantially that 50 shares of the same were pledged to the bank by one Garner as security for a debt owing by him to it, and that the other 10 shares were pledged to it by A. W. and H. C. Caswell to secure a debt owing by them to the bank; that said stock, as well as the dividends arising therefrom, were pledged to the bank, and that, to protect it and the City National Bank against conflicting claims of other creditors of said pledgors, new certificates of said stock were issued to John C. Harrison, trustee, respectively on June 28, 1894, and November 2, 1894; that said stock, since said dates, has appeared on the books of the City National Bank in the name of John C. Harrison, trustee, and has never at any time appeared in the name of the State National Bank; and that the State National Bank at no time became the owner of any of said shares of stock, and never had any interest in the same, except as pledgee to secure said debts. On the trial, the parties, by agreement in writing, waived a jury, and the cause was submitted to the court without a jury. October 15, 1898, a judgment was rendered for plaintiff against the State National Bank of Ft. Worth for the sum of \$6,815 and costs of suit, and in

favor of defendant John C. Harrison that plaintiff take nothing as to him, and that he go hence without day, and recover his costs. After the rendition of the judgment, the defendant below moved the court to find a special verdict as to the facts proved on the trial of said cause which are material to the issue raised by the pleadings, and to find a certain conclusion of law in favor of the defendant. This motion appears to have been granted so far as it sought to have a special verdict on the facts proven on the trial of said cause prepared and filed, and also so far as it sought to have the court find its conclusions of law. Thereafter there is in the record, of date October—, 1898, the following, entitled "Special Findings of Fact":

"First. It was admitted on the trial of this case: That the City National Bank is a national bank, chartered under the laws of the United States. That the bank became insolvent on the 4th day of April, 1895, closed its doors, and ceased to transact business. It passed into the hands of a bank examiner on the 5th day of April, 1895, at which time John P. Smith was appointed receiver. That he qualified as such receiver, and is acting in that capacity, under appointment from the comptroller of the currency of the United States. That the comptroller of the currency of the United States on the 10th day of July, 1896, made an assessment of 100 cents on the dollar of the entire capital stock of the City National Bank of \$300,000. That demand has been made by the plaintiff receiver in this case upon the defendant for payment of \$100 per share on the stock in litigation, amounting to \$6,000. That said demand was made on the 10th day of July, 1896, and that payment has been refused.

"Second. The two certificates of the capital stock of the City National Bank sued on in this case are (1) No. 96, Series C, for ten shares issued to John C. Harrison, trustee, on the 2d day of November, 1894, signed by John C. McCarthy, president, and Max Elser, cashier. On the reverse side of this certificate is indorsed, 'For value received, assigned and transferred to Warren Coleman.' This transfer bears date April 4, 1895, and is signed by John C. Harrison, trustee. Both of said certificates of stock were left with John C. McCarthy, president of the City National Bank of Ft. Worth, on the 4th day of April, 1895, in an envelope, on which was indorsed the following: 'The property of John C. Harrison, trustee. Left at 5:30 o'clock p. m., April 4, 1895, for transfer.' It was admitted on the trial of the case that the sale to Warren Coleman was a sham sale, and was in no way relied upon by the defendant, and that Coleman was a negro porter of the State National Bank, and insolvent, at the time of the sale; that he paid to John C. Harrison, cashier of the State National Bank, \$10 for the said stock, which said \$10 was returned by the said John C. Harrison, cashier of the State National Bank, on the morning of the 5th of April, 1895.

"Third. On or about the—— day of August, 1893, the State National Bank loaned to Dan Garner \$5,000, taking as security therefor his note for that sum, and also, as collateral security, 50 shares of the capital stock of the City National Bank of Ft. Worth.

"Fourth. On or about the—— day of November, 1893, the State National Bank loaned to Caswell Bros. the sum of \$1,300, and took the note of said firm for that amount, and also, as collateral security, 10 shares of the capital stock of the City National Bank of Ft. Worth, Texas.

"Fifth. Both of said notes gave full power and authority to the State National Bank to sell at public or private sale, at the option of said bank or its assigns, with the right to become the purchaser at such public or private sale of the collateral attached thereto, which is 60 shares of the capital stock of the City National Bank of Ft. Worth, heretofore described, on the non-payment of said notes, without advertisement or notice, and, after deducting the legal costs of said sale and delivery, to apply the residue of such sale or sales to the payment of said notes.

"Sixth. While the evidence as to whether or not there was a sale and purchase of said stock is conflicting, I find as a matter of fact there was a sale of said stock under the authority conferred by said notes. The said State National Bank, on or about the 28th day of June, 1894, sold and became purchaser of the stock of the City National Bank of Ft. Worth, known as the 'Lee and Garner stock,' and on or about the 2d day of November, 1894, sold and became purchaser of the stock known as the 'Caswell stock,' and

thereby the said State National Bank became the owner of the same, and caused new stock to be issued for it on the above dates in the name of John C. Harrison, trustee; and after said dates said stock was credited upon the books of said State National Bank as an asset of said bank, and was so reported on March 5, 1895, in its sworn report to the comptroller of the currency of the United States, required by law to be made to the comptroller of the currency of the United States.

"Seventh. At the close of business of the City National Bank of Ft. Worth on the 4th day of April, 1895, both of said certificates of stock sued on stood on the books of said bank in the name of John C. Harrison, trustee. I find that John C. Harrison, trustee, was trustee for the State National Bank of Ft. Worth, and both of said certificates of stock were then and now owned by the State National Bank of Ft. Worth, Texas.

"Eighth. The defendant introduced in evidence a note dated on or about the — day of July, 1894, signed by C. E. Lee and W. A. Garner, which note recited that the 50 shares of stock of the City National Bank of Ft. Worth were placed as collateral to secure this note. On the back of this note of Lee and Garner there was an indorsement of interest paid on same up to October 1, 1894, and there was a credit on said note of \$10.23, dated July 14, 1894, and a credit of \$164 was entered on the back of said note on the 10th day of September, 1894. The amount of this note was the same as the amount of the Dan Garner note, which was dated the — day of August, 1893; and while I do not find that the interest was paid on the Lee and Garner note up to October 1, 1894, I do find that no interest was paid on said note after that date. The State National Bank still has possession of this note.

"Ninth. The defendant offered in evidence a note dated November 22, 1893, signed by Caswell Bros., upon which there is indorsed a credit of \$50, dated April 4, 1894, and indorsed on back, 'Interest paid to August 1st, 1894;' and while I do not find that interest was paid on this note to August 1, 1894, I do find that no interest was paid on said note after that date. The State National Bank still has possession of this note.

"Tenth. The 50 shares of stock deposited as collateral security for the Dan Garner note stood on the books of the City National Bank in the name of Lee and Garner until the 28th day of June, 1894, when new stock was issued for same to John C. Harrison as trustee, and the same stood on the books of the bank in his name as trustee up to the date of the failure of the City National Bank.

"Eleventh. On the 28th day of June, 1894, John C. Harrison, cashier of the State National Bank, and being the same party in whose name as trustee said certificates of stock stood, made a written statement to the City National Bank of Ft. Worth, Texas (said written statement being made on the letter head of the State National Bank), to the effect that the State National Bank had become the purchaser and owner of the said 50 shares of stock deposited as collateral security by Dan Garner, and said written statement was attached, and still remains attached, to the stub of the stock book of the City National Bank, and is as follows:

"Fort Worth, Texas, June 28, 1894.

"Max Elser, Esq., Cashier, City National Bank, Fort Worth, Texas—Dear Sir: This is to certify that we have sold, and become purchaser thereof (ourselves), 50 shares of the capital stock of the City National Bank of Fort Worth, Texas, being certificates Nos. 17, 18, 246, and 247, for 5, 5, 10, and 30 shares in the name of Dan Garner and L. R. Garner.

"Respectfully,

[Signed] John C. Harrison, Cashier.

"P. S. Said stock held by us as collateral to loan originally made on or about September 1st, 1893."

"Twelfth. The ten shares of stock deposited by Caswell Bros. stood on the books of the City National Bank at the time of the failure of said bank in the name of John C. Harrison, trustee, and John C. Harrison was then and there trustee for the State National Bank, and said stock then belonged, and now belongs, to the State National Bank.

"Thirteenth. On and after June 28, 1894, John C. Harrison, cashier of the State National Bank, stated to the officers of the City National Bank that it (the State National Bank) was the owner of the stock in litigation in this

cause, amounting to \$6,000, and same was treated by the officers of the City National Bank as the property of the State National Bank from said 28th day of June, 1894, to the time of the failure of the said City National Bank.

"Fourteenth. The State National Bank, on a book called the 'Blotter,' of said bank (said book covering a period from June 23, 1894, to June 17, 1896), on pages 660 and 661, charged the Lee and Garner note for \$4,967.42 and the Caswell Bros.' note for \$1,300 to profit and loss, and on page 661 there is an entry showing the State National to have acquired 50 shares of stock of the City National Bank for \$5,000, and ten shares of the stock of the City National Bank for \$1,000; making a total of \$6,000. On the general ledger of the State National Bank, under the head of 'Securities, Mortgages, Claims,' etc., there is an entry dated December 31, 1894, referring to the aforesaid entry on pages 660 and 661 of said 'blotter,' relative to the \$6,000 of stock acquired as aforesaid, and on the books of the bank before mentioned the said stock of the said City National Bank, amounting to \$6,000, stands as the property of the said State National Bank, and as an asset of the bank.

"Fifteenth. On April 5, 1895, securities, stocks, bonds, mortgages, etc., accounts on the books of the State National Bank is credited with 60 shares sold to Warren Coleman for \$6,000, and a corresponding entry on page 261 of said book, on April 5, 1895, profit and loss is debited with 'loss of City National Bank stock, \$6,000.'

"Sixteenth. On the 31st of December, 1894, the directors of the State National Bank, at a regular meeting of the board, adopted the following resolutions, to wit: 'It was also agreed that there should be charged to other stocks, bonds, and mortgages, 60 shares of the City National Bank of Ft. Worth stock, having to take same in payment of Garner and Lee note for \$5,000, and A. W. Caswell's note for \$1,300, to hold same in trust to secure said notes.' I find that the words 'to hold same in trust to secure said notes' are interlined in said minutes of said directors' meeting containing said resolutions. I find that said minutes are in the handwriting of said John C. Harrison, cashier, and that said interlineation is in the same handwriting.

"Edward R. Meek, U. S. District Judge."

And then follow conclusions of law, to wit:

"I find that the plaintiff, John P. Smith, receiver of the City National Bank, should recover of the State National Bank the amount of the assessment on said stock, together with six per cent. interest from the 10th day of July, 1896, and all costs of suit. I further find that the amount of the judgment plaintiff should recover of the defendant, the State National Bank, including interest, is the sum of \$6,815, and that this judgment bear interest at the rate of six per cent. per annum from this date, together with all costs in this behalf. I further find that the plaintiff take nothing against the defendant John C. Harrison, and that said defendant go hence without day, and recover his costs in this behalf expended.

Edward R. Meek, U. S. District Judge."

There are six assignments of error relating to the alleged findings of the court, and generally contending that they are inconsistent, conflicting, and do not support the judgment rendered.

W. P. McLean and D. W. Humphreys, for plaintiff in error.

T. F. West, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

Having stated the facts, the opinion of the court was delivered by PARDEE, Circuit Judge.

This is not a case where, a jury having been waived, the court proceeded to make a special finding of facts, and then rendered judgment thereon, but rather a case where the court proceeded to make a general finding, and rendered judgment thereon, and thereafter—possibly during the term—allowed to be prepared, found, and filed special findings as to the facts proven on the trial of the case. We have had occasion to hold that in an action at law, where a jury

is waived by stipulation in writing, the court cannot be required to make a special finding of facts, but may make a general finding. *Key West v. Baer*, 30 U. S. App. 140, 13 C. C. A. 572, and 66 Fed. 440. It is irregular, in such cases, for the court to make both a general and a special finding of facts, unless the same be done at one time, and in such a way that the conclusion necessarily follows that the general finding is based upon the special facts found. In fact, the supreme court, in *British Queen Min. Co. v. Baker Silver-Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523, held that the finding must be either general or special, and cannot be both. The special findings prepared and filed are made up of recitals of admissions, recitals of evidence, findings of preliminary evidential facts, and findings of ultimate facts.

In *Raimond v. Terrebonne Parish*, 132 U. S. 192, 10 Sup. Ct. 57, it is held, citing authorities, that:

"By the settled construction of the acts of congress defining the appellate jurisdiction of this court, either a statement of facts by the parties or a finding of facts by the circuit court is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence, or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred. *Burr v. Navigation Co.*, 1 Wall. 99; *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321."

In *Moller v. U. S.*, 13 U. S. App. 472, 480, 6 C. C. A. 459, 464, and 57 Fed. 490, 495, this court, in dealing with an alleged finding of facts, took occasion to advise the bar as follows:

"The bill of exceptions, which purports to be a finding of facts, is nothing more than a recapitulation of conflicting evidence, where, as recited therein, some witnesses testified one way and others testified directly to the contrary. It is neither a statement of facts by the parties nor a finding of facts by the court. *Raimond v. Terrebonne Parish*, 132 U. S. 192, 10 Sup. Ct. 57; *Glenn v. Fant*, 134 U. S. 398, 10 Sup. Ct. 583; *Davenport v. Paris*, 136 U. S. 580, 10 Sup. Ct. 1064; *British Queen Min. Co. v. Baker Silver-Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523. We suggest to the members of the bar in this circuit that an examination of these last-cited cases will be advantageous if hereafter, in common-law cases, they should desire to bring facts to this court for review."

An examination of the special findings shows that the evidence and the preliminary facts found are somewhat conflicting, but the weight thereof preponderates in favor of the correctness of the ultimate facts found. On writ of error we are not permitted to examine the evidence to determine its force and effect otherwise than, if such question be properly made, to inquire if there is any evidence at all to support the findings of fact. As to the weight and effect of the evidence, the finding of the trial court is as conclusive as the verdict of a jury. *Lehnen v. Dickson*, 148 U. S. 71, 73, 13 Sup. Ct. 481. And if we were called upon to examine the weight of the evidence, we should be embarrassed in this case, because there is no certificate that the evidence recited in the findings of fact was all the evidence submitted on the trial. If we assume the proceedings below to have been regular, and therefore that the special finding of facts is properly before us, then is presented the question whether the facts as found are sufficient to sustain the judgment. On this proposition we have no doubt. The court specifically found that the stock of the City National Bank of Ft. Worth, in question, was sold, and

purchased about June 28 and November 2, 1894, by the State National Bank of Ft. Worth, under authority conferred by the notes which said bank held against Dan Garner and Caswell Bros.; that the purchase was duly notified to the City National Bank, and new stock certificates were issued therefor, and, under the direction of said State National Bank, placed in the name of John C. Harrison (its cashier) as trustee; that the State National Bank not only held and controlled the certificates, but placed the stock upon its books as an asset, and on March 5, 1895, reported the same to the comptroller of the currency; that John C. Harrison, trustee, in whose name the stock was placed, was a trustee for the State National Bank of Ft. Worth; and that at the date of the failure of the City National Bank the State National Bank of Ft. Worth was the owner of the stock. There is recited in the special findings some evidence, as well as evidential facts, tending to show that the State National Bank was, notwithstanding the sale and purchase, holding the stock as collateral, and not as owner; but, as said above, this court cannot consider nor give effect to this evidence. It was doubtless given full weight, in connection with the other evidence, by the judge who tried the case. Affirmed.

PLATT v. LARTER et al.

(Circuit Court, S. D. New York. May 31, 1899.)

1. CORPORATIONS—STOCKHOLDERS' LIABILITY—NEW YORK STATUTE.
Laws N. Y. 1892, c. 688, §§ 54, 55, which impose upon stockholders of a corporation certain liabilities to pay its debts, and provide that such liability shall continue for two years, apply only to stockholders in New York corporations, and the limitation cannot be invoked by a stockholder in a foreign corporation.
2. SAME—LIABILITY OF STOCKHOLDERS UNDER KANSAS STATUTE.
A stockholder in a Kansas corporation, who, under the statute of that state, becomes liable to a judgment creditor of the corporation on the return of an execution against the corporation unsatisfied, cannot defend against a suit to enforce such liability on the ground that the corporation has some assets in the hands of its receiver.
3. SAME—ACTION TO ENFORCE STOCKHOLDERS' LIABILITY—EQUITABLE SET-OFF.
Equitable defenses are not permitted in actions at law in the federal courts; and, in an action to enforce the liability of a stockholder in a Kansas corporation to a creditor of the corporation, a set-off which is equitable in its nature, and does not arise out of any provision of the statute creating the liability, cannot be considered.

On Demurrer to Answer.

Powell & Cady, for plaintiff.

Smith & Bowman, for defendants.

SHIPMAN, Circuit Judge. This is an action at law to enforce the liability of the defendants, as executors of the last will of John A. Larter, who in his lifetime was a stockholder of the Western Farm Mortgage Trust Company of Kansas, and which stock the defendants, as executors, own, to pay the debts of that corporation. The complaint alleges, among other things, that the

Commercial National Bank of Denver, Colo., recovered on June 3, 1893, in a state court of Kansas, a judgment against the Western Farm Mortgage Trust Company; that the execution which was issued upon this judgment was returned unsatisfied on September 7, 1894, and is unpaid; and also alleges the ownership by the defendants of 10 shares of stock at the date of the entry of judgment. John A. Larter died on April 6, 1893. The defendants were appointed executors on May 1, 1893. This action was commenced on September 10, 1898. The alleged liability is \$1,000 and interest. The plaintiff is receiver of the Commercial National Bank. The defendants, in their answer, stated nine defenses, to the second, sixth, and eighth of which the plaintiff demurred. The defenses which were demurred to are as follows:

Second. "Said defendants allege, upon information and belief, that the alleged cause of action set forth in the complaint matured and became due more than two years immediately preceding the commencement of this action, and that therefore this action cannot be brought under the statutes of the state of New York." Sixth. "Said defendants allege, upon information and belief, that said Western Farm Mortgage Trust Company of Lawrence, Kansas, with its property and assets, went into the hands of a receiver or receivers, and certain of such property and assets remains in the hands of such receiver or receivers, and is applicable to the discharge of obligations held by creditors of said corporation, in exoneration of these defendants." Eighth. "That said defendants allege, upon information and belief, that before and at the time of the commencement of this action the said Western Farm Mortgage Trust Company of Lawrence, Kansas, was and still is indebted to the defendants in the sum of at least \$1,067.75, with interest thereon at the rate of seven per cent. per annum from the 5th day of January, 1898, for the following cause: That on the date last mentioned, and for a long time prior thereto, and at the present time, these defendants, as executors aforesaid, were and are the holders and lawful owners of a certain bond or obligation of the said Western Farm Mortgage Trust Company of Lawrence, Kansas, in the sum of \$1,000, which is long past due, and no part of which has been paid; that in the year 1897 these defendants commenced their action against the said Western Farm Mortgage Trust Company of Lawrence, Kansas, upon said bond, in the district court of Douglas county, Kansas, by personal service of the summons in said action upon the said trust company within the jurisdiction of said court; that in said action said trust company duly appeared by its attorneys, and that the issues in said action came regularly on to be heard by the said district court of Douglas county, Kansas, on the 5th day of January, 1898, and, the issues having been then duly tried in said court, judgment was rendered thereby in favor of these defendants (the plaintiffs in said action) against the said Western Farm Mortgage Trust Company of Lawrence, Kansas, for the sum of \$1,067.75, with interest at seven per cent. per annum, and that said judgment is now in full force and effect and is wholly unpaid; that the said district court of Douglas county, Kansas, had full jurisdiction, under the laws of said state, to hear and determine said cause; that thereafter, and on the 7th day of January, 1898, an execution against the property of said trust company upon the said judgment was duly issued out of the said district court, directed and delivered to the sheriff of Douglas county, where the said Western Farm Mortgage Trust Company was located; that said writ of execution was thereafter returned to the said court wholly unsatisfied; that out of the said sum of money so due to these defendants they hereby offer to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any shall be found in his favor in this action, in respect of the alleged matters complained of."

The defendants ask to amend the second defense, so that it shall allege that the action was not brought within two years after the

defendants' testator ceased to be a stockholder of said mortgage company, and that therefore this action cannot be brought under the statutes of the state of New York. It appears that the testator died on April 6, 1893, and the defendants' point is that he ceased to be a stockholder more than two years before the suit was brought.

Sections 54 and 55 of the New York stock law of 1892 (chapter 688, Laws 1892) impose upon stockholders of a corporation certain liabilities to pay its debts, and provide that the liability shall continue for two years after the defendant ceases to be a stockholder. While some of the sections of the statutes refer to foreign corporations, this liability is one imposed upon New York corporations, and sections 54 and 55 have no reference to the stockholders in foreign corporations.

The sixth defense is also of no value. Section 32 of the Kansas statute (chapter 23, p. 221, Comp. Laws 1879), upon which this action is brought, made the liability of the stockholder to mature at and upon the return of an execution unsatisfied. When an execution was returned nulla bona, the right of action against the stockholder accrued or became enforceable, notwithstanding the insolvent corporation might have some scattered assets. *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759; *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757.

The eighth defense is not permissible in an action at law in the federal courts. It alleges that the mortgage trust company is indebted to the defendants, as executors, in a claim upon a bond of this company which has been merged in an unpaid judgment against it rendered on January 5, 1898, for \$1,067.75, and offers to set off to the plaintiff so much of said judgment as will be sufficient to satisfy his damages. This sort of set-off has been permitted in Kansas as a matter of equity (*Abbey v. Long*, 44 Kan. 688, 24 Pac. 1111; *Musgrave v. Association*, 5 Kan. App. 593, 49 Pac. 338), and has been permitted as an equitable set-off in suits in the courts of New York, to obtain from directors and stockholders of a manufacturing corporation payment of debts against such corporation (*Mathez v. Neidig*, 72 N. Y. 100; *Wheeler v. Millar*, 90 N. Y. 359); but the defense is always called an equitable one, is permitted by virtue of the Code provision which allows defenses both legal and equitable, and is said by Judge Finch in *Bulkley v. Whitcomb*, 121 N. Y. 107, 24 N. E. 13, to be a creation of a court of equity, and to be governed in its extent by the circumstances of the case. In the federal courts, equitable defenses are not permitted in an action at law; but, if the defendant wishes to interpose such a defense, he must do it by a bill in equity. *Montejo v. Owen*, 14 Blatchf. 324, Fed. Cas. No. 9,722; *Railroad Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323. The admissibility of a defense of this character in a suit to enforce a stockholders' liability to pay the debt of a Kansas corporation was considered by Judge Dallas in *Mechanics' Sav. Bank v. Fidelity Insurance, Trust & Safe-Deposit Co.*, 87 Fed. 113, and was denied. The Kansas decisions were not founded

upon a construction of the statutes of Kansas, but upon considerations of equity as between stockholders and creditors. The demurrer is sustained.

KULP v. SNYDER (two cases).

(Circuit Court, E. D. Pennsylvania. June 2, 1899.)

Nos. 1, 2.

1. LIMITATION OF ACTIONS—PLEADING STATUTE.

Under Rev. St. § 4920, the statute of limitations may be pleaded specially in the federal courts, either with or without the general issue, regardless of the state practice.

2. PLEADING—FEDERAL COURTS.

The tendency of the federal courts is to regard with disfavor the interposition of inconsequential points of technical pleading.

On Rule to Strike Off Special Pleas of the Statute of Limitations.

Joshua Matlack, Jr., for plaintiff.

Hood Gilpin, for defendant.

DALLAS, Circuit Judge. The special plea of the statute of limitations is prohibited in any action ex delicto by the procedure act of Pennsylvania of May 25, 1887. But this act is not to be applied by this court to cases where congress has legislated, and upon the subject of pleadings congress has legislated in section 4920 of the Revised Statutes, under which it seems that defenses other than those there enumerated may be pleaded specially, with as well as without the general issue. See notes to Rob. Pat. § 992. Moreover, the question sought to be raised does not appear to be of any practical importance. If the defendant is entitled to the benefit of the statute, and if, upon the whole evidence, it shall appear that the plaintiff has a valid cause of action which accrued within six years, he will be entitled to recover; otherwise, he will not be. This can readily be determined as a single issue upon a single trial, and the tendency of the courts at this day is to regard with disfavor the interposition of inconsequential points of technical pleading. The plaintiff's rule to strike off the defendant's pleas, etc., is discharged.

BOARD OF LEVEE INSPECTORS OF CHICOT COUNTY v. CRITTENDEN
et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1899.)

No. 1,013.

1. CORPORATIONS—CREATION BY IMPLICATION—CONFERRING CORPORATE POWERS ON LEVEE BOARD.

A board of levee inspectors created by act of the legislature of Arkansas for a county, and given the powers usually incident to corporations, including the power to condemn land for levee purposes, employ engineers, attorneys, and other agents, make contracts for work, and take bonds from the contractors, and fix the rate of taxation for levee purposes within their

district, constitutes a corporation, with power to sue and be sued, although not in express terms declared by the act to be a corporation.

2. LEVEES—RIGHT TO COMPENSATION FOR LANDS TAKEN OR INJURED—LAW OF ARKANSAS.

Whether or not there exists a servitude upon the lands bordering on the Mississippi river within all the original Louisiana territory which authorizes the taking of land for a public levee without compensation (a question not decided), it has never been the policy of the state of Arkansas to claim or exercise such right, and it cannot be asserted in a federal court by a board of levee inspectors created by the legislature of that state by an act which provides for the payment of compensation for lands so taken.

3. SAME — TAKING EARTH AND TIMBER FOR REPAIRS — RIGHT OF OWNER TO COMPENSATION.

A levee board, in taking earth and timber from land of an individual owner for the repair of a levee previously constructed, acts in its corporate capacity and within its powers, although there is no statutory provision for such taking; and the board is liable in such capacity, under the constitution of Arkansas, for just compensation to the landowner for so much of his property as was "taken, appropriated, or damaged."

4. EMINENT DOMAIN—DAMAGES FOR PROPERTY TAKEN—BENEFITS.

General benefits resulting to a landowner in common with others from a public improvement are not to be taken into consideration, as against the value of his property taken or destroyed in making such improvement.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Sterling R. Cockrill and Ashley Cockrill, for plaintiff in error.

F. M. Rogers, U. M. Rose, W. E. Hemingway, and G. B. Rose, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by O. B. Crittenden and Henry Crittenden, the defendants in error, against the board of levee inspectors of Chicot county, Ark., the plaintiff in error, to recover damages for entering upon their land, and by excavations and digging upon the land destroying one house, filling up a ditch cut for the purpose of drainage, and damming up the natural outlet for the surface water, and destroying timber. There was a demurrer to the complaint upon the ground that the facts stated failed to show a cause of action. The demurrer was overruled, and thereupon the defendant filed its answer. The answer set up the following defenses: First. A denial of the trespass complained of. Second. That the board was created by the act of the legislature of the state of Arkansas for the purpose of building and repairing levees in Chicot county; that the defendant caused the levee to be built on plaintiffs' premises, but that the damages were duly assessed in accordance with the law at the sum of \$1; and that in fact plaintiffs' lands were enhanced in value by the building of the levee in a sum greater than any damage done. Third. The plea of the statute of limitations of one year, and also of three years. There was a trial by jury, who assessed the plaintiffs' damages as follows: For damage to cultivated lands on account of excavations, \$1,568; for damage to timber lands, \$224; for cutting new ditch, \$700; for damage to land on account of obstruction to drainage, \$500; for destruction of house, \$50,—and on this verdict judgment was entered. The plain-

tiffs entered a remittitur for the \$500 allowed for the obstruction to drainage, because no claim was made for it in the complaint.

The demurrer raises two principal questions: First, that the act creating the board of levee inspectors confers no corporate powers upon the board, and does not authorize a suit to be brought against it; second, that the levee district would not be liable in any event, for the reason that in all the original Louisiana territory there is a servitude upon lands bordering upon the Mississippi river, which justifies the taking of land for a public levee without making any compensation therefor.

While it is true that the act does not in express terms say that the board of levee inspectors shall be a body corporate and subject to suit, it confers upon the board all the powers of a corporation. It is authorized to locate, build, and repair levees, and for that purpose condemn lands; to employ engineers and such other agents, attorneys, and employes as may be necessary to carry into effect the objects of the act; to pay them for their services; to let contracts for building or repairing levees; to fix and determine the rate of taxation to be levied on the lands in the levee district; to require bond from the contractors; to have general supervision of the levees; and, in short, to do everything necessary for the protection of the lands in that district from overflow. These powers are the principal attributes of a corporation, and, although the statute does not in terms declare it to be a corporation, it is sufficient if that intent clearly appears. Whenever the powers conferred upon a board are of such a character that they cannot be performed or made effective without the exercise of the right to sue and to be sued, that right is necessarily implied. Judge Dillon, in his work on Municipal Corporations, says:

"Although corporations in this country are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, may be established without any particular form of words or technical mode of expression, though such words are commonly employed. If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly. This is well illustrated in a case in Massachusetts, where the question was whether the plaintiffs were a corporate body with power to sue. They were not incorporated expressly. But by statute the inhabitants of the several school-districts were empowered, at any meeting properly called, to raise money to erect, repair, or purchase a school house, to determine its site, etc.; the majority binding the minority. The cause was argued by able counsel, and after several consultations the judges of the supreme judicial court finally agreed in the opinion that the plaintiffs possessed sufficient corporate powers to maintain an action on a contract to build a school house, and to make to them a lease of land. But the intention of the legislature, where it is sought to show that a corporation has been created by implication, must satisfactorily appear." Dill. *Mun. Corp.* (4th Ed.) § 43.

And see, to the same effect, 1 *Thomp. Corp.* §§ 1, 2.

This question came before the supreme court of California, and that court held that an act of the legislature requiring the supervisors of a county, upon certain conditions, to create a levee district, and

providing the details by which the work should be effected, makes the levee district thus organized by the board of supervisors a corporation, and a public corporation, although the act does not in terms declare it a corporation. *Dean v. Davis*, 51 Cal. 406, 411. And see, to the same effect, *Elmore v. Commissioners*, 135 Ill. 269, 25 N. E. 1010; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 576. This is the construction put upon the act by the board itself, for the record shows that it has brought and maintained suits in its corporate name.

Whether in all the original Louisiana territory there is a servitude upon lands bordering upon the Mississippi river which justifies the taking of the land for a public levee without compensation, it is not necessary to determine in this action. Upon this general subject, see *Eldridge v. Trezevant*, 160 U. S. 452, 16 Sup. Ct. 345. It is enough to say that there is nothing in the record before us to show, or tending to show, that the state of Arkansas, or any department of its government, has ever claimed or asserted this right. If the right exists, it seems never to have been the policy of the state to assert it. On the contrary, the act under which the levee which gives rise to this suit was built makes provision for awarding to the landowner on whose land the levee is located and built such damages as "six land owners of the county * * * may deem just and right." We would not be justified in forcing on the state of Arkansas a policy inconsistent with that which has characterized all her legislation on this subject, and inconsistent with the provisions of the act which created this board of levee inspectors. The claim now put forward for the first time by this board finds no sanction either in the constitution or the laws of the state. Assuming, but not deciding, that, if there had been no legislation on the subject, such a servitude would exist, it is clearly not a right that is paramount to the constitution and laws of the state, and which the state is bound to exercise.

The demurrer to the complaint was properly overruled.

In determining the other questions in the case, it is important to bear in mind that this action is not for the taking of land upon which to construct a levee. The land upon which the levee was constructed was condemned, and the levee originally located and built in 1887. In 1892-93 it became necessary, for the protection of the land in the levee district from overflow, to increase the width and height of the levee. The earth and other materials necessary for this purpose were taken from the plaintiffs' land inside of the levee, and outside of the land originally condemned for the right of way of the levee.

Obviously the damages resulting to the plaintiffs from this action of the board were not covered by the assessment of damages for the land originally taken for the levee. If the board could have proceeded under the act to condemn the additional land necessary to increase the width and height of the levee, it did not do so. It, or others acting by its authority, entered upon the plaintiffs' land and did the damage complained of. We have no difficulty in holding that, in all the board did in the premises, it was acting in its corporate capacity, and is liable in its corporate capacity for the property taken, damaged, or destroyed. Levee

boards in the valley of the lower Mississippi are necessarily invested with large powers and discretion. It frequently occurs that levees have to be repaired, strengthened, or increased in height with the greatest celerity in order to prevent widespread damage to property, and destruction of animal, and sometimes human, life. In such emergencies time cannot be taken to condemn in a formal way the property and materials essential to be used to prevent such disasters; but the action of the board in such cases is its corporate act,—as much so as if it had proceeded in the most deliberate and formal manner to have the property condemned to the use to which it was appropriated. Such action is as much a part of the board's official duty as the original location and construction of the levee. The board's action in this case was not, therefore, extraofficial. But the mode of assessing the damages for property taken or damaged to meet such emergencies is necessarily different from that prescribed by statute in the case of the original location of the levee. There is no provision of the act authorizing the board to take land, timber, or earth, or to make excavations on land beyond the limits of the land condemned for the levee as originally laid off and constructed. Unquestionably, it is the existing policy of the state and of the act in question to compensate the owner for land taken for the original construction of the levee; and it is equally clear that after that has been done, and the levee built, the land, earth, and other materials necessary for maintaining, repairing, and strengthening the levee cannot be taken ad libitum outside of the limits of the right of way originally condemned, without making compensation to the owner for the value of the same, or the damages thereby sustained. The constitution of the state declares that:

"The right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated or damaged for public use without just compensation therefor." Const. Ark. art. 2, § 22.

This constitutional provision is applicable to this case, and entitles the plaintiffs to "just compensation" for so much of their property as was "taken, appropriated or damaged" for the public use mentioned.

It is assigned for error that the board was not permitted to show the benefits which accrued to the land of the plaintiffs in consequence of the acts complained of. But it is well settled that mere general or public benefits, or such benefits as result to the public at large,—as, for illustration in this case, to the other lands within this levee district,—cannot be charged to the owner of the land which is taken for the public use. "In estimating either the injuries or benefits," says Judge Cooley, "those which the owner sustains or receives in common with the community generally, and which are not peculiar to him, and connected with his ownership, use, and enjoyment of a particular parcel of land, should be altogether excluded." Cooley, Const. Lim. § 698; *Chiles v. New Haven & N. Co.*, 133 Mass. 253; *Sullivan v. Railroad Co.*, 51 N. J. Law, 518, 18 Atl. 689; *Railroad Co. v. Currie*, 62 Miss. 506.

There was an offer to prove some special benefits resulting to

the plaintiffs from the action of the board complained of, which was rejected,—upon what ground the record does not disclose; but a sufficient ground to support the ruling of the lower court is found in the fact that the board set up no such claim or defense in its answer. Aside from the general denials of the answer, all that is found on the subject of damages is contained in paragraph 2 of the substituted and amended answer, which reads as follows:

"(2) Said board alleges that it was created under the act of March 20, 1883, for the purpose of building and repairing levees in Chicot county, Arkansas; that it caused the line of levee to be built on the plaintiffs' premises described in the complaint in the year 1887; that the damages done to said premises by reason thereof were duly assessed in accordance with law in the year aforesaid at the sum of one dollar; that, in fact, the plaintiffs' lands were enhanced in value by the levee built thereon in a sum greater than any damage done by the building thereof."

Obviously the benefits here attempted to be set up are the benefits which the plaintiffs' lands received in common with the other lands within the levee district by the original construction of the levee; and, moreover, if the averment could be considered to relate to special benefits, they are special benefits resulting from the original construction of the levee, which were considered and disposed of in the condemnation proceedings taken in 1887, and are quite foreign to this case. Nothing is said about any special benefits accruing to the plaintiffs or their land by reason of the acts done by the board for which this suit is brought. If the defendant relied upon any such defense, it should have set it up in its answer.

One of the pleas of the statute of limitations has been abandoned, and, as to the statute of three years, there being conflicting evidence as to when the cause of action arose, the court below properly submitted the issue to the jury, and its finding is conclusive. It would serve no useful purpose to examine in detail all the requests for instructions, and the numerous assignments of error arising upon exceptions. The principal and vital questions in the case have been considered and decided. A careful consideration of the whole record satisfies us that there was no substantial error committed in the trial of the case, and that the judgment is right, and should be affirmed.

PITTSBURG, C. & ST. L. RY. CO. v. HOOD.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1899.)

No. 685.

1. HIGHWAYS—USE BY RAILWAY COMPANIES—NUISANCES.

In the absence of legislative authority, either direct or through the authorized action of a municipality, the construction and use by a railroad company of its road longitudinally on a public highway is a public nuisance.

2. SAME—UNAUTHORIZED USE—LIABILITY FOR INJURIES.

The unauthorized occupation and use of highways by a railway company makes such company a trespasser, and liable for such damages as

proximately result to persons or property in the absence of contributory negligence.

3. USE OF STREETS BY RAILROADS.

Where authority, under power delegated by the legislature to a city, is given to construct a railroad upon city streets, reasonable conditions, essential for the protection of the public interest, may be imposed, which, if accepted by the company, are binding on the parties.

4. SAME—ORDINANCES.

An ordinance, under power delegated by the legislature, granting a railway company a right to construct a railroad upon a public landing under condition prohibiting use of the track during specified hours, combines contractual as well as police provisions, the latter being in the interest of public safety.

5. SAME—POLICE POWER.

That a police provision pursuant to clear legislative authority is found in an ordinance which contains contract provisions does not affect the essential character of the power exercised, as within the corporate limits the police provision has the force of a law enacted by the legislature.

6. RAILROADS—PERSONAL INJURIES—PROXIMATE CAUSE.

Plaintiffs' intestate, a teamster, stopped his team on the landing at a wharf at a point 30 to 60 feet from a train, and commenced to unhitch the horses preparatory to hauling another wagon into position. A movement of the train at this time was made, and the engine let off steam, and otherwise caused much noise. The horses became frightened, and the teamster, in the effort to control them, was dragged and trampled upon by the horses, inflicting injuries from which he died. The operation of trains at this point at the time of the accident was prohibited by ordinance. *Held*, that the act of the railroad company was the proximate cause of the injuries.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action to recover damages for the death of plaintiff's intestate, based upon the ground that the injury which resulted in death was caused by the wrongful act and negligence of the defendant. The injury was sustained on a public landing in the city of Cincinnati, on the morning of September 19, 1895, at 6:50 a. m. This public landing is an open space on the river front, and is a large landing equal in dimensions to about two ordinary city blocks. It extends from the river across the line of Water street to the line of Front street, and from the east line of Broadway crossing Sycamore street to the west line of Main street. A railroad track crosses the north end of this public landing in the line of Front street. A spur track branches off from the south side of the main track in the line of Sycamore street, extending westerly, and parallel with the main line, into Water street. These are called the "connection tracks," by means of which passengers and freight are transferred across the city between the east and west systems of railroad terminals. The tracks were constructed under the authority and provisions of a city ordinance, by which the plaintiff in error acquired the right to operate only during the nighttime and until 6 o'clock in the morning. The material parts of the ordinance for the purposes of this case are as follows: "The hours which said track may be used for the transmission of freight and passengers shall be as follows: From the 1st of April to the 1st of October from 8 o'clock p. m. to 6 o'clock a. m., and from the 1st of October to the 1st of April from 7 o'clock p. m. to 6 o'clock a. m., and no cars shall be drawn on the track at any other hours. The companies to have the privilege of using the steam or horse power, as they may, in their judgment, think best; subject, however, to the approval of the city council. But in no case shall cars be drawn through the city at a greater speed than six miles per hour." The public landing, during the daytime, was used for all purposes to which a public landing is usually devoted, there being a wharf at the foot of Sycamore street, including its use by wagons, drays, and other suitable vehicles in the transportation of freight, which was discharged and received at the landing. At the

hour above mentioned a freight train operated by plaintiff in error entered the public landing, and was pushed into the Water street spur track, slowing up, and stopping its head end in Water street, with its rear end at or near Sycamore street. At this time the plaintiff's intestate was driving a two-horse wagon, loaded with tobacco, from the wharf diagonally across the public landing in the direction of Main street. He stopped at a distance variously estimated, but which may be put at from 30 to 60 feet from the train. His team was turned until it headed west, and the plaintiff's intestate then began to unhitch the horses, his purpose being to leave the wagon at that place, and drive the horses back to the wharf to aid in pulling the next wagon up the grade. Just at this moment a movement of the train was made, letting off steam, and otherwise causing much noise. The horses became frightened, and Hood went quickly to their heads in the effort to control them. The horses swung around suddenly, and plunged forward, dragging Hood as they went, and finally running over him, and inflicting the injuries from which he died. The main facts attending the accident as thus given are undisputed. The case, as stated in the petition, proceeded upon the grounds: First, that the cars were being operated unlawfully upon the public landing at the time, in violation of the ordinance; and, second, that the horses were frightened and the accident caused by the negligent manner in which the train was operated. In the court's instruction to the jury the case was thus stated: "The plaintiff claims that he is entitled to recover damages from defendant—First, because defendant's train, which frightened Hood's horses, and thereby caused the injuries of which he died, was unlawfully upon the public landing in violation of the ordinance; second, because the frightening of the horses, and the subsequent injuries to Hood, were caused by the negligence of the defendant in operating the train." Verdict was returned in plaintiff's favor for the sum of \$4,500. A motion for a new trial having been overruled, judgment was duly entered upon the verdict, and to revise that judgment this writ of error is sued out.

Robert Ramsey, for plaintiff in error.

Alfred Mack, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

"In relation to the first ground on which the right to recover was rested, the court charged the jury as follows:

"It being conceded, gentlemen, that the train of the defendant was unlawfully upon the public landing, in violation of the ordinance forbidding it to be there at all at that time, and that it frightened the horses of Hood and thereby caused the injury of which Hood died, a prima facie case of negligence on the part of the defendant is presented, which will entitle the plaintiff to recover, unless it appears from the evidence that Hood was himself in fault, and that he was guilty of negligence which directly contributed to the injury."

This instruction is assigned for error, and is the only ground relied on in argument for reversal, and presents the only serious question which could arise on this record. The contention of plaintiff in error is: First, that, treating the ordinance in question as a valid police regulation, its violation is only evidence of negligence, which should have been submitted to the jury; and, second, that the ordinance was a mere contract, and not a police regulation, and that its violation was a breach of private contract, and not a violation of law. In determining the true construction and effect of this ordinance, it will be well to keep in view the law which would control the case

in the absence of such an ordinance. The public landing on which the accident occurred is a public highway in the fullest sense, and must be so regarded for all legal purposes, and the right to occupy such a public highway with a railroad is an extraordinary privilege. Legislative authority must exist to warrant the occupation of such a highway by express grant or by necessary implication. 1 Wood, R. R. (2d Ed.) 746; 2 Dill. Mun. Corp. (4th Ed.) § 707; *Memphis City R. Co. v. Mayor, etc., of City of Memphis*, 4 Cold. 406; *People's Pass. Ry. v. Memphis City R. Co.*, 10 Wall. 38; *Barney v. City of Keokuk*, 94 U. S. 324; 3 Cook, Corp. § 713. The legislature may, of course, instead of granting by direct act or general legislation the power to railroad companies to occupy streets for the purpose of constructing and operating railways thereon, delegate to municipalities the right to consent to such use of the streets. In the absence of legislative authority, either direct or through the authorized action of a municipality, the construction and use by a railroad company of its road longitudinally on a highway or street is a public nuisance, and the company is subject to indictment for creating and maintaining such a nuisance. *City of Knoxville v. Africa*, 47 U. S. App. 74, 23 C. C. A. 252, and 77 Fed. 501; 2 Dill. Mun. Corp. (4th Ed.) § 708; 1 Wood, Nuis. (3d Ed.) pp. 96, 97; *Com. v. Old Colony & F. R. R. Co.*, 14 Gray, 93; *Railroad Co. v. Naylor*, 2 Ohio St. 235; *Hussner v. Railroad Co.*, 114 N. Y. 433, 21 N. E. 1002; 1 Wood, Nuis. (3d Ed.) §§ 300, 303. Such unauthorized occupation and use of streets and highways, being wrongful, not only creates a nuisance, but constitutes a railway company a trespasser, and renders it liable for such damages as proximately result to persons or property in the absence of contributory negligence. If authority is given to construct a railroad upon the streets of a city or town, provided the company first obtains the consent of the municipal corporation, or where, by the delegation of power from the legislature, the municipality itself grants the right, reasonable conditions may be annexed to the grant and imposed upon the company as to the construction and operation of its road, such as are deemed essential for the protection of the public interest and safety; and, if these are accepted by the railroad company, they are binding upon the parties. 1 Wood, R. R. 748; *Pacific R. Co. v. City of Leavenworth*, 18 Fed. Cas. 953 (No. 10,649); *Richmond, F. & P. R. Co. v. City of Richmond*, 96 U. S. 521; 1 Dill. Mun. Corp. (4th Ed.) § 706. It is this legislative authority, derived either immediately or through the authorized action of the municipality, which protects a railway company in the use of streets for railroad purposes from prosecution and suit for a public nuisance; and, when the consent of a city or town is required, the importance of an ordinance like the one in question is apparent. When the ordinance prescribes conditions on which the right is granted, these become binding, and the right to use the streets must be exercised strictly within the provisions of the ordinance. *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, is a leading and instructive case upon this subject. Judge Lurton (now one of the judges of this court), delivering the unanimous judgment of the supreme court of Tennessee, said:

"Mr. Wood, in his work upon Railroads, lays down what we regard as the sound and reasonable rule in the following words: 'It may be stated as a general rule that whatever is authorized by statute within the scope of legislative powers is lawful, and therefore cannot be a nuisance. But this must be understood as subject to the qualification that, where an act that would otherwise be a nuisance is authorized by statute, it only ceases to be a nuisance so long as it is within the scope of the powers conferred. If the power conferred is exceeded, or exercised in another or different manner from that prescribed by law, it is a nuisance as to such exercise, or difference in the mode of its exercise. Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care to prevent injury to person or property of those who may be affected by such acts.'"

In an extended note at page 759 of the work thus quoted from and approved the same author says:

"The rule is invariable that, where the statute imposes conditions upon the use of a highway for railway purposes, they must be complied with, or the railway will be a continuing nuisance. *Town of Hamden v. New Haven & N. Co.*, 27 Conn. 158; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Inhabitants of Springfield v. Connecticut R. R. Co.*, 4 Cush. 63; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152."

See, also, *Harmon v. Railroad Co.*, 87 Tenn. 614, 11 S. W. 703, in which the doctrine of *Railroad Co. v. Bingham* is reaffirmed.

In *Railroad Co. v. Naylor*, 2 Ohio St. 235, the facts were that the charter of a railroad company merely fixed a few points through which the road was to pass from its commencement to its terminus, leaving the exact location of the road to the discretion of the corporation. After the road had been once located, the company undertook to relocate and to change and rebuild the road, and in doing so rendered the premises of the defendant in error less valuable than they had been before, for which suit was brought, and judgment recovered. On writ of error to the supreme court of Ohio, it was held that, the company having once located the road, their power in that respect ceased, that the relocation was unauthorized, and that the company was, consequently, liable for any damage done to property in the relocation of the road. The court, through Caldwell, J., said:

"The act of the railroad company in changing their location being unlawful, the next question arises,—whether they are liable to the defendant in error for the damage which he has sustained by such relocation. It is contended that, inasmuch as the road as relocated does not touch his property, the company cannot be made liable. It is a general principle of law that a person is liable for all the damage done by his illegal act, and this whether the injury was intended or not. It is well settled that an action lies as well for damage to adjoining property, by stopping or impeding the travel on, to, or from a street or highway, as any other damage that can be done to property, although the property injured may not be touched by the obstruction. See *Fletcher v. Railroad Co.*, 25 Wend. 462; *Bingham v. Doane*, 9 Ohio, 165; 5 Eng. Law & Eq. 339; 29 E. C. L. 336."

The doctrine thus declared does not proceed upon the ground that the construction and operation of the railroad under such circumstances is negligent, but upon the ground that the prosecution of the business is unauthorized by law, and constitutes a nuisance. Accordingly, in *Congreve v. Smith*, 18 N. Y. 79, the court of appeals of New York, speaking by Strong, J., said:

"The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful."

So, too, in *Heeg v. Licht*, 80 N. Y. 579, it was adjudged that the keeping of gunpowder or other explosives under circumstances where it would be liable, in case of explosion, to injure the property or persons of those residing in close proximity, would constitute a private nuisance, and render the person keeping such explosives liable in damage in case of injury therefrom; and it was said that this liability was entirely without regard to the question whether the person so keeping such explosives was chargeable with carelessness or negligence. This doctrine is laid down broadly as the established law in 2 Dill. Mun. Corp. (4th Ed.) § 1032, in the following language:

"No person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavations made in the sidewalk by the abutter, or by unsafe hatchways left therein, or by opening or leaving open an area way in the pavement, or by undermining the street or sidewalk, or by placing unauthorized obstructions thereon, which make the use of the street unsafe or less secure, is guilty of a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom; and in such cases the person who created or continues the nuisance is thus liable irrespective of the question of negligence on his part."

See *Hayes v. Railroad Co.*, 111 U. S., at pages 235, 236, 4 Sup. Ct. 369, where this general rule is recognized, and cases cited in which it was declared. See, also, *Hetzel v. Railroad Co.*, 169 U. S. 26, 18 Sup. Ct. 255; *Evans v. Fertilizing Co.*, 160 Pa. St. 209, 28 Atl. 702; *Dennis v. Eckhardt*, 3 Grant, Cas. 392.

The rule in this class of cases is thus stated by Judge Cooley:

"It is only necessary for the plaintiff in these cases to show how he has been injured by the nuisance, and to distinguish his injury from that suffered by the public at large, and he brings himself within the rules entitling him to redress." Cooley, *Torts* (2d Ed.) 736, 737.

See, too, *Powell v. Fall*, 5 Q. B. Div. 597, *Rapier v. Tramway* [1893] 2 Ch. 588, *Railway Co. v. Truman*, 11 App. Cas. 45, in which the common law, as well as the effect of certain statutory enactments, were stated.

It is conceded, and could not be controverted, that the legislature of Ohio conferred upon the city power to grant the right to construct and use the railroad upon the public landing, with power to annex conditions. The existence of the power to consent to such a use of the streets and highways in the city, and the power to impose valid and binding conditions, were fully recognized in the well-considered case of *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 534, and 76 Fed. 296; *Id.*, 78 Fed. 307. It will admit of question whether, in the absence of constitutional or legislative restriction, municipal corporations, by virtue of the police authority

over streets, and the power to protect the safety of persons and property, might not impose, by ordinance duly enacted, conditions upon the operation of a railway through the streets of a city, similar to the provisions contained in the ordinance now in question. 1 Dill. Mun. Corp. (4th Ed.) §§ 393, 713; *Richmond, F. & P. R. Co. v. City of Richmond*, 96 U. S. 521; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513; *Gaslight Co. v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505. It being established, and here conceded, that the city was vested with power to make the grant with conditions annexed, it is unnecessary for us to decide to what extent the power to impose conditions would exist in the absence of express legislative authority to do so. It is not to be doubted that the purpose of the legislature in conferring upon the municipality the power to consent to the use of the public landing with conditions was to enable the city to properly exercise its police power in the protection of persons and property against great danger in a public and much-used place, such as this landing. And in this view it is not open to reasonable question that the ordinance as enacted combines contractual as well as police provisions, the latter being in the interest of the public safety. In so far as the ordinance granted the right or franchise to construct and operate a railway upon this public ground, it became, when accepted, a contract; but the provision by which the use of the track was prohibited during the daytime was in its nature and effect a municipal or police regulation operating in the interest of public safety. *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Joy v. City of St. Louis*, 138 U. S. 42, 11 Sup. Ct. 243. This police provision having been enacted pursuant to clear legislative authority, the fact that it is found in an ordinance which also contains contract provisions does not change the result or affect the essential character of the power exercised; and this police provision, being thus specifically authorized and duly enacted, unquestionably has, within the corporate limits, the force of a law enacted by the legislature of the state. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Robbins v. City of Chicago*, 4 Wall. 657; *City of Chicago v. Robbins*, 2 Black, 418; *Doran v. Flood*, 47 Fed. 543; *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; 1 Dill. Mun. Corp. (4th Ed.) §§ 308, 393. It results from this view that the operation of the railroad by plaintiff in error during the daytime, contrary to the provisions of the ordinance was a violation of law, and constituted a nuisance.

It is finally insisted that there was error in the court's holding that the act of plaintiff in error was the proximate cause of the injury sustained. The proximate causal connection between the wrongful operation of the railroad by plaintiff in error and the injury is, however, in the light of authority, too clear to admit of question. *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; *Railroad Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 374, and 19 U. S. App. 596; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Whart. Neg.* § 107. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, strongly supports throughout the conclusions at which

we arrive in this case. And this is so notwithstanding the difference in the specific ground of liability declared in that case and in this. Substantially the same grounds urged for reversal here were pressed upon the attention of the court unsuccessfully in that case. In that case the liability of the defendant was put upon the ground of negligence in the omission of a duty imposed by ordinance, while the ground of liability in the case at bar is that of a public nuisance causing special injury. In that case the operation of the railway was permitted, and the mode of operation regulated, whereas in this case the use of the railway track at the time was expressly prohibited. The provision of law in that case went to the manner of operation, while in this it goes to and denies the right to operate at all. The distinction is between the prosecution of a lawful business in a negligent manner and the prosecution of a business prohibited by law. The breach of law in that case was an omission of duty imposed, and in this the commission of a wrong expressly prohibited. Whether, in the ordinary case, where the original act of the defendant is lawful, or authorized by statute, negligence is the gist of the action, or a necessary element, we are not required to decide, as the original act in the case at bar was clearly unlawful and wrongful.

The cases relied on by counsel for plaintiff in error are those in which the business was lawful, and the question was whether the business was operated in a negligent or unlawful manner. In view of the distinction which we have stated, such cases are not applicable. We conclude, therefore, in view of the whole case, that the court rightly instructed the jury that the undisputed facts established a right to recover, unless such right was defeated by the contributory negligence of the plaintiff's intestate. The fact that the instruction apparently proceeded upon the theory that the presence and operation of the train unlawfully upon the public landing constituted also a case of negligence does not affect the correctness of the proposition that the plaintiff was, upon the undisputed facts, entitled to recover, provided plaintiff's intestate was in the exercise of due care on his part. We think the law as thus stated and applied to this case is fully sustained upon authority, and is sound in principle, and we now so hold in a case which squarely presents the question. Judgment affirmed.

HICKS v. KNOT.

(District Court, S. D. Ohio, W. D. June 1, 1899.)

No. 1,781.

BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.

Under the bankruptcy act of 1898, a federal district court sitting in bankruptcy has no jurisdiction of a bill in equity by a trustee in bankruptcy against a creditor of the bankrupt to recover from the defendant money alleged to have been paid to him by the bankrupt as a preference or in fraud of the other creditors. Such a suit must be brought in the proper state court or federal circuit court.

In Equity.

This was a bill in equity by William A. Hicks, as trustee in bankruptcy of Albert Knost and Arnold Wilhelmy, late partners under the firm name of Knost & Wilhelmy, against Bertha Knost.

Max H. Winkler and W. A. Hicks, for plaintiff.

Frank M. Coppock, for defendant.

THOMPSON, District Judge. This is a suit in equity by a trustee in bankruptcy to compel the defendant to account for certain moneys which, it is claimed, were in part paid to her as a creditor of the bankrupts, by way of preference, and in part given to her, without consideration, in fraud of the other creditors, and is now presented to the court on the motion of the trustee for an order restraining the defendant from disposing of the moneys pending the hearing of the cause. This motion is resisted by the defendant on the ground that the court is without jurisdiction to entertain the bill or issue the injunction. If the court has jurisdiction to entertain the bill, it must be found in those provisions of sections 2 and 23 of the bankrupt act which read as follows:

"Sec. 2. That the courts of bankruptcy as hereinbefore defined, viz. the district courts of the United States in the several states, * * * are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

"Sec. 23. Jurisdiction of United States and State Courts. (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

This question has been considered by many of the district courts, but they do not agree as to the true construction of the sections quoted. It has been held that section 2 is in no wise limited by section 23; that section 23 applies only to the circuit courts, and limits their jurisdiction to such suits and actions as might have been brought or prosecuted therein, by the bankrupts, because of diverse citizenship; that clause b of section 23 was intended to cover suits and controversies, arising without the territorial jurisdiction of the bankruptcy courts, which trustees would be required to bring and prosecute in the courts where the bankrupt might have brought or prosecuted them, to wit, in the state courts, or in the United States circuit courts, if there was diversity of citizenship and the amount was sufficient to invoke that jurisdiction; but that, in all

cases arising within the territorial jurisdiction of the bankruptcy courts, resort may be had by trustees to those courts alone, and that full scope for the application of the exception in clause 7 of section 2 is found in the provisions of the act which authorize compromises and arbitrations, and which permit trustees to prosecute or defend pending suits. In *re Sievers*, 91 Fed. 370-373. It has also been held that the limitation of jurisdiction referred to by the exception in clause 7 of section 2 is found in section 23, but that it is only applicable to causes of action existing in favor of bankrupts prior to adjudication, and is not intended to cover causes of action accruing to trustees in the discharge of their official duties; that in such a case as the one at bar the trustee's right of action is not a derivative one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his suit is, in effect, the exact equivalent of a creditors' bill to reach property fraudulently transferred; that when suits which the bankrupt could have brought or prosecuted in the courts of the state are spoken of, evidently real suits upon existing causes of action belonging to the bankrupt are meant, and not suits for the pretended enforcement of causes of action which never existed in favor of the bankrupt. *Carter v. Hobbs*, 92 Fed. 594.

It is said, in support of these rulings, that a construction of the exception in clause 7 of section 2 which would remit to the courts of the state jurisdiction over all suits for the collection of debts and demands due the bankrupt would be repugnant to the body of the act, and not admissible. Is this true? Whether it is or not must be determined from an examination of the act itself, with a view to ascertain its general purpose and intent. The object and purpose of the law is (1) to discharge honest bankrupts from their debts, and (2) to secure to their creditors an equal distribution of their estates. Now, is it necessary, within the meaning of the law, in order to accomplish these ends, to invest bankruptcy courts with jurisdiction to hear and determine all controversies incident to the collection and conversion into money of the bankrupt's estate? Must all suits and actions for that purpose, actions on accounts, promissory notes, and contracts, and suits to foreclose mortgages, set aside fraudulent conveyances, and the like, be brought in the bankruptcy courts, without reference to the amount involved, the citizenship of the parties, or the questions presented? Must the dockets be crowded, and the time of the district courts be taken up with the hearing of minor controversies, at great inconvenience and expense to the litigants, who may be compelled to travel long distances to attend the courts, or was it the intention of congress to follow its long-established policy of permitting such controversies to be determined in the local state courts, at the doors of the people, without unnecessary expense or inconvenience? It is the policy of congress to require all controversies where the amount involved is less than \$2,000 to be determined in the state courts, notwithstanding they may involve a federal question or the parties be of diverse citizenship, and the construction of the bankrupt act insisted upon by the complainant would

antagonize and defeat that policy, in so far as controversies arising under that act are concerned. The consistent adherence of congress to this policy is illustrated by the act of August 13, 1888 (25 Stat. 433), permitting receivers appointed by United States courts to be sued in the state courts, and, if congress intended by the bankrupt act to establish an exception repugnant to this general policy, it should clearly appear from the language of the law, without the aid of ingenious construction.

Under the bankrupt act the courts of bankruptcy are invested with jurisdiction to adjudge persons bankrupt; allow or disallow claims against bankrupts; appoint receivers or the marshals to take charge of the property of bankrupts until the trustee is qualified; try offenses against the bankrupt law; authorize the business of bankrupts to be conducted by receivers, marshals, or trustees; bring in parties necessary to a complete determination of a matter in controversy; close estates, when they appear to be fully administered; confirm or reject compositions; consider, and confirm, modify, or overrule, the action of referees; determine the bankrupt's exemptions; discharge or refuse to discharge bankrupts; enforce obedience to the orders of the court by fine and imprisonment; extradite bankrupts; make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act; punish contempts before referees; appoint trustees, when the creditors fail to do so, and remove them; tax costs and render judgments therefor; transfer causes to other courts of bankruptcy; and "cause the estates of bankrupts to be collected, reduced to money, and distributed; and determine controversies in relation thereto, except as herein otherwise provided." But it is claimed that, if this exception permits actions and suits incident to the collection and reduction to money of the bankrupt's estate to be brought in the state courts or the United States circuit courts, the bankruptcy courts will be shorn of power to accomplish the purpose of their creation. The bankruptcy courts may cause such controversies to be compromised or arbitrated (sections 26 and 27), or may determine them when they arise between trustees and bankrupts, or between trustees and creditors, but will be shorn of power to accomplish the purpose of their creation, if they are not permitted to try actions at law and hear suits in equity between trustees and strangers who claim property acquired or claimed by the trustees.

I cannot agree with this construction of the law. It seems to me that it was the intention of congress to permit such controversies, when they could not be settled by compromise or arbitration, to be litigated in the courts which, under the general law, would have jurisdiction of them, just as assignees under state insolvency laws bring suits in courts of general jurisdiction to collect assets, which are afterwards distributed by the court of insolvency. The bankrupt court controls the trustee, supervises the administration of his trust, settles his accounts, and orders the distribution of the moneys in his hands, but is not required to assume the burden of the litigations necessary for the collection of assets, nor are adverse claimants of

property acquired or claimed by trustees to be put to unnecessary inconvenience and expense in litigating their rights. I find support for this view of the law in *Burnett v. Mercantile Co.*, 91 Fed. 365, in *Mitchell v. McClure*, Id. 621, and in *Re Abraham* (recently decided by the circuit court of appeals, Fifth circuit) 1 Nat. Bankr. News, 281, 93 Fed. 767.

It is not necessary in this case to give construction to the last clause of subdivision b of section 23 which reads, "Unless by consent of the proposed defendant," but I am inclined to think it has reference, not to jurisdiction in bankruptcy courts, but to courts having jurisdiction of the subject-matter of the action, but not of the person of the proposed defendant. The motion for the injunction will be overruled, and the bill will be dismissed, at complainant's costs.

In re HOLLENFELTZ.

(District Court, N. D. Iowa. June 12, 1899.)

BANKRUPTCY—MORTGAGE CREDITOR—PAYMENT OF TAXES.

Where a mortgage creditor of the bankrupt forecloses his mortgage, and bids in the property at the foreclosure sale, but the property remains in the possession of the trustee in bankruptcy during the time allowed by law for redemption, and the latter collects rent from tenants of the premises, the creditor is not entitled to be reimbursed, out of such rent, for the amount advanced by him in payment of taxes which were due and a lien on the property at the time of the sale.

In Bankruptcy. On review of rulings of referee.

Duffy & Maguire, for bankrupt.

SHIRAS, District Judge. From the facts certified up by the referee in the above case it appears that Michael Hollenfeltz was adjudged a bankrupt on October 4, 1898; that at that time the Dubuque National Bank held a mortgage on the middle and south middle fifths of lot 434 in the city of Dubuque to secure an indebtedness due the bank, upon which a decree of foreclosure was rendered in favor of the bank at the January term, 1899, of the district court of Dubuque county, Iowa, and that at the sheriff's sale had in pursuance of the decree of foreclosure the bank became the purchaser of the realty for the sum of \$11,145, and now holds the sheriff's certificate of sale, the time of the redemption under the statute of Iowa not having expired. It further appears that at the time of the sheriff's sale there were due upon said realty, and a lien thereon, the taxes for the year 1897 and 1898, amounting to the sum of \$16.60, which have been paid by the bank, and it also appears that the trustee has collected as rentals from the mortgaged realty the sum of \$176. Based upon these facts, the bank now asks an order directing the trustee to apply, so far as necessary, the rentals received from the realty to the repayment of the taxes, on the ground that it would be inequitable to require the bank to pay the taxes, and yet permit the trustee to retain the rentals for the benefit of the

general creditors. The referee refused to make the order asked by the bank, and at the request of the bank has certified the question to the court for review and decision.

When the bank became the purchaser of the property at the sheriff's sale, it bought the same subject to the lien of the taxes then due upon it. If Hollenfeltz had not been adjudged a bankrupt, he would have been entitled to the possession of the property until the period of redemption expired, and no facts are made to appear justifying the holding that he could have been compelled to apply the rentals in his hands to the payment of the taxes. The presumption is that the amount bid by the bank at the sale was the sum the bank was willing to give for the property in its then condition; that is, subject to the lien of the unpaid taxes. If the property should be redeemed from this sale by any one, the bank will receive the amount of its bid, plus the amount of the prior liens paid by it, which would include the taxes paid. If redemption is not made, then the bank will obtain the title to the property for the consideration it bid at the sale, and there seems to be no equitable ground for granting the relief prayed for by the bank. If it were true that the bank, by reason of the purchase at the foreclosure sale, had become entitled to the rentals of the property during the year of redemption as against the mortgagor and bankrupt, it might claim the same as its property, even though they had been collected by the trustee; but it is not shown that the bank had the right to the rentals, and therefore it has no right or equity thereto, and there exists no ground for holding that the bank is entitled to be reimbursed, out of the rentals, for the amounts advanced by it in payment of the taxes upon the realty which it purchased at the sheriff's sale. The ruling of the referee is therefore affirmed.

In re CURTIS et al.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 575.

BANKRUPTCY—PETITIONING CREDITORS—ESTOPPEL.

A debtor made a general assignment for the benefit of creditors under a state statute providing for the administration and distribution by the state courts of estates so assigned, and requiring creditors to file their claims within three months after notice from the assignee, on pain of being postponed until all proving creditors were paid in full. The time having not yet arrived when a petition in involuntary bankruptcy could be filed under the act of 1898, certain creditors filed their claims with the assignee; being then in ignorance of facts tending to show that the assignment was fraudulent, and that the debtor had disposed of property in fraud of creditors. No dividend was declared under the assignment, nor any judicial action taken on the claims filed. *Held*, that such creditors were not estopped to maintain a petition in involuntary bankruptcy against the debtor.

Appeal from the District Court of the United States for the Southern District of Illinois.

In bankruptcy. On August 11, 1898, the bankrupts, who are surviving partners of Levi H. Henry, deceased, doing business as the Bank of Waverly, in

the Southern district of Illinois, made a voluntary assignment for the benefit of their creditors, under the statutes of the state of Illinois (2 Starr & C. Ann. St. [2d Ed.] p. 2174 et seq., c. 72, §§ 37-51), to Ausben W. Reagal, who duly qualified and entered upon the discharge of his duties, and, pursuant to section 38 of the chapter, notified creditors to present their claims within three months. The forty-sixth section of the chapter provides that creditors not so filing their claims shall not participate in dividends until after payment in full of all claims so presented. Under that notice the creditors who subsequently presented the petition in bankruptcy in the court below filed their respective claims with the assignee in the months of August and October, 1898. On November 1, 1898, the requisite number of creditors filed their petition in the district court, seeking an adjudication of bankruptcy against their debtors. By an amended petition filed by leave of the court on November 25, 1898, the creditors set forth, not only the general assignment as an act of bankruptcy, but also certain fraudulent transfers by the debtors, of which they asserted they were ignorant at the time of the filing of their claims under the assignment. No proceedings were had upon the claims filed with the assignee, with the exception of the claim of Caruthers, which proceeding is not considered by the court, for the reason that, omitting this claim, a sufficient number of creditors joined in the petition. No dividend was declared under the assignment, and no action by the court was had upon the claims presented, with the exception stated, until the 29th of November, 1898, and after the filing of the amended petition in bankruptcy, and that merely an order allowing the claims unless objections thereto should be filed within 30 days thereafter, and such action was without the knowledge or consent of the petitioning creditors. On the 24th of January, 1899, a decree of bankruptcy passed, from which decree on the 1st day of February, 1899, an appeal was allowed to this court. The opinion in the court below is reported in 91 Fed. 737, 1 Nat. Bankr. News, 163.

Logan Hay and Samuel P. Wheeler, for appellants.
Bluford Wilson and P. B. Warren, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, upon the foregoing statement of facts, delivered the opinion of the court.

We do not find occasion upon this appeal to deal with the interesting and important question determined by the court below,—whether upon the going into effect of the bankrupt law a general assignment for the benefit of creditors under a state law is void, or voidable merely upon attack by creditors through proceedings in bankruptcy, for upon other grounds we are of opinion that the adjudication was correct. The question is one not free from difficulty, and one upon which the courts are not wholly at agreement. In *re Gutwillig*, 90 Fed. 475, affirmed upon appeal in 92 Fed. 337; In *re Smith*, Id. 135; In *re Romanow*, Id. 510.

It is urged that the petitioning creditors, from the mere fact of filing their claims with the assignee under the general assignment, are estopped to attack that assignment. We do not think that, strictly speaking, there is here any estoppel in pais. Such an estoppel arises from acts or conduct which have induced change of position by another in accordance with the real or apparent intention of the party against whom the estoppel is asserted. But here there has occurred no action induced by the presentation to the assignee of the claims of the petitioning creditors. There was no change of position by him. No dividend was declared, no action taken upon the claims until subsequent to the filing of the amended petition in

bankruptcy. If the petitioning creditors are precluded from asserting their supposed rights in the bankruptcy court, it is not because of any estoppel that has been wrought by their conduct, but because they have elected a particular remedy, and cannot be heard to invoke another or inconsistent remedy. We are not inclined to dispute the general principle which underlies the doctrine of the election of remedies, nor have we any contention with the rule which denies to a creditor who has knowingly participated in the execution of a conveyance prohibited by law the right to impugn that conveyance. We need not, therefore, review the numerous cases presented to our consideration upon that question.

At the time of the filing of these claims the creditors were in a peculiar position. Unless such claims were presented within three months from the 19th of August, 1898, payment of any part of them would be postponed to the payment in full of all claims presented within that time. It was not permitted by the law to file an involuntary petition in bankruptcy prior to the 1st day of November, 1898, and whether the proper combination of creditors in number and amount could then be procured to join in such petition may have been problematical. Under such circumstances, it would hardly have been the part of prudence to have delayed the filing of the claims; for, if the bank in question had possessed quick assets, a dividend might have been declared and paid before the bankrupt court could be properly invoked in protection of their rights. This, however, may possibly not excuse, if the election of remedy was deliberate and intelligent. The principle which underlies the doctrine of election is held, in general, to be as stated by Mr. Bigelow in his work on Estoppel (5th Ed. pp. 679, 683),—that any decisive act done by a person with knowledge of his right and of all other facts material to him is binding. And this is, in substance, the rule asserted by the supreme court in *Robb v. Vos*, 155 U. S. 13, 43, 15 Sup. Ct. 4. We had occasion to consider this question of election of remedies in *Oil Co. v. Hawkins*, 46 U. S. App. 115, 20 C. C. A. 468, and 74 Fed. 395; and we there held that, to constitute a valid election, the act must be with the full knowledge of the circumstances of the case, and of the right to which the person put to his election was entitled, and that, if one party elects a remedy in ignorance that he may have pursued a better remedy, he may change his position, if the change will impose no detriment, in a legal sense, upon the opposing party. We do not think it needful, in view of that decision, to enlarge upon the subject, and need only inquire whether the facts here present a case which falls within the principle there declared. It is shown by the record that certain transfers of property by the bankrupts were made, which the petitioning creditors insisted were fraudulent, and certain other frauds are asserted, which need not be here detailed, and that knowledge of these fraudulent transactions was not possessed by the petitioning creditors prior to the 1st day of November, 1898, when this petition was presented; that their claims were filed under the assignment in ignorance of these alleged fraudulent transactions. Under the circumstances, and considering that no legal detriment has resulted to any one from the filing of

claims under the assignment, we are of opinion that the petitioning creditors are not precluded by the mere fact of filing their claims with the assignee from selecting another forum, in which, as they think, their rights as against supposed fraudulent transactions may be the better protected. The claims were filed in the belief that the transactions of the bankrupts were fair and honest and in the interest of their creditors. No one has been harmed by that act. No one has received any benefit from it, or suffered any detriment because of it. Having now discovered facts which tend to show that this assignment was fraudulent, and that the debtors have disposed of property with a view to defraud creditors, we perceive no just reason to deny the petitioning creditors the right to appeal to the courts of bankruptcy, where such matters are properly, if not now exclusively, cognizable, for the assertion of their rights. The decree is affirmed.

GROSSCUP, Circuit Judge, sat at the hearing, and concurred in the decision of this cause, but, by reason of illness, had no share in the preparation of the opinion.

In re RICHARD.

(District Court, E. D. North Carolina. May 23, 1899.)

1. **BANKRUPTCY—SUSPENSION OF STATE INSOLVENCY LAWS.**

The national bankruptcy law supersedes state insolvency laws; and, upon an adjudication in bankruptcy, the court of bankruptcy takes jurisdiction of the estate of the bankrupt and all matters pertaining thereto, and will administer the same to a final settlement.

2. **SAME—DISSOLUTION OF EXISTING LIENS.**

Where an insolvent debtor, being sued on several claims, appeared in court and acknowledged the validity of the claims, and consented to the entry of judgment thereon, and in one case consented to the separation of an indivisible claim into two causes of action, to bring it within the jurisdiction of a justice of the peace, and to the entry of judgment thereon, and executions were issued and levied on the defendant's property, and he made an agreement with the creditors as to the custody and sale of the property, *held*, that the liens of such executions were dissolved by the debtor's adjudication in bankruptcy within four months after the bringing of the suits, and the trustee was entitled to the property or its proceeds.

3. **SAME—EXEMPTIONS.**

Where a bankrupt selected from his personal property articles amounting in value to the sum exempted by the law of the state, but, by agreement with the trustee, allowed these articles to be sold with the rest,—that course being for the benefit of the estate, in that it made the stock, as a whole, more salable,—*held*, that the trustee should allow to the bankrupt, as his exemption, out of the proceeds of the sale, a sum of money equal to the value of the goods originally selected.

4. **SAME—PROVABLE DEBTS.**

Where, in a contest between the trustee in bankruptcy and an execution creditor of the bankrupt, it is adjudged that the lien of the execution previously levied on property of the bankrupt was dissolved by the adjudication in bankruptcy, because sought and permitted in fraud of the bankruptcy act, but there was no actual fraud in the judgment on which it was based, the creditor, if he will surrender the amount collected by means of his execution, may then prove his claim against the estate as an unsecured creditor.

In Bankruptcy. On review of rulings of referee in bankruptcy.
The referee in bankruptcy found as follows:

(1) That on the 12th of December, 1898, the said Gerson Richard was insolvent; his property not being sufficient in value to pay one-half of his indebtedness. That he was for some time before that date constantly pressed for money, his obligations in many instances either protested or returned by the bank, and many claims against him having been in the hands of local attorneys. That he was frequently attempting to borrow money. That on the said 12th of December, 1898, ten summonses were issued by one John P. Tillery, a justice of the peace of Rockymount, at the instance of the respondents, including Augustus Wright, against the said Gerson Richard, returnable at 2 o'clock p. m., same day. The hearing of said actions was commenced about 2:30 p. m.; the plaintiffs in the same being represented by John M. Sherrod, Esq., and J. H. Baker, attorneys at law. No witnesses were sworn, but judgments were entered in all the cases, except the case of Wright, upon the debtor's acknowledgment of the claims sued upon. In some of the cases there were verified accounts filed, and in some notes were offered in evidence, but no proof of signature was introduced. The justice states that he rendered these nine judgments upon acknowledgment of their correctness by the said Richard.

(2) That, after these, came up for trial the tenth action, which was in favor of Augustus Wright, whose account was indivisible, and for \$238.10, contracted as of October 1, 1898, payable, as Richard contended, four months after date; the summons being for \$200, interest and costs, and the \$38.10 being remitted by the said Wright. Richard denied the said plaintiff's right to recover. A jury was demanded by Richard. He deposited \$3 for the fees. The jury was drawn. The case was continued until the next day, December 13th, at 3 p. m., and Richard's attorney left the place of trial.

(3) Executions were issued December 12, 1898, on the nine judgments rendered that day, and levied on Richard's goods.

(4) Then, without the knowledge of Richard's attorney, the justice of the peace that evening, about night (December 12th), entered a nonsuit in the said case of Wright against Richard, at instance of Wright's attorney, and then issued two summonses on said indivisible account, each for \$119.05 and interest and costs, of which summons Richard accepted service, and judgments were rendered and executions issued on the same, which executions were also levied on said goods. The \$3 was refunded to Richard. The two judgments in favor of Wright were not resisted by Richard. After the levy of the eleven executions as aforesaid, it was agreed between the respondent's attorneys and Gerson Richard that the executions should be returned "Indulged," which was done, and the liens were abandoned, and that the said Richard should execute a trust deed of all his property to B. H. Bunn, law partner of John M. Sherrod, to secure the said eleven judgments; and said instrument was accordingly drafted that night by Messrs. Sherrod and Baker.

(5) That the next day (December 13, 1898) the plan of executing a trust deed was abandoned, and eleven other executions were issued on said judgments; and were levied on said debtor's property, which was permitted to remain in the custody of the clerk of said Richard under the written agreement and circumstances mentioned in the evidence. In regard to said levies and the liens thereof (the judgments aforesaid having been begun within four months before the filing of the petition in bankruptcy), the referee finds from all the evidence which is herewith sent (a) that said liens were obtained and permitted while said defendant was insolvent, and that their existence and enforcement will work a preference; (b) that such liens were sought and permitted in fraud of the provisions of the bankrupt act; and (c) that said levies were not open, notorious, and unequivocal.

(6) That during all these proceedings in the justice's court, and until the closing of the stores on the 16th of December, 1898, by the respondents, they had reasonable ground to believe that said Richard was insolvent, and that the acquisition of said liens would give them a preference over other creditors.

(7) That said Richard having acknowledged the nine claims on which judgments were first rendered, and having consented to the division of the Wright claim after the remittitur, and making no defense to the two actions brought after the nonsuit on the first, and having signed the written agreement (a copy of which is annexed to respondent's answer) in reference to the cus-

tody and sale of his goods, the referee finds that he facilitated the proceedings against him, as to time and method, and for these additional reasons permitted the acquisition of said liens. (8) That the facts in regard to the bankrupt's personal property exemptions are truly stated in the bankrupt's petition, dated January 26, 1899 (a copy of which, marked "Z," is herewith filed), and in the trustee's report, dated January 18, 1899, to which no objections have been filed. (9) That the articles of personal property which the trustee caused to be allotted to Gerson Richard as his personal property exemptions amounted at cost prices to \$833.66%, and their true value was this sum less 40 per cent.; that is, \$500. These articles, being sold with the other goods, added at least \$500 to the price that the whole brought; and it made out, in the aggregate, a more salable stock, and it was better for creditors that all the goods be sold together as was done. It appears from a list of the articles assigned as a personal property exemption that there are many standard articles, and it is to be presumed, as a matter of fact, that the debtor would select the best things in the lot. (10) That the respondents received the amounts from sale of goods December 13th, 14th, 15th, and 16th that are stated in article 10 of the reply.

Conclusions of Law.

(1) That the alleged liens of December 13, 1898, are dissolved by the adjudication of bankruptcy, and are null and void as to the trustee, and as to the creditors other than the respondents. (2) That, in the matter of the allotment of the personal property exemptions of Gerson Richard, it appears from the trustee's report that the allotment was made with substantial regularity. It was not necessary for the trustee to follow the state law on this subject. (3) That out of the said \$1,775, proceeds of sale, now in the hands of the trustee, he shall pay \$500, in lieu of said personal property exemptions, to the H. B. Claffin Company; the claim for the same having been transferred by Gerson Richard to his wife, Mrs. C. Richard, a free trader, and by her to the said company, as set out in the trustee's supplemental report. (4) That the order made December 22, 1898, directing the United States marshal to seize the goods, should not be revoked, and that neither the bankrupt property, nor the proceeds of sale thereof, should be given up by this court, except in the way of administering the same under the bankrupt law. (5) That the money received by respondents as stated in reply article 10 must be repaid to the trustee by them, and they cannot deduct the expenses incurred by them in proceedings that were in fraud of the bankrupt law.

Jacob Battle, for bankrupt and H. B. Claffin Co.

Baker & Sherrod and B. H. Bunn, for other petitioners.

Jas. E. Shepherd, for other creditors.

PURNELL, District Judge (after stating the facts). The bankrupt law should be, and is, eminently fair and just to all parties. That there is opposition to its operation is to be expected, until creditors cease to demand their full dues,—a "pound of flesh when it is so nominated in the bond,"—and to gain advantage over other creditors who, from improvident credits, are similarly situated. The purpose of the law is, further, to establish throughout the United States a uniform system, to supersede diverse state insolvent or assignment laws. It is enacted in accordance with an express constitutional authority, and is the supreme law. Except as provided in the act (30 Stat. 544), such as section 6, which provides that the passage of the act shall not affect the exemptions allowed where the bankrupt has his domicile, the state law is suspended and inoperative after an adjudication in bankruptcy. The bankrupt court takes jurisdiction of the estate and all matters pertaining thereto, and will administer the same to a final settlement. *In re Bininger*, Fed. Cas. No. 1,420; *In re Hathorn*, Id. 6,214; *In re Wallace*, Id. 17,094; *In re Washington Marine Ins. Co.*, Id. 17,246; *In re Smith*, 92 Fed. 135;

In re Gutwillig, Id. 337; In re Etheridge Furniture Co., Id. 329; Davis v. Bohle, Id. 325; and opinion of Judge Baker in Re Smith, 92 Fed. 135. The authorities to this effect are overwhelming, and a study of them is commended to attorneys who seem to persistently shut their eyes to the principles involved, or, to satisfy pugnacious clients, make a Quixotic fight to have state laws prevail in the courts of bankruptcy when the same conflict with the act of congress and the constitution of the United States.

The finding of facts by the referee, after a careful examination of the record, is affirmed.

Respondents contend:

1. That their liens are valid because they are liens under judgments obtained without collusion before bankruptcy. The finding of the referee as to the facts is a complete answer, under the act, to this contention.

2. "Property, or the fund arising from the sale thereof, should be restored to the constable, to be paid out according to priorities of executions as they came into his hands." This would set at naught the bankrupt law and the general principles above enunciated. That the contention is untenable is too manifest to admit of argument.

3. As against these judgments, the bankrupt is not entitled to personal property exemptions, or, if any, only to a per cent. of funds as property allotted. Section 6 of the bankrupt act provides that the exemptions shall not be affected by the passage of the act, and the state law governs. In re Stevenson, 93 Fed. 789. The constitution of North Carolina (article 10, § 1) exempts from sale under process \$500 of personal property, to be selected by the debtor, and this is exempt from sale under final process whether set apart or not. Albright v. Albright, 88 N. C. 238, and cases cited; Cowan v. Phillips, 122 N. C. 70, 20 S. E. 961. There is nothing in the record which can be held as a waiver, or that exemption was not demanded in apt time. Pate v. Harper, 94 N. C. 25. The burden is on the party making the objection. The bankrupt selected goods, as he had a right to do, and these were valued at their cash price. It is not shown this was not fair. By consent, he allowed them to be sold with the other goods,—this course being, in the judgment of the trustee, for the benefit of the estate; and it is not shown that the goods selected did not sell for \$500, or that they do not bear that proportion to the balance of the stock, or caused the stock of goods to sell for that much more than it would otherwise have sold for if these goods had been taken therefrom. The court will not overrule a referee, or set aside the acts of the trustee, upon argument, without evidence showing reasonable cause for such action. In contemplation of the law, the officers provided for in chapter 5, § 33 et seq., are to do the detail work in cases in bankruptcy, and the judge of the district court cannot be expected to look through voluminous depositions and records for errors which are not plainly pointed out.

4. "Moneys recovered by the constable and paid out should not be required to be refunded. He has fully accounted for them."

Such judgments, under the finding of facts, are dissolved, and all rights acquired under them. Section 67, subsec. c, cls. 1-3.

5. "The judgment creditors, if liens are not valid, should be permitted to prove their claims as other creditors." The referee asks advice of court "as to whether the respondents, having failed to establish their liens, can now prove their claims as unsecured creditors, if the other creditors or the trustee shall refuse to accept a surrender of the alleged preferences after this decision by the referee." There is no denial of respondents' "debt," as defined in section 1 (11), nor allegations that there was any actual fraud in obtaining the judgments,—only such fraud of the bankrupt law as vitiates any lien acquired. The debts are due. Respondents have received and can receive no preference, lien, or advantage by reason of or under the judgments of the magistrate's court. They are nullities in this court to this extent, but they establish the debt. Section 63, in prescribing what debts may be proved, provides "(5) for provable debts reduced to judgment after the filing of the petition and before the consideration of the application of the bankrupt for discharge, less costs incurred," etc. Respondents have attempted to gain an advantage and failed. These proceedings, as far as gaining a lien, are void. The respondents must pay the cost in the state court, and refund what has been collected under these proceedings. They are still creditors of the bankrupt, after a fruitless fight. They have gained no advantage and acquired no lien, but are still creditors unsecured. Should they be punished by a loss of their debts because they were vigilant? The law does not so provide. It favors vigilance, especially when untainted with fraud. The cases cited under the act of 1867 do not apply. In most of them the creditor had gained a preference which he would not surrender, or made himself party to an actual fraud; and such would be the law under section 57 of the act of 1898. Respondents have received no preference and been parties to no actual fraud, but only to such fraud of the operation of the bankrupt act as vitiates their proceedings. They are creditors, and, on a surrender of the amount collected of the bankrupt estate, are entitled to prove their claims as other unsecured creditors.

The conclusions of law by the referee, except as herein modified, are affirmed. The claims sent up since the report of the referee will be returned to that officer, who will proceed to settle the estate accordingly. It is so ordered.

In re JEHU et al.

(District Court, N. D. Iowa. June 13, 1899.)

1. BANKRUPTCY—VOLUNTARY PETITION—OPPOSITION BY CREDITORS.

The bankruptcy act of 1898 does not authorize creditors of a proposed voluntary bankrupt to file answers in opposition to his petition for adjudication.

2. SAME—EXAMINATION OF BANKRUPT—WHO ENTITLED TO DEMAND.

Any person who shows that he is actually a creditor of the bankrupt, by his being named as a creditor in the bankrupt's schedule, or by other evidence satisfactory to the referee, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim.

In Bankruptcy. Submitted on certificate from William A. Ladd, referee in bankruptcy.

Crim & Penn, for bankrupts.

J. G. Myerly and J. W. Corry, for creditors.

SHIRAS, District Judge. I know of no provision of the bankrupt act which authorizes creditors to file answers to a voluntary petition in bankruptcy, such as were filed in this case; and, viewing the papers in that light, the order of the referee is affirmed. On the other hand, I know of no provision of the bankrupt act which requires that a creditor must file and prove up his claim before he is entitled to an order for the examination of the bankrupt. Before granting an order for the examination of a bankrupt, the referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason exists why the examination should not be had, even though the creditor may not have proved his claim in set form. Thus, in this case, if it appears that Kingman & Co. are named as creditors in the schedules attached to the petition in bankruptcy, I see no good purpose to be served in compelling them to go to the expense of proving up their claim, as a condition precedent to the exercise of their right to examine the bankrupt. In this case the schedules filed by the bankrupt do not disclose any assets, and so far no trustee has been appointed. Unless assets are discovered, no dividend will be made, and the creditors may properly decline to incur the expense of proving their claims until it appears that some good will result from so doing. If the purpose of the creditors who filed the answers stricken from the files was to obtain an order for the examination of the bankrupt, they should be accorded leave to renew the application in proper form, which may be done through an attorney appearing for them.

UNITED STATES v. MOREWOOD & CO.

(Circuit Court, S. D. New York. May 19, 1899.)

No. 2,667.

CUSTOMS DUTIES—APPRAISEMENT—RECALL FOR CORRECTION OF ERRORS.

Under article 1126 of the treasury regulations of 1892, after an appraisement has been completed, and a return thereof made to the importer, and accepted by him, the appraisement cannot be recalled, even for the correction of a clerical error, where the effect of such correction is to change the appraisal; and, if such action is taken, the importer has the right to protest against the second valuation on the ground that it amounts to a new appraisement, and is without jurisdiction, and is not bound to give notice of dissatisfaction, as provided in section 13 of the customs administrative act of 1890.

Appeal by the United States from a decision of the board of general appraisers, which reversed the action of the collector in the assessment of duty upon the merchandise in question.

H. P. Disbecker, Asst. U. S. Atty.

Arthur Sherer, for appellees.

TOWNSEND, District Judge. In this case four invoices of sugar were entered at the custom house and appraised, November 13, 1896. It appears that one of the clerks in the appraiser's office found that he had made a mistake in the final appraisal, and corrected two of the invoices before they left the appraiser's office. The four invoices were then returned to the collector, and the importer was notified of the appraisal, and wrote on the return: "All right. Accept." After this had been done, said appraiser remembered that he had forgotten to correct his former mistake as to two of the invoices, and he then recalled them from the collector, and changed the figures. The government contends that the effect of this action was merely to correct a clerical error, and not to make a new appraisal, and that, therefore, under article 1126 of the treasury regulations of 1892, and section 13 of the customs administrative act of 1890, the decision of the appraiser was final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, within two days thereafter, called for a new appraisal. Counsel for the importer contends that an unlawful duty was exacted upon said valuation, and that the recall of the invoices for the making of a new valuation thereon after the appraisement had been completed, and return thereof made to the importer, and accepted by him, was illegal and void, and in conflict with treasury regulations, which provide that such recall cannot be made for the purpose of changing the appraisal. The board of general appraisers has found that the change of value was a new appraisement, without lawful warrant, and void.

It is not clear from the evidence in this case exactly what kind of an error was made in the appraiser's office, but I concur in the decision of the board, because, assuming that the error was a clerical one,—which is not satisfactorily shown,—it seems to me that

under the provisions of article 1126 of the treasury regulations even the correction of a clerical error is not permitted where it amounts to a change in the appraisal. The importer thereupon had the right to protest against the second valuation by the appraiser on the ground that he (the appraiser) had no jurisdiction to recall the invoices, and make a reappraisal. I am not sufficiently familiar with the practice in these matters to feel certain as to the proper course to be pursued, but it seems to me that under section 13 of the customs administrative act of 1890 it is doubtful whether the importer could have taken advantage of this unauthorized act of the appraiser by notice, within two days after appraisement, of dissatisfaction, because this does not appear to be a question of dissatisfaction with an appraisal, but of jurisdiction to make a new appraisal.

The decision of the board of general appraisers is affirmed.

SCHOELLKOPF, HARTFORD & MACLAGAN, Limited, v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1899.)

No. 2,493.

CUSTOMS DUTIES—CLASSIFICATION—CRUDE CARBOLIC ACID.

The article known commercially and popularly as crude carbollic acid, and used for manufacturing purposes, which is the first product of the distillation of coal tar, and contains, in addition to carbollic acid, many combinations of basic oils and bitumens, although not chemically an acid, is entitled to free entry under paragraph 473 of the tariff act of 1890 as an "acid used for manufacturing purposes," and is not dutiable under paragraph 19 as a preparation of coal tar.

Appeal by the importers from a decision of the board of general appraisers, which sustained the action of the collector of customs in assessing duties upon the importations in question.

Albert Comstock, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge. The article in question is a crude product obtained from the distillation of coal tar, and was assessed for duty at 25 per cent. ad valorem, in accordance with the provisions of paragraph 76 of the act of 1890, as a product known as an oil. The importers protested, claiming that it was either free, as an acid used for manufacturing purposes, under paragraph 473 of said act, or dutiable at 20 per cent. ad valorem, as a "preparation of coal tar," under paragraph 19 of said act. In view of the decisions in *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394, affirmed in 78 Fed. 810, and *U. S. v. Warren Chemical & Mfg. Co.*, 28 C. C. A. 500, 84 Fed. 638, it is admitted that the assessment of duty at 25 per cent. was wrong. The sole question herein is whether this product is free under paragraph 473. It is conceded that it is commercially known as crude carbollic acid, and that it

is used for manufacturing purposes, and that for a period of about 15 years products popularly known as carbolic acids have been classified for duty by the treasury officials as such. On the other hand, it is admitted that it is not, in strict chemical parlance, an acid, and that there is, in fact, no such acid as a carbolic acid. The contention of counsel for the government is that the article in question is a crude carbolic oil of the dead oil class, containing only about 35 per cent. of what are commonly known as carbolic and cresylic acids. In support of this contention it is shown that this product is the first running over in the process of distillation of coal tar, and that it contains many combinations of basic oils and bitumens in addition to the carbolic acid, and that certain German writers call this product carbolic oil. It was decided in *Lutz v. Magone*, 153 U. S. 105, 14 Sup. Ct. 777, that in the construction of tariff acts questions of whether an article was or was not an acid were not scientific questions, and that, therefore, scientific tests were not conclusive. It appears that the term "crude carbolic acid" covers a wide range of products of varying degrees of purity; and the evidence introduced on behalf of the government, derived chiefly from German chemical works, is insufficient to overcome the proof that this product, which is commercially known as crude carbolic acid, is also popularly and scientifically known in this country as crude carbolic acid. The conclusions herein are strengthened by an examination of the opinion of Judge Dallas in *Re Schultz*, 94 Fed. 820, in the Eastern district of Pennsylvania, where he holds that an article similar in character, although differing somewhat in the comparative quantities of foreign substances, is substantially an acid. The decision of the board of general appraisers is therefore reversed.

LESHER, WHITMAN & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 17, 1899.)

No. 2,732.

CUSTOMS DUTIES—CONSTRUCTION OF ACT OF 1894—SCOPE OF PROVISION DEFERRING TAKING EFFECT OF WOOLEN SCHEDULE.

Paragraph 297 of the tariff act of 1894, providing that the reduction of rates of duty therein made on manufactures of wool should not take effect until January 1, 1895, embraced all the various classes of goods in Schedule K, made wholly or in part of wool,—those specifically enumerated as well as those which were not.

Appeal by the importers from a decision of the board of general appraisers which sustained the action of the collector of customs in assessing duties upon the merchandise in question.

Stephen G. Clarke, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge. The article in question is a manufacture of worsted and cotton, worsted chief value, commercially

known as "Italian cloth." It was imported into the port of New York October 30, 1894, and was assessed for duty in accordance with the provisions of paragraph 394 of the act of 1890, under paragraph 297 of the act of 1894, which provides as follows: "The reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five." The importers protested, claiming that it was dutiable according to the provisions of paragraph 283 of the act of 1894. Counsel for the importers contends that, inasmuch as this article is dutiable by a specific commercial name, it is differentiated from the nonspecifically enumerated manufactures of wool; and he cites in support of this contention the case of *U. S. v. Field*, 18 C. C. A. 225, 71 Fed. 513. In view, however, of the later decision of the supreme court of the United States in *U. S. v. Klumpp*, 18 Sup. Ct. 311, and of the circuit court of appeals in this circuit in *Re Schnabel*, 89 Fed. 1019, I think it is clear that congress intended to provide that paragraph 297 of said act of 1894 should embrace the various classes of goods made wholly or in part of wool in Schedule K. The decision of the board of general appraisers is therefore affirmed.

UNITED STATES v. UNITED STATES EXP. CO.

(Circuit Court, S. D. New York. May 17, 1899.)

No. 2,809.

CUSTOMS DUTIES—CLASSIFICATION—PEARL SCALES.

Strips of pearl, commonly called "pearl scales" or "stock pearl," chiefly used for knife handles, but also used on fans, opera glasses, button hooks, and for inlaid work, are dutiable under paragraph 450 of the tariff act of 1897, as "manufactures of mother-of-pearl, not specially provided for," and not under paragraph 153, as "parts of knives, wholly or partly manufactured."

Appeal by the United States from a decision of the board of general appraisers which reversed the action of the collector of customs in assessing duty upon the importations in question.

Henry C. Platt, Asst. U. S. Atty.

Howard T. Walden, for appellees.

TOWNSEND, District Judge. The articles in question are strips of pearl, commercially known as "pearl scales" or "stock pearl," classified for duty at 5 cents apiece, as "parts of knives, wholly or partly manufactured," under paragraph 153 of the act of 1897. The importer protests, claiming that the articles are dutiable at 35 per cent. ad valorem, under paragraph 450 of said act, as "manufactures of mother-of-pearl, not specially provided for." It is agreed that they are not raw material, but manufactured articles. The question presented is whether they are parts of knives. On behalf of the United States it is urged that inasmuch as in some cases they are shipped, in accordance with orders, in certain sizes, and inasmuch as their chief use is for knife handles, they are parts

of knives, partly manufactured, under the decisions in *Magone v. Wiederer*, 159 U. S. 555, 16 Sup. Ct. 122, *In re Blumenthal*, 51 Fed. 76, and *U. S. v. Simon*, 84 Fed. 154. It further appears, however, that the articles in question are the cheapest quality of pearl, are sometimes sold by the pound and in all sizes and shapes, and are used on fans and opera glasses, for inlaying work, and for the handles of button hooks, corkscrews, and other articles. And inasmuch as in their present condition they are not necessarily a part of a knife handle, and would not necessarily be recognized as such, and are not in such a condition as to be part of the knife without being further advanced by filing, drilling, and trimming, in order to adapt them to the shapes of the knife handles and to fasten them thereto, I think the United States has failed to show that the goods are anything more than the material from which parts of pocketknives may be manufactured. This conclusion is strengthened by the decisions in *Re John Russell Cutlery Co.*, 56 Fed. 221, *Worthington v. Robbins*, 139 U. S. 341, 11 Sup. Ct. 581, and *U. S. v. Simon*, 84 Fed. 154. The decision of the board of general appraisers is affirmed.

MORRIS EUROPEAN & AMERICAN EXP. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 18, 1899.)

No. 2,788.

1. CUSTOMS DUTIES—APPRAISEMENT—REVIEW.

Where a finding of the board of appraisers is wholly without evidence to support it, the court will disregard it.

2. SAME—STATUTES—PROFESSIONAL PRODUCTIONS.

Statues carved out of wood by a professional sculptor may be admitted free of duty, as "the professional production of a statuary or sculptor," although the design was produced by an artist in the United States.

Appeal by the importers from a decision of the board of general appraisers which sustained the action of the collector of customs in assessing duty upon the importations in question.

Howard T. Walden, for the importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, J. In 1897 the appellants herein imported two carved or sculptured figures in oak wood, about 3½ feet in height, representing adoring angels, of conventional design, produced in France from drawings executed by a professional architect and sculptor in the United States. They were assessed for duty at 25 per cent. ad valorem, under paragraph 181 of the act of 1894, as "manufactures of wood not specially provided for." The importers protested, claiming that they were free, as "statuary, the professional production of a statuary or sculptor." The board of appraisers found as follows:

"That these articles are not the professional production of a statuary or sculptor, who conceived the design and executed the originals or models thereof, but are mechanical productions executed by artisans, and by mechanical means."

It appears that the statuery in question was not before the board as a basis for said finding, and it was not produced in this court. If the decision of said board were based upon conflicting evidence, I should hesitate to disturb it, under the decision in *White v. U. S.*, 18 C. C. A. 541, 72 Fed. 251. But inasmuch as said finding that this statuery is "mechanical productions executed by artisans, and by mechanical means," is wholly without evidence to support it, it is the duty of this court to disregard it, under *In re Van Blankensteyn*, 5 C. C. A. 579, 56 Fed. 477. The only evidence produced was the declaration of the sculptor, Marquis, a consular certificate, and the sketches and testimony of the architect and sculptor who made said sketches, and who testified that said Marquis was a well-known sculptor, whose work was represented at the Salon in Paris, and that in order to produce such statuery he would have to make a model in clay, which would be transferred to plaster, and from the plaster the statue would be finished in whatever material might be called for.

The single question in this case is whether these statues are the professional productions of a sculptor. In passing upon the question whether they are or are not professional productions, I do not mean to be understood as holding that the testimony or affidavit of the sculptor is conclusive; nor do I wish to be understood as assenting to the argument of counsel for the importers that it is only necessary that the work be done by a professional sculptor, even if it be not a work of art. The courts have frequently held that the object of this statute is to encourage the importation of works of art done by or under the hand or eye of a sculptor or artist. It seems clear that congress has meant, by the term "professional productions," productions so in the line of the sculptor's profession as to constitute artistic works. In the present case there is no evidence that this is not the professional work of the sculptor, and inasmuch as it appears that he is a sculptor of high professional standing, and inasmuch as he has declared upon oath that he is a sculptor or statuery by profession, and that the statuery mentioned and described in the accompanying invoice was executed by him, and inasmuch as the consular agent has testified that these statements are true to the best of his knowledge and belief, I think it is sufficiently proved, in the absence of contradictory evidence, that it is his professional production, irrespective of the additional statement to that effect in his affidavit. The contention founded on the fact that the design was produced by an artist in this country is disposed of by the decision of the supreme court of the United States in *Tutton v. Viti*, 108 U. S. 312, 2 Sup. Ct. 687, where it was held that professional productions of a statuery were not limited to those executed from models or from completed statues of another sculptor, or from antique masterpieces, and by the decision in *Merritt v. Tiffany*, 132 U. S. 169, 10 Sup. Ct. 52. The decision of the board of general appraisers is reversed.

UNITED STATES v. LOUIS HINSBERGER CUT-GLASS CO.

SAME v. FENSTERER et al.

(Circuit Court, S. D. New York. May 27, 1899.)

Nos. 2,751, 2,931.

1. CUSTOMS DUTIES—CLASSIFICATION—MANUFACTURES OF GLASS.

Plain unground glass blanks, intended to be finished by cutting into dishes for table use, are not "glassware," within the meaning of paragraph 100 of the tariff act of 1897, but are dutiable under paragraph 112, as manufactures of glass not specially provided for.

2. SAME—GROUND-GLASS BLANKS.

Glass blanks ground on the edge and bottom are dutiable under paragraph 100 of the tariff act of 1897, as "articles of glass, ground," without regard to the purpose for which the grinding was done.

Appeals by the United States from decisions of the board of general appraisers which reversed the action of the collector of customs in assessing duty upon the importations in question.

J. T. Van Rensselaer, Asst. U. S. Atty.

Albert Comstock, for the importers.

TOWNSEND, District Judge. The merchandise in question comprises two glass blanks,—one ground, the other unground. The former was classified as an "article of glass, ground," the latter as "blown glassware," and each was assessed at 60 per cent. ad valorem, under paragraph 100 of the act of 1897. The importer protested, claiming that they were dutiable as "manufactures of glass not specially provided for," at 45 per cent. ad valorem, under paragraph 112 of said act. The board sustained the contention of the importers, and the United States appeals.

The plain unground blank is almost identical with the oval glass blank which was before Judge Wheeler in the case of *U. S. v. Fensterer*, 84 Fed. 149; and Judge Wheeler there held (affirming the decision of the board of general appraisers) that these articles were manufactures of glass, under paragraph 102 of the act of 1894, as against the classification of glassware under paragraph 88 of the same act. Considerable new testimony has been taken on both sides in the present case as to commercial and common designation. Seven of the trade witnesses testify that these blanks are included within the commercial term "glassware." Five of the witnesses deny this statement. Therefore no trade designation is proved. There is much force in the contention of counsel for the United States that the word "glassware" is a comprehensive word, as was held in *Rossman v. Hedden*, 145 U. S. 561, 12 Sup. Ct. 925, and that, as these blanks are articles made of glass, they are glassware in fact, within the dictionary definitions; but, as I am not satisfied that the contention or proof differs materially in character or degree from that which was before Judge Wheeler, I feel bound by his conclusion that said blanks are not glassware in fact, and as to them the decision of the board of general appraisers is affirmed.

The other blank is ground on the edge and bottom. There is considerable conflict in the testimony as to the purpose for which the

grinding was done. Some of the witnesses say that it is the first process in the glass-cutting operation, for the purpose of saving work for the cutter, and that the value of the blank is increased thereby, while others deny this statement, and say that it is merely done in order to remove defects in manufacture, or to obviate the danger of cutting the workmen's hands. One of the witnesses for the importers, however, says (and I think this is fairly shown from the testimony generally) that its effect is to make the article more salable. Counsel for the importers contends that congress could not have meant to provide for such an infinitesimal amount of cutting; and must have intended to cover, by the provision for articles of ground glass, only those where the grinding was done for a permanent purpose. But the court would not be authorized in thus contradicting the express provision of the statute. *Saltonstall v. Wiebusch*, 156 U. S. 601, 15 Sup. Ct. 476. It is clear that this grinding is intentional, and for some purpose; and as the language of the statute includes all grinding, except for stoppers of bottles, and inasmuch as the bowl is an "article of glass," ground, I think it is dutiable under the provisions of paragraph 100, at 60 per cent. ad valorem. The decision of the board of appraisers as to these blanks is reversed.

EAGLE v. NOWLIN, Collector.

(District Court, D. Indiana. May 29, 1899.)

No. 5,873.

INTERNAL REVENUE—TAX ON OLEOMARGARINE—DEALERS—KNOWLEDGE.

Under 1 Supp. Rev. St. p. 505, § 3, providing that "retail dealers in oleomargarine shall pay" a certain tax, and that "every person who sells oleomargarine" in specified quantities is a retail dealer, such a dealer is liable to the tax, though he honestly believed that what he bought and sold was butter.

This is an action brought by the plaintiff against the defendant, as collector of internal revenue, to recover the amount of a tax assessed against, and collected from, the plaintiff, as a retail dealer in oleomargarine, by the defendant. The plaintiff insisted that he was not liable to the tax, and paid the same to the collector under protest. The case was, by agreement, submitted to the court for trial on the following agreed statement of facts:

"The plaintiff, John H. Eagle, is a grocer in the city of Indianapolis, Ind., doing business at No. 624 North Delaware street. That said John H. Eagle bought of the Three Friends Creamery what was sold by said company as creamery butter, and sold the same to the trade generally, believing at the time that it was creamery butter. That he handled these goods for a period of 11 months, beginning with August, 1897. That it was discovered by the revenue officers that the said Three Friends Creamery was manufacturing oleomargarine in violation of law, and that the goods bought by said John H. Eagle, and sold as creamery butter, were in fact oleomargarine. That the commissioner of internal revenue thereupon assessed a tax of \$44 and a penalty of \$22 against him as a retail dealer in oleomargarine, and the revenue collector notified him, the said Eagle, that such assessment had been made, and must be paid within 10 days. Mr. Eagle asked for time to present application for abatement of tax and penalty to the commissioner of internal revenue, which time was

granted. On this application and proof offered, the commissioner abated the penalty, but ordered the collection of the tax, \$44, which was paid by Mr. Eagle under protest; he having filed the usual return for special tax on Form 11, a copy of which is hereto attached, marked in red ink 'Copy.' This was also filed under protest by Mr. Eagle. He also appealed to the commissioner of internal revenue from said assessment and payment thereof, which appeal was overruled. It is agreed that he did sell, at retail, oleomargarine, but it is also agreed that he did not know at the time it was oleomargarine. It is also agreed that he made no special effort to inform himself as to whether it was oleomargarine or creamery butter. It is also agreed that he had no special tax stamp at the time, nor had he paid any special tax, as a retail dealer in oleomargarine. That the defendant collected the amount, \$44, as the revenue collector of the Sixth district, and not otherwise. That it was paid by the plaintiff after time had been given to him to present the matter to the commissioner of internal revenue, and after the hearing of his complaint, and the abatement of the penalty of 50 per cent., and that he appealed from said assessment of tax against him, which was also heard and overruled, after which this suit was brought, and is now pending, to recover the said sum of \$44 so paid."

The statute under which the tax was assessed and collected reads:

"Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine." 1 Supp. Rev. St. U. S. p. 505, § 3.

Frank B. Burke, for plaintiff.

A. W. Wishard and J. J. M. La Follette, for defendant.

BAKER, District Judge (after stating the facts as above). The contention of the plaintiff is that having in good faith, and without fault or negligence, purchased the oleomargarine as creamery butter, and having sold the same in like good faith, without fault or negligence, he is not liable to the tax. The statute is a revenue regulation, operating incidentally for the protection of the public health, and the congress regarded the dealing in oleomargarine as a suitable subject for the imposition of a tax. In the absence of the statute, dealing in oleomargarine would be as legitimate as dealing in any other harmless commodity. The statute is not aimed at dealing in oleomargarine as an act which is immoral or malum in se, but as one which is made malum prohibitum, in aid of the revenue, except upon payment of the prescribed tax. It does not make knowledge on the part of the dealer an ingredient in his liability to pay the tax; nor ought the court to import, by construction, such an ingredient into it. If a person deals in oleomargarine, without regard to the question of motive or knowledge, he becomes liable to the tax. The principle on which this doctrine is grounded is well stated in 3 Greenl. Ev. § 21, where it is said:

"Ignorance or mistake of fact may, in some cases, be admitted as an excuse. But where the statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective

of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his peril."

A brief review of some of the cases will show that where the statute commands that an act be done or omitted which, in the absence of such statute, might have been lawfully done or omitted, ignorance of the fact or state of things contemplated by the statute will not excuse its violation.

The case of *Reg. v. Woodrow*, 15 Mees. & W. 404, was an information for the recovery of a penalty brought by William Hedges, an officer of the excise, against Woodrow, a licensed dealer in tobacco by retail, for having in his possession adulterated tobacco, contrary to an act of parliament. The action was brought under the third section of 5 & 6 Vict. c. 93, § 3, which provided as follows:

"That every manufacturer of, dealer in, or retailer of tobacco, who shall receive or take into or have in his possession, or who shall sell, send out, or deliver any tobacco or snuff which shall have been manufactured with, or shall have added thereto or mixed therewith, or into or amongst which there shall have been put, either before or after being manufactured, or in which there shall be found on examination thereof any other material, liquid, substance, matter or thing, than, as respects tobacco, water only, shall forfeit two hundred pounds."

The case stated for the judgment of the court was that the defendant had purchased the tobacco of a manufacturer as genuine tobacco, and believed that the tobacco so purchased was genuine, and that he had no knowledge nor cause to suspect that the tobacco he so purchased, and which was seized, had any substance, matter, or thing added to or mixed therewith prohibited by the statute, or that it had been manufactured in any other way than as directed by law. It was strenuously insisted by counsel for the defendant that he could not be held liable for having in his possession the adulterated tobacco because he was ignorant of that fact, and that such ignorance did not arise from any fault or negligence on his part. The court, however, was unanimously of the opinion that the respondent was liable for the penalty imposed by the statute. Counsel insisted that the degree of care on the part of the purchaser prescribed by the court would require a nice chemical analysis. To this Parke, B., responded:

"You must get some one to make that nice chemical analysis, or you must rely on the manufacturer and dealer who sells to you, and take your remedy against him. You may take a warranty from him that it is lawful tobacco. There are very ample reasons for these provisions of the act, on account of the difficulty of convicting in such cases."

It was further said by Parke, B., in the course of his opinion:

"It is very true that in particular instances it may produce mischief because an innocent man may suffer from the want of care in not examining the tobacco he has received, and in not taking a warranty, but the public inconvenience would be much greater if in every case the officer were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words."

The case of *Beckham v. Nacke*, 56 Mo. 546, was a *qui tam* action brought by the plaintiff against the defendant, who was a justice

of the peace, for the penalty imposed by statute for joining in marriage her minor son without her consent. The action was founded on the sixth section of the marriage act (2 Wag. St. p. 930), which provided that:

"If any such person shall join in marriage any minor without the written certificate of consent under the hand of the parent, guardian or other person under whose care and government the minor may be, or the presence and consent of the parent," etc., "such person shall forfeit \$300 to be recovered with costs of suit by civil action in any court having cognizance, by the parent, guardian or person having charge of such minor; the one-half of such penalty to the use of the county, and the other half for the use of the person who shall prosecute for the same."

The justice defended on the ground that he was honestly mistaken in respect to the age of the minor, in good faith believing that he was at the time of full age. The court held, without dissent, that it was not sufficient that he acted under the bona fide belief that such minor was of full age; that his honest mistake in that regard would not protect him. This case goes upon the principle that an honest mistake of fact will not relieve from the penal consequences of the statute.

The case of *Com. v. Boynton*, 2 Allen, 160, was an indictment against the defendant for being a common seller of intoxicating liquor. On the trial, after certain sales of beer had been testified to, the defendant offered evidence to prove that the article sold was not intoxicating, and that if it were so he had no reason to suppose that it was intoxicating, and bought it for beer, which was not intoxicating, and did not believe it to be intoxicating. The court below instructed the jury that, if the defendant sold liquor which was in fact intoxicating, he might be found guilty, although he did not know or suppose that it was intoxicating. The defendant was convicted, and alleged exceptions. The supreme court overruled the exceptions, holding that the charge of the court below was correct. The court said:

"The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases; and the hardship is no greater where the law imposes the duty to ascertain a fact."

The court held that it was the duty of the defendant to ascertain the fact for himself whether the beer which he sold was intoxicating or not.

The case of *Com. v. Farren*, 9 Allen, 489, was an indictment upon St. 1864, c. 122, § 4, which provides, among other things, that whoever sells or keeps or offers for sale adulterated milk, or milk to which water or any foreign substance has been added, shall be punished by a fine, as therein provided. The defendant contended that the commonwealth should have been held to prove on the trial that he committed the offense knowing the milk to be adulterated. The supreme court held that the statute did not require such proof, and that it was evident that the legislature did not intend that it should be so. It was held that the statute was a police regulation for the security of the public health, and that it was important that the community should be protected against frauds, which were then practiced so extensively and skillfully in the adulteration of articles of

diet in common use by the people. It was adjudged that, although the defendant did not know that the milk which he sold was adulterated, he was still liable to the penalty, and that he was bound, at his peril, to ascertain whether the milk was pure or adulterated. The case of *Com. v. Waite*, 11 Allen, 264, announces the same doctrine.

The case of *Com. v. Raymond*, 97 Mass. 567, was an indictment charging the defendant with having knowingly, willfully, and maliciously killed a certain calf, which was less than four weeks old, with intent then and there the meat of said calf to sell, contrary to the statute. The court said:

"The defendant is charged with an offense under the first clause of section 1, c. 253, St. 1866, by which it is made punishable to kill a calf less than four weeks old for the purpose of sale. It was not necessary to allege in the indictment that he knew the calf to be less than four weeks old. Under this clause, as under the laws against the sale of intoxicating liquor or adulterated milk, and many police, health, and revenue regulations, the defendant is bound to know the facts and obey the law at his peril. Such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed."

The case of *State v. Hartfiel*, 24 Wis. 60, was an indictment for selling spirituous liquor to a minor in violation of the statute. The defendant introduced evidence to show that he believed, in good faith, that the minor to whom he made the sale was of age. The court below instructed the jury that ignorance as to the fact that the person to whom the sale was made was a minor was no defense. The defendant was convicted, and appealed to the supreme court, where it was held that, although the defendant did not know or suspect that the purchaser was a minor, he was nevertheless properly convicted. The court held that where the statute commands an act to be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute constitutes no excuse for its violation.

The statute in question is a revenue regulation, and I entertain no doubt that the congress intended to require the payment of the tax, irrespective of the knowledge or motive of the person who deals in oleomargarine. Indeed, if this were not so, it is plain that the statute might be easily evaded and violated times without number, to the great and irremediable loss of the revenue. Any other construction would practically emasculate the operation of the statute, and defeat the accomplishment of the purpose aimed at in its enactment. The dealer in butter is bound to ascertain and know whether he is dealing in genuine butter or oleomargarine, and to obey the law, at his peril.

It results that there must be judgment for the defendant. So ordered.

DENNISON MFG. CO. v. THOMAS MFG. CO

(Circuit Court, D. Delaware. May 5, 1899.)

No. 204.

1. EQUITY PLEADING—MULTIFARIOUSNESS.

The objection of multifariousness is one which addresses itself to the sound discretion of the court, and should not be sustained where the relief prayed is of the same kind with respect to the several matters complained of and is based on substantially similar considerations, and no hardship or injustice is likely to result to the defendant from the joinder of such matters.

2. TRADE-MARKS—MARKS AND NAMES SUBJECTS OF OWNERSHIP.

Nothing can legally be appropriated by any one as a trade-mark which, aside from superiority in excellence, popularity or cheapness of the article bearing it, would practically confer upon him a monopoly in the production or sale of like articles.

3. SAME.

The word "quality" is used in different senses in the cases. It is employed in some to denote the grade, ingredients or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark as denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense.

4. SAME—UNFAIR COMPETITION.

The doctrine of unfair competition in trade rests on the proposition that equity will not permit any one to palm off his goods on the public as those of another. Unfair competition in trade as distinguished from infringement of trade-marks does not involve the violation of any exclusive right to the use of a word, mark or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape or quality, and as such open to the public, yet there may be unfair competition in trade by an improper use of such word, mark or symbol.¹

5. SAME—MANNER OF MARKING OR DRESSING GOODS.

No one has a right, intentionally, fraudulently and with purpose to deceive the public, to dress articles manufactured or sold by him by such mode of packing or numbering as to cause or be likely to cause purchasers to mistake them for those produced by a business rival.

In Equity. This was a suit in equity by the Dennison Manufacturing Company against the Thomas Manufacturing Company for alleged infringement of trade-marks, and for unfair competition in trade. Heard on demurrer to bill.

Rowland Cox and Charles W. Smith, for complainant.

Augustus T. Gurlitz and Lewis C. Vandegrift, for defendant.

BRADFORD, District Judge. The bill in this case charges infringement of certain alleged common law trade-marks and also unfair competition in trade, and prays for an injunction and an account. The defendant has demurred to the bill, alleging that it is multifarious, defective and insufficient. Both the complainant and defendant are engaged in the business of manufacturing and selling

¹ As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and supplementary thereto note to *Lare v. Harper*, 30 C. C. A. 376.

stationers' supplies. The bill charges numerous instances of infringement by the defendant of alleged trade-marks of the complainant as well as unfair competition in trade on the part of the defendant. Seventy causes of demurrer have been assigned, of which the first fifty five are confined to the charge of multifariousness. While the bill relates to various articles and details of the business conducted by the defendant, the relief prayed is of the same kind with respect to all those articles and details and is based on substantially similar considerations. No hardship or injustice is likely to result to the defendant from the inclusion in one suit of the various matters complained of. On the other hand, to require the filing of separate bills relating respectively to the several matters set forth in the present bill would involve great expense and annoyance to both parties. Such a course would not subserve the convenience of either the parties or the court. The objection of multifariousness is one which addresses itself to the sound discretion of the court, and under the circumstances should not be sustained here. *Oliver v. Piatt*, 3 How. 333, 412; *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 352, 9 Sup. Ct. 90; *Harrison v. Perea*, 168 U. S. 311, 319, 18 Sup. Ct. 129; *Sheldon v. Packet Co.*, 8 Fed. 769; *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. 622; *Harper v. Holman*, 84 Fed. 222; *Weir v. Gas Co.*, 91 Fed. 940.

The first of the two main questions in the case is whether the bill together with the exhibits therein referred to and made part thereof shows infringement by the defendant of common law trade-marks of the complainant. The bill alleges, among other things, that the complainant is a corporation of the state of Massachusetts, created during or about 1878, and that it thereupon succeeded to the business of the firm of Dennison & Co., consisting of the manufacture and sale of numerous articles adapted to the use of jewelers, such as paper boxes, labels, tags, jewelers' cotton, and the like, and also of numerous articles commonly sold by stationers, and that the property which in connection with the business of that firm passed to the complainant embraced the "real estate, plant and other property of every name and nature belonging to the said firm of Dennison & Co., together with the good-will of the business of said firm, and all rights of whatsoever nature thereto appertaining, including the trade-marks, trade-names, designations, labels and other indicia belonging and relating to said business." The bill further alleges:

"Thereafter said business, founded and carried on as aforesaid and made over to your orator, was, without interruption continuously by your orator conducted and carried on without change, except that the said business from time to time has been very greatly enlarged and extended by your orator, branch houses and agencies for the sale of its products throughout the United States and in foreign countries having been by your orator established and conducted, with the result that your orator's business of manufacturing tags, labels and numerous other articles commonly known as stationers' specialties and jewelers' findings is, and for a long period of years has been, the most important and extensive business of its kind existing in the United States, and, your orator believes, the largest and most important in the world. * * * And your orator further says that each of the numbers, designations or marks hereinafter enumerated as having been by it used, was arbitrarily selected and applied and originally and for the first time used in connection with its business, and has

been, since the adoption thereof continuously, by your orator's predecessors and by your orator, without interruption, used and availed of in connection with the sale of the particular tag, label, check, seal or other article to which it has been appropriated. * * * And your orator avers that by reason of the premises aforesaid, and otherwise, it now has, as against this defendant and otherwise, the sole and exclusive right to use in the United States and elsewhere the said marks, numbers and designations, and each and all of them, as trade-marks in connection with the tags, labels, checks, seals and other articles to which they have severally related and been applied."

Two exhibits made part of the bill relate to sealing wax and are marked "Complainant's Wax" and "Defendant's Wax," being specimens of sealing wax with its trade dress sold by the parties respectively. The boxes containing the wax and respectively used by them are of practically the same size, form and color. On the left hand upper corner of the lid or cover of the complainant's box there is a circle containing a monogram and the words "Trade Mark," and on the right hand lower corner of the lid there is a circle of the same size as that containing the monogram in which appear the words "Four Sticks." The most prominent and controlling words on the lid are printed diagonally thereon, running from the lower left hand corner to the upper right hand corner, and are "No. 2 American Express." The word "Dennison's" appears on the upper portion of the lid immediately to the right of the circle containing the monogram, and the word "Manufacture" on the lower portion of the lid immediately to the left of the circle containing the words "Four Sticks." On the left hand upper corner of the lid or cover of the defendant's box there is a circle of the same size as those on the lid of the complainant's box, and of the same color, containing the words "Four Sticks," and on the lower right hand corner of the lid is another circle, similar in color and size, also containing the words "Four Sticks." The most prominent and controlling words on the lid, running diagonally from the lower left hand corner to the upper right hand corner of the lid, are "No. 2 American Express." Each box contains four sticks of sealing wax of substantially the same form, size and color. On each of the complainant's sticks appear a monogram and the words "No. 2 American Express," beneath which are the words "Dennison Mfg. Co." On each of the defendant's sticks appear the words "No. 2 American Express" in the place on the stick corresponding to that occupied on the complainant's sticks by the same words. On the end of the complainant's sticks appears a monogram somewhat difficult to decipher save through close observation. On the end of the defendant's sticks appears a crown. The difference between the marks on the ends of the sticks of the complainant and defendant respectively is not sufficient to attract the attention of an ordinary purchaser using the degree of care customarily employed by those purchasing such articles. The same may be said of both the sealing wax and the boxes in which it is contained. The words "American Express" are not in themselves descriptive of the article, its size or quality, and are properly the subject of exclusive appropriation as a trade-mark for sealing wax, and must under the averments of the bill be held to constitute a valid trade-mark. The bill, in my opinion, shows an infringement

by the defendant of the trade-mark of the complainant with respect not only to the sticks of sealing wax but to the boxes in which they are contained. In this particular the demurrer cannot be sustained.

The complainant contends that the bill and exhibits show an exclusive right on its part to the use of certain letters and numerals in connection with sundry articles of such kinds as are manufactured and sold by the defendant as well as by the complainant, and violations of that right by the defendant. This contention involves an assertion that such letters and numerals as applied to such articles are common law trade-marks of the complainant. Preliminarily it should be observed that a demurrer admits matters of fact well pleaded and all reasonable inferences to be drawn therefrom, but not mere arguments or conclusions of law as made or drawn by the pleader. *U. S. v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 544, 12 Sup. Ct. 308; *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695. And "a fact impossible in law cannot be admitted by a demurrer." *Railroad Co. v. Palmes*, 109 U. S. 244, 253, 3 Sup. Ct. 193. The bill further alleges:

"That since the time of its incorporation your orator has continued uninterruptedly to conduct and carry on the said business as the successor in business in all things of said Dennison & Co. and has been and is now in the full, undisturbed and complete possession and enjoyment of the rights and properties, all and singular, of every nature and description, belonging to its predecessors in business, all and singular, and the business by them carried on. And your orator says that for many years it and its predecessors have given much of their attention to the manufacture and sale of tags, labels, cards, tickets, wrappers, checks, seals, and the like, of many different sizes, shapes and styles. * * * And your orator says that the different styles and sizes of tags, labels, tickets and similar goods by it produced and sold have been very numerous, consisting in some instances of perhaps a hundred examples, more or less, each differing from the other in size or shape and each being required to meet a specific demand or adapted to a particular use to which no one of the others was adapted. To enable and promote the sale of these numerous examples differing from each other in essential particulars it became necessary to apply to each example a mark or number which would indicate its origin and by whom it was made, and serve also to indicate or suggest the shape, size or style of the article.

* * * It is now and has long been the custom for each manufacturer of tags, tickets, labels, seals, wrappers and boxes, as well as each manufacturer of steel pens, pencils, buttons, ornamental nails and many other articles which are necessarily made in a great number of different sizes, shapes and styles, to select, appropriate and use a series of numbers or marks arbitrarily chosen and availed of by such manufacturer to the exclusion of all others, such custom having its origin and foundation in the necessities of the trade and being of essential and fundamental importance. * * * Your orator's predecessors and your orator have in connection with all the different goods which they have produced taken the greatest pains to select and apply numbers, marks and indicia in every instance arbitrarily chosen and having no relation whatsoever to any characteristics of the goods, which were original with them and could be invested with a secondary meaning to indicate by whom the thing was manufactured and also at the same time to assist in the identification of the thing to be offered and sold. This custom or rule your orator and its predecessors have observed continuously with all classes of goods which they have produced, selecting and using such numbers and marks as had never been used or availed of by others and which would effectually serve to give individuality to their goods and separate and differentiate the same from the goods of all other producers. * * * And your orator says that each and all of its said marks and designations were adopted by your orator's predecessors or by your orator to denote the origin of the tags, labels, seals and other ar-

articles in connection with which they have been used. * * * And your orator further avers that by reason of the long, continuous and extensive use, extending in a majority of instances for forty years or more, of the said marks, numbers and designations in connection with the sale of your orator's tags, labels, seals and other articles, and by reason of the great popularity of said products, and each of them, and by reason of your orator's industry, zeal and expenditures in the premises and that of your orator's predecessors, it has for many years been true that said designations and marks, and each and all of them, whenever and wherever used in connection with the sale of tags, labels, checks, seals and other articles upon which they have been used, have acquired with the trade, the public and consumers a meaning and significance as denoting and identifying tags, labels, seals and other articles, and each of them, manufactured and sold by your orator and by it alone."

With the exception of the words "American Express" as applied to sealing wax, the marks, numbers, indicia and designations to which the controversy relates are letters or numerals, or both, possessing no marked peculiarity as to form or by way of ornamentation. The demurrer admits that such letters or numerals were arbitrarily selected and first applied by the complainant or its predecessors to the various articles enumerated in the bill to indicate their origin or ownership and that for many years such articles have been bought, known and recognized by consumers and the public as being solely of the complainant's manufacture by reason of the letters or numerals applied to them by the complainant or its predecessors. It appears from the bill and exhibits, however, that the letters and numerals were employed by the complainant or its predecessors not only to indicate the origin of the articles produced by it, but to denote or suggest their shape, size, style or quality. On page 17 of the complainant's catalogue are the words "Always Use the Letter when Ordering. The Number gives Size, the Letter the Quality." On many of the pages letters are used to designate either the quality of articles or their size or form, and it is nowhere stated in the catalogue that letters or numerals do or do not indicate or denote the origin or ownership of the goods therein mentioned. While letters or figures arbitrarily chosen may not, and often do not, of themselves indicate shape, size, style, grade or quality, yet, if they be attached to articles to distinguish different shapes, sizes, styles, grades or quality, they may become by association just as descriptive as words expressly defining the same. It is urged on the part of the complainant that the letters and numerals, although indicating shape, size, style or quality, have according to the allegations of the bill a secondary meaning by association, disclosing to the public origin or ownership, and consequently must be held valid trade-marks. The defendant contends that as the function of the letters and numerals was to denote shape, size, style or quality, they could not by association or otherwise constitute valid trade-marks, and that the bill in averring that they were such alleged a legal impossibility not admitted by the demurrer. Does or does not the fact that the letters and numerals, which are applied to the complainant's articles to denote their shape, size, style or quality, possess through association a secondary significance pointing to the origin or ownership of such

articles, negative the existence of a right on the part of others to use such letters and numerals in connection with the manufacture or sale of like articles? Or, in other words, does or does not the right of the complainant to use the letters and numerals in connection with articles produced by it operate to exclude any right on the part of the defendant to use the same letters and numerals in connection with articles produced by the latter and similar to those produced by the complainant? The function of a trade-mark is to indicate to the public the origin, manufacture or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with the articles bearing it. No person other than the owner of a trade-mark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance falsely represent to the public that his goods were of the manufacture or selection of the owner of the trade-mark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trade-mark is infringed the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade-marks. It is not necessary that a trade-mark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, &c. This doctrine has repeatedly been declared by the Supreme Court. *Canal Co. v. Clark*, 13 Wall. 311, 323; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 54; *Medicine Co. v. Wood*, 108 U. S. 218, 223, 2 Sup. Ct. 436; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143; *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 603, 9 Sup. Ct. 166; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 546, 11 Sup. Ct. 396; *Mill Co. v. Alcorn*, 150 U. S. 460, 462, 14 Sup. Ct. 151. A trade-mark may consist of a name, mark, form, brand, device or symbol, although well-known, but not previously used in connection with the same article. And the Supreme Court has in several cases recognized that, subject to certain qualifications, it may consist of letters or figures. *McLean v. Fleming*, 96 U. S. 245, 254; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 547, 11 Sup. Ct. 400. In the former case the court said:

"Subject to the qualification before explained, a trade-mark may consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity."

In the latter case the court, adopting language from the opinion in *Manufacturing Co. v. Spear*, 2 Sandf. 599, said that no one has a "right to the exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the

goods, but are only meant to indicate their names or quality." In *Manufacturing Co. v. Trainer*, 101 U. S. 51, 55, the court used the following language, quoted with approval in *Menendez v. Holt*, 128 U. S. 514, 520, 9 Sup. Ct. 144:

"Letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language."

In *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, the court held that "mere numerals used descriptively" were not "capable of exclusive appropriation," and said that "it is clear that neither the words 'Best Six Cord,' nor '200 Yds.' are capable of exclusive appropriation, as they are descriptive, and indicative only of quality and length." Nothing can legally be appropriated by any one as a trade-mark which, aside from superiority in excellence, popularity or cheapness of the articles bearing it, would practically confer on him a monopoly in the production or sale of like articles. Indeed aside from superior excellence, popularity or cheapness of goods to which a legitimate trade-mark is applied, such trade-mark could be of little or no value to its owner. In *Canal Co. v. Clark*, 13 Wall. 311, 323, the court said:

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed."

A trade-mark is designed to enable one legitimately to build up or protect his business, but not to deprive others of the right to use necessary or proper means for carrying on an honorable competition in trade. No one has a "right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." *Canal Co. v. Clark*, 13 Wall. 311, 324. Hence no one can acquire an exclusive right to the use, as a trade-mark, of a generic name, or word, which is merely descriptive of an article, or a sign, symbol, figure, letter, brand, form or device, which either on its face or by association indicates or denotes merely grade, quality, class, shape, style, size, ingredients or composition of an article, or a word or words in common use designating locality, section or region of country. The word "quality" is used in different senses in the cases. It is employed in some to denote the grade, ingredients or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trade-mark as denoting quality when used merely in the former sense, there may be a valid trade-mark as indicating quality when used in the latter sense. Thus in *McLean v. Fleming*, 96 U. S. 245, 253, the court said:

"Such a proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trade-mark adopted and applied by him to the goods, to distinguish them as being of a particular manufacture and quality," &c.

In *Medicine Co. v. Wood*, 108 U. S. 218, 222, 2 Sup. Ct. 439, the court said:

"He may thus notify the public of the origin of the article and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture."

In *Menendez v. Holt*, 128 U. S. 514, 520, 9 Sup. Ct. 144, the court, speaking of the words "La Favorita" as applied to flour, said:

"It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. * * * And the fact that flour so marked acquired an extensive sale, because the public discovered that it might be relied on as of a uniformly meritorious quality, demonstrates that the brand deserves protection rather than it should be debarred therefrom, on the ground, as argued, of being indicative of quality only."

The letters and numerals in question, taken severally, may fairly be considered such as by the custom of traders are used to denote size, style, quality, &c. of articles in trade, and hence the complainant is not entitled to a monopoly in those letters and numerals, possibly to the inconvenience or detriment of other traders in articles similar to those manufactured and sold by him. Nothing that is here said is intended to convey an idea that figures, like letters, may not be so combined as to constitute a valid trade-mark, or that a single letter or figure may not be so peculiar and unusual in form or ornamentation as to answer the same purpose. The court is dealing only with the case before it. It appears from the bill and exhibits, as before stated, that the letters and numerals were adopted to denote or indicate the origin or ownership, as well as the shape, size, style and quality of the complainant's goods; but it does not clearly appear whether such letters or figures were adopted primarily for the purpose of indicating their origin or ownership. On the face of the bill and exhibits there is a serious question whether it does not appear that the letters and figures only secondarily pointed to origin or ownership. But it is settled that a valid trade-mark cannot exist unless it point either by itself or by association primarily to origin, manufacture or ownership. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 547, 11 Sup. Ct. 400, the court said:

"Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while if the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade (*Burton v. Stratton*, 12 Fed. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark."

In *Mill Co. v. Alcorn*, 150 U. S. 460, 463, 14 Sup. Ct. 152, the court said:

"(1) That to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose

of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark."

While the doctrine enunciated in the second paragraph above quoted may possibly be the subject of future modification in a case involving a decision of the point, the court must hold in the light of the authorities that the bill cannot be sustained in so far as it charges infringement of trade-marks, save in the instance of the words "American Express" as applied to sealing wax.

The second of the two principal questions in the case is whether the bill and exhibits show unfair competition in trade by the defendant so far as the complainant is concerned. The gradual but progressive judicial development of the doctrine of unfair competition in trade has shed lustre on that branch of our jurisprudence as an embodiment, to a marked degree, of the principles of high business morality, involving the nicest discrimination between those things which may, and those which may not, be done in the course of honorable rivalry in business. This doctrine rests on the broad proposition that equity will not permit any one to palm off his goods on the public as those of another. The law of trade-marks is only one branch of the doctrine. But while the law of trade-marks is but part of the law of unfair competition in trade, yet when the two are viewed in contradistinction to each other an essential difference is to be observed. The infringement of trade-marks is the violation by one person of an exclusive right of another person to the use of a word, mark or symbol. Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use "like the adjectives of the language," yet there may be unfair competition in trade by an improper use of such word, mark or symbol. Two rivals in business competing with each other in the same line of goods may have an equal right to use the same words, marks or symbols on similar articles produced or sold by them respectively, yet if such words, marks, or symbols were used by one of them before the other and by association have come to indicate to the public that the goods to which they are applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such a manner, by trade dress or otherwise, as to deceive or be capable of deceiving the public as to the origin, manufacture or ownership of the articles to which they are applied; and the latter may be required, when using such words, marks, or symbols, to place on articles of his own production or the packages in which they are

usually sold something clearly denoting the origin, manufacture or ownership of such articles, or negating any idea that they were produced or sold by the former. In *Coats v. Thread Co.*, 149 U. S. 562, 566, 13 Sup. Ct. 967, the court said:

"Irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiff. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

This subject was exhaustively examined and admirably explained in the following two recent cases; one decided by the House of Lords in March, 1896, and the other by the Supreme Court in May of the same year. In *Reddaway v. Banham* [1896] App. Cas. 199, it was held that one person was not entitled to pass off his goods as those of another by selling them under a name which was likely to deceive purchasers, whether immediate or ultimate, into the belief that they were buying the goods of the former, although the name used was in its primary meaning merely a true description of the goods. The plaintiffs had during several years made belting largely composed of camel hair, and sold it as "Camel Hair Belting," which name had come to mean in the trade the plaintiffs' belting and nothing else. Afterwards the defendants sold belting made of the yarn of camel's hair, stamping it "Camel Hair Belting," so that it was likely to mislead purchasers into the belief that it was the plaintiffs' belting, thus endeavoring to pass off their goods as those of the plaintiffs. It was held that the plaintiffs were entitled to an injunction restraining the defendants from using the words "Camel Hair" as descriptive of or in connection with belting manufactured by the defendants or belting other than of the plaintiffs' manufacture, sold or offered for sale by the defendants, without clearly distinguishing such belting from that of the plaintiffs. Lord Halsbury, L. C., in his address moving for judgment for the plaintiffs, said:

"For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow. * * * It would be impossible, for instance, to say that a trader could not describe his goods truly by enumerating the particulars of what they consisted, unless such description was calculated to deceive and make his goods pass as the goods of another. What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade. It would be very rash a priori to say how far a thing might or might not be described, without being familiar with the technology of the trade."

Lord Herschell said:

"For many years belting made of camel hair yarn had been known in the markets of the world. It had been sold under a variety of names. But there

was ample evidence to justify the finding, that amongst those who were the purchasers of such goods, the words 'camel hair' were not applied to belting made of that material in general; that, in short, it did not mean in the market belting made of a particular material, but belting made by a particular manufacturer. * * * I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat the plaintiffs of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality. * * * The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this I think he would, on well-established principles, be entitled to an injunction. In my opinion, the doctrine on which the judgment of the Court of Appeal was based, that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark, is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival. * * * I rather demur, however, to the statement of James, L. J., that the defendant in *Wotherspoon v. Currie* [L. R. 5 H. L. 508] was not telling a lie in calling his starch 'Glenfield starch,' as I do to the view that the defendants in this case were telling the simple truth when they sold their belting as camel hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is surely not to be absolved from a charge of falsehood because in another sense which will not be conveyed and is not intended to be conveyed it is true."

Lord Macnaghten said:

"The substance of Reddaway's complaint, as I understand it, is that Mr. Banham is putting his goods on the market under a designation which enables purchasers from him to make a false representation to their customers. It is immaterial that the designation in question, taken by itself, would convey to a person not conversant with the trade information which cannot be called untrue if by means of that designation Mr. Banham does make, not perhaps directly, but certainly through the medium of other persons, a false representation that his goods are the goods of Reddaway. * * * The appellants concede—they cannot indeed any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel hair belting provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under color of imparting accurate and possibly interesting information. * * * The learned counsel for the respondents maintained that the expression 'camel hair belting' used by Banham was the 'simple truth.' Their proposition was that 'where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make.' That seems to me to be rather begging the question. Can it be said that the description 'camel hair belting' as used by Banham is the simple truth? I will not call it an

abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth."

In *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, the court, after holding that on the expiration of a patent the right to make the thing theretofore covered by it as well as the generic designation which the thing acquired during the existence of the monopoly passed by dedication to the public, said:

"But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name imports that there is no duty imposed, on the one using it, to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elementary and applies to every form of right, and is generally expressed by the aphorism *sic utere tuo ut alienum non lædas*. This qualification results from the same principle upon which the dedication rests, that is, a regard for the interest of the public and the rights of individuals. It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic and the other pointing to the origin or manufacture and the name is availed of by another without clearly indicating that the machine, upon which the name is marked, is made by him, then the right to use the name because of its generic signification, would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another. To say that a person who has manufactured machines under a patented monopoly can acquire no good will, by the excellence of his work, or the development of his business, during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or good will resulting from meritorious work would be subject to appropriation by every one. On the other hand, to compel the one who uses the name after the expiration of the patent, to indicate that the articles are made by himself, in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public. This fact is fully recognized by the well settled doctrine which holds that although every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.' * * * Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications. * * * The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his con-

sent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact."

Certain exhibits, made a part of the bill, relate to gummed labels, including "Complainant's Gummed Labels" A, B, C, and D, and "Defendant's Gummed Labels" A, B, C, and D. The defendant's gummed labels contained in exhibit "Defendant's Gummed Labels A" are of the same size, shape and color as those contained in exhibit "Complainant's Gummed Labels A." There is no word, letter or figure to distinguish the labels from each other. A dozen small boxes are packed by the parties respectively in each of the larger boxes. All of the small boxes are of substantially the same size, shape and color, and contain the same number of labels. On the lid of each of the small boxes of the complainant is a label in all respects similar to those within it, save that it has printed on it "Dennison's 223." On the lid of each of the small boxes of the defendant is a similar label containing only the number "223." The large box of each of the parties is of substantially the same size and shape; that of the complainant being gray, and that of the defendant salmon colored. On one end of the complainant's box on a label similar to those in the small boxes are the word and number "Dennison's 223," and on one end of the lid are the words in block capitals "Extra Gummed." On one end of the defendant's box on a label similar to the complainant's is the number "223," and on one end of the lid are the words in block capitals, similar to those used by the complainant, "Extra Gummed." In the case of both parties the words "Extra Gummed" are on a label unlike those contained in the small boxes, but precisely similar to each other. On the top of the lid of the complainant's large box the following appears: "1 Dozen. Dennison's Gummed Labels are warranted perfect in sticking qualities, full count, and well printed and cut." There are no words or figures on the top of the lid of the defendant's large box. A comparison of the exhibit "Defendant's Gummed Labels B" with the exhibit "Complainant's Gummed Labels B" shows a similar condition of things, save in the following particulars. The boxes and labels are larger, each large box containing ten small boxes. The small boxes of the complainant and defendant are numbered "2004"; those of the complainant having also the number and word "100 Dennison's" above the numeral "2004." The label on the end of the complainant's large box bears the following: "1000 Dennison's 2004," while that on the end of the defendant's large box contains merely the number "2004"; and on the lid the number "1000" is substituted for "1 Dozen." A comparison of the exhibit "Defendant's Gummed Labels C" with the exhibit "Complainant's Gummed Labels C," shows a condition of things similar in all respects to that disclosed in the complain-

ant's and defendant's exhibits A, except as to size, and that both the large and small boxes of the defendant and complainant are numbered "209." And precisely the same statement which has been made as to exhibits C is applicable to the exhibit "Defendant's Gummed Labels D" when compared with "Complainant's Gummed Labels D," except that both the large and small boxes of the parties are numbered "201." It should be added that on the large boxes shown in the defendant's exhibits C and D there is a paper band apparently for the purpose of holding the lid to the box, containing a black star with a white circle in its center. Within the circle are the letters "T M Co" and the words, "One Dozen Boxes Gum Labels Double Gummed," are on the band beneath the star. This band, however, is not fastened in any manner to the boxes and readily slides off of them, and on sale of the labels may or may not be removed or replaced. It is in the highest degree unreasonable to assume that, after the complainant had adopted the numbers "223," "2004," "209" and "201" in connection with certain trade dress for certain sizes and styles of labels to which they were applied, the defendant's use of the same numbers and substantially the same trade dress, with the omission of its name, in connection with the same sizes and styles of labels, was an accidental coincidence. It is true that the complainant's boxes bore its name, but it is a fact of much significance that the boxes of the defendant did not bear its name, or any word, mark or figure to distinguish them from the complainant's, or to indicate that the labels therein contained were put on the market by the defendant or by any person other than the complainant. The bill charges that the trade dress and numbers, as used by the defendant in connection with the gummed labels, were a fraudulent imitation by it of the trade dress and numbers as applied by the complainant to similar labels, and that the purpose of the defendant in resorting to such fraudulent imitation was to deceive the trade and the public. The defendant had an equal right with the complainant to manufacture and sell the same sizes and styles of labels, but not intentionally and fraudulently to dress them by such a mode of packing or numbering as to cause or be likely to cause purchasers to mistake them for those produced by the complainant. In *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 356, 9 Sup. Ct. 93, the court said:

"It is a mistake to suppose that in stating the facts which constitute a fraud, where relief is sought in a bill in equity, *all* the evidence which may be adduced to prove that fraud must be recited in the bill. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him."

And here, as was said by the court in *City of St. Louis v. Knapp Co.*, 104 U. S. 658, 661, "while the allegations might have been more extended, without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet." On this demurrer it must, in view of the averments in the bill, be held that the defendant sought by imitative devices, likely

to prove successful, to beguile the public into buying its goods under the impression that they were those of the complainant, and therefore was guilty of unfair competition in trade.

Reference is made in the bill, among other things, to two exhibits, made part of the bill, marked, respectively, "Complainant's Price List of Gummed Paper" and "Defendant's Price List." Both relate to adhesive paper, of different colors and give samples of the same. Each sample contains a numeral, the name of the color and the dimensions, in figures, of a full sized sheet. Each of the complainant's samples has printed on it "Dennison's Gummed Paper," and each of those of the defendant bears the words "Thomas Mfg. Co. Gummed Paper." Aside from the words "Dennison's Gummed Paper" and "Thomas Mfg. Co. Gummed Paper," samples of the paper of the parties respectively, are marked as follows:

Complainant's Samples.	Defendant's Samples.	Complainant's Samples.	Defendant's Samples.
No. 1. White Folio. Size 17x22.	No. 1. White Folio. Size 17x22.	No. 2. White Folio. Size 17x22.	No. 2. White Folio. Size 17x22.
No. 02. All Rope, Tea. Size 20x24.	No. 02. All Rope, Tea. Size 20x24.	No. 3½. Salmon Medium. Size 20x25.	No. 3½. Salmon Medium. Size 20x25.
No. 4. Yellow Medium. Size 20x25.	No. 4. Yellow Medium. Size 20x25.	No. 14. Green Plated Size 20x24.	No. 14. Green Plated. Size 20x24.
No. 5. Blue Medium. Size 20x25.	No. 5. Blue Medium. Size 20x25.	No. 15. Green Glazed. Size 20x24.	No. 15. Green Glazed. Size 20x24.
No. 6. Green Medium. Size 20x25.	No. 6. Green Medium. Size 20x25.	No. 18. Ultramarine Blue Plated. Size 20x24.	No. 18. Ultramarine Blue Plated. Size 20x24.
No. 7. Dark Pink Medium. Size 20x25.	No. 7. Dark Pink Medium. Size 20x25.	No. 20. Vermillion Plated. Size 20x24.	No. 20. Vermillion Plated. Size 20x24.
No. 9. Light Pink Medium. Size 20x25.	No. 9. Light Pink Medium. Size 20x25.	No. 20½. Vermillion Glazed. Size 20x24.	No. 20½. Vermillion Glazed. Size 20x24.
No. 11. Salmon Plated. Size 20x24.	No. 11. Salmon Plated. Size 20x24.	No. 22. Coated Label Paper. Size 17x22.	No. 22. Coated Label Paper. Size 17x22.
No. 13. Orange Plated. Size 20x24.	No. 13. Orange Plated. Size 20x24.	No. 23. Buff Plated. Size 20x24.	No. 23. Buff Plated. Size 20x24.

The color of each sample corresponds with its name, and, while in a few instances a sample similarly marked by the complainant

and defendant varies appreciably in shade of color, in most cases they are indistinguishable to the ordinary observer. Accidental coincidence is out of the question so far as the numbers, the names and the sizes on these samples, in their sequence, are concerned. In these particulars the defendant's samples are manifestly a studied imitation of those of the complainant. The bill alleges with respect to these price lists as follows:

"That the defendant, at the time and place aforesaid, in fraudulent imitation of your orator's said price list and for the purpose of deceiving the trade and public, has made and used a book or price list which is a studied imitation of your orator's said price list. * * * And your orator says, on information and belief, that the defendant, having prepared large numbers of price lists like that herewith produced and marked 'Defendant's Price List,' has distributed the same for use in the trade and by dealers, in fraudulent violation of your orator's rights, whereby the public have been misled and unfair competition in business promoted, and your orator's sales reduced, to its great loss and injury actually sustained."

The front and back covers of "Defendant's Price List" radically differ from the front and back covers of "Complainant's Price List of Gummed Paper." The former state in prominent words that the gummed papers are manufactured by the defendant, while the latter state with equal clearness that the gummed papers are manufactured by the complainant. Each sample of the complainant bears its name, and the name of the defendant is on each of its samples. The bill does not charge fraudulent combination between the defendant and dealers, to whom its price lists are furnished, to deceive purchasers as to the origin, manufacture or ownership of the gummed paper. Substantially the same may be said of the other price lists and catalogues of the respective parties. The bill does not allege whether the gummed paper of the defendant as sold in the market does or does not bear any distinguishing marks or words, nor describe the style or characteristics of its trade dress or packing. Details and circumstances necessary for the formation of an intelligent opinion are not disclosed. The same considerations apply to other causes of complaint alleged in the bill. The bill and exhibits show on their face that the complainant is entitled to some relief, and with respect to other relief prayed a decision should be reached, not on demurrer, but after a full hearing of the case on such evidence as shall be adduced. *Brooke v. Hewitt*, 3 Ves. 253; *Verplank v. Caines*, 1 Johns. Ch. 57. A case much in point in this immediate connection is *Merriam v. Publishing Co.*, 43 Fed. 450, where Mr. Justice Miller, in delivering the opinion of the court overruling the demurrer, said:

"Now, taking all of these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and facts upon a final hearing."

In view of these authorities it is unnecessary to decide whether the demurrer in this case should be treated as a single demurrer to

the whole bill, or as in effect several demurrers applicable to different portions of the bill, and collectively covering all of it.

The demurrer must be overruled and the defendant be required to make answer to the bill by the first Monday in June next.

ILLINOIS WATCH-CASE CO. et al. v. ELGIN NAT. WATCH CO.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 525.

1. TRADE-MARKS—GEOGRAPHICAL NAMES—"ELGIN" WATCHES.

Under the rule established by a uniform course of decision that geographical names cannot be appropriated as trade-marks, the word "Elgin," as applied to watches or watch movements, though exclusively used by a company for so long a time that it has come to be recognized by the public in the United States and foreign countries as designating the particular manufacture of such company, cannot become a trade-mark, so that its registration, under the act of March 3, 1881, will entitle that company, under the act, to protection by a federal court in its exclusive use in foreign trade.¹

2. SAME—UNFAIR COMPETITION—JURISDICTION OF FEDERAL COURTS.

The right to an injunction against unfair competition in trade does not rest on the right of complainant to be protected in the exclusive use of a trade-mark, but upon the ground of fraud; and the federal courts have no jurisdiction of a suit for such an injunction, even with respect to foreign commerce, unless by reason of diversity of citizenship between the parties, or at least its jurisdiction is so limited, and the act of March 3, 1881, by which, if at all, it is conferred, is of such doubtful constitutionality that it will not be exercised in a suit between citizens of the same state.

3. SAME—SUIT FOR INJUNCTION—SUFFICIENCY OF BILL.

A bill for an injunction to restrain defendant from using a name claimed by complainant as a trade-mark, which contains no allegation of actual fraud or fraudulent intent on the part of defendant, is insufficient to entitle the complainant to relief, unless his right to the exclusive use of the name as a trade-mark is established.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellee, the Elgin National Watch Company, filed its bill in equity in the court below, setting forth that it was a corporation organized under the laws of the state of Illinois, and having its principal place of business at Elgin, and its office at Chicago, in that state; that the defendant, the Illinois Watch-Case Company, is a corporation created and organized under the laws of the state of Illinois, and having its principal place of business at Elgin, in that state; that the other defendants named were citizens of the state of Illinois, and were, respectively, the defendant Duncan, president, treasurer, and superintendent, and the defendant Abrahams, secretary, of the Illinois Watch-Case Company; that prior to April 11, 1868, the complainant engaged in manufacturing watches at Elgin, then a small town containing no other manufactory of watches or watch cases; that the complainant built up a large business in such manufacture; that the watches and watch movements so made by complainant have become known all over the world, and have been largely sold and used both in the United States of America and in foreign countries; that before that date the complainant had adopted the word "Elgin" as a trade-mark for its watches and watch movements, which word was marked upon the watches

¹ As to right to use geographical names as trade marks and names, see note to *Hoyt v. J. T. Lovett Co.*, 17 C. C. A. 657.

and watch movements, both those which entered into commerce in this country and those exported to and sold in foreign countries, and that the complainant's watches became known all over the world as Elgin watches, which word declared their origin and source as a product of the complainant's manufacture, and they became known from those of all other watches by the distinguishing word or trade-mark "Elgin," which word, at the time of its adoption, had been appropriated by no other person, firm, or corporation as a trade-mark or designation of goods; that this trade-mark the complainant caused to be registered on the 19th day of July, 1892, under the act of congress, relating to the registration of trade-marks, approved March 3, 1881 (21 Stat. 502); that the defendants have infringed upon the rights of the complainant by engraving or otherwise affixing the word "Elgin" to watch cases made and sold by them; that such watch cases are adapted to receiving watch movements of different construction from those made by the complainant; that inferior watch movements are liable to be, and often are, incased in them, and, when so incased, the entire watch, including both movement and case, appears upon the market with the word "Elgin" upon it, thereby leading the public to believe that such watch, as an entirety, was made by the complainant, and enabling parties unlawfully using the word "Elgin" to profit by the great reputation of the complainant, to palm off other and inferior goods as the goods made by the complainant, to injure the reputation of the complainant as a watchmaker, and to deprive it of a portion of the business and patronage which it would otherwise receive from the public. The prayer of the bill is for an injunction to restrain defendants "from directly or indirectly making or selling any watch case or watch cases marked with your orator's said trade-mark, and from using your orator's said trade-mark in any way upon watches or watch cases, or in the defendant's printed advertisements, circulars, labels, or on boxes or packages in which the said watch cases are put up or exposed for sale." A demurrer interposed to this bill being overruled, defendants answered, denying the legality of the registration of the trade-mark, denying the right of the complainant to the exclusive use of the word as a trade-mark, asserting that they had never manufactured or sold, or offered for sale, watches or watch movements, but that they manufactured at Elgin watch cases only, and that the complainant had never manufactured or sold watch cases with the word "Elgin" upon them; that the business of the two corporations are distinct and separate, the one from the other, and that, whenever the defendant company had used the name "Elgin," it had usually, if not invariably, been done in connection with some other word, as "Elgin Giant," or "Elgin Commander," or "Elgin Tiger," or some other word used in combination with the word "Elgin" or "Elgin, Illinois"; that the company has seldom, if at all, used the word "Elgin" alone or separately as registered by the complainant upon goods exported to foreign nations or used in foreign commerce, but only in domestic commerce, and to inform the public of the place where the watch cases of the defendant company were manufactured; that such watches were sold upon a guaranty running for a number of years, so that it became necessary to inform purchasers of the city where the defendant company was carrying on its business, that purchasers might be able to find the company in case it became necessary to call upon it to make good its guaranty; that the term "Elgin" is a geographical name, indicating the name of a prominent manufacturing city, and that any manufacturer of watches, watch movements, or watch cases is at liberty to locate or carry on his business thereat, and that the name may not be appropriated by any single manufacturing person, firm, or corporation, but is open, as a common right, to the use of any person carrying on business at that city. To this answer there was a general replication, and, upon proofs taken, the parties proceeded to a hearing. By leave of the court at or immediately after the hearing and before decree, the complainant amended its bill, alleging that the watch cases so manufactured and marked by the defendants in violation of the complainant's right "are intended by the defendants to be sold in foreign countries, and are in fact exported to and sold in foreign countries." A decree passed for the complainant that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of the complainant's exclusive rights in the premises, and that an injunction issue restraining the use of the word "Elgin" alone or in connection with other words or devices upon watches or

watch cases, or upon packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchasers or others to mistake said watches or watch movements incased in such watch cases for watches or watch movements manufactured by the complainant. The opinion of the court below is reported. *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 89 Fed. 487.

Thomas A. Banning and Ephraim Banning, for appellants.
Lysander Hill, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, upon this statement of the case, delivered the opinion of the court.

It was ruled in *Trade-Mark Cases*, 100 U. S. 82, that the act of congress approved August 14, 1876 (19 Stat. 141), was void for want of constitutional authority, but the court expressly left the question undecided "whether the trade-mark bears such a relation to commerce, in general terms, as to bring it within congressional control when used and applied to the classes of commerce which fall within that control." That the congress had no power, under the commerce clause of the constitution, to regulate the subject, was ruled by the circuit court of the United States for the Eastern district of Wisconsin in *Leidersdorf v. Flint*, 8 Biss. 327, Fed. Cas. No. 8,219. This is the only direct adjudication upon that question. Following the decision of the supreme court in the *Trade-Mark Cases*, the congress of the United States enacted the present law (Act March 3, 1881; 21 Stat. 502), limiting its operations to trade-marks used in commerce with foreign nations or with the Indian tribes. There has been no ruling upon the constitutionality of this act, and it need only be said that its validity is fairly doubtful.

The appellee, the complainant below, by its bill asserts and seeks to maintain its right to the use of the word "Elgin" as a trade-mark, claiming that right as one arising under federal law. It is, of course, clear that this bill cannot be sustained, all of the parties to it being citizens of the same state, unless its right can be sustained as one arising under the laws of the United States. The statute does not define what shall constitute a trade-mark. To determine, therefore, what that trade-mark is which is protected by this statute, we must be referred to the common law. It is not now a question that no one can acquire an exclusive right to the use of geographical names as trade-marks. *Canal Co. v. Clarke*, 13 Wall. 323; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 547, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 542, 11 Sup. Ct. 625; *Mill Co. v. Alcorn*, 150 U. S. 464, 14 Sup. Ct. 151; *Mills Co. v. Eagle*, 58 U. S. App. 490, 30 C. C. A. 386, and 86 Fed. 608; *Iron Co. v. Uhler*, 75 Pa. St. 467; *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 136, 40 N. E. 616. In *Mill Co. v. Alcorn*, supra, the court observes that "the word 'Columbia' is not a subject of exclusive appropriation, under the general rule that a word or words in common use as designating locality or section of country cannot be appropriated by any

one as his exclusive trade-mark. * * * The appellant was no more entitled to the exclusive use of the word 'Columbia,' as a trade-mark, than he would have been to the use of the word 'America,' or the 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated or be made the subject of exclusive property. They do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership." But, while one cannot obtain the exclusive right to use a geographical name as a trade-mark, and cannot make a trade-mark of his own name to deprive another of the same name from using it in his business, that other may not resort to artifice to do that which is calculated to mislead the public as to the identity of the business or of the article produced, and so create injury to the other beyond that which results from the similarity of name. There are a large number of cases in which this principle has been declared. *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 239; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thompson v. Montgomery*, 41 Ch. Div. 35; *Reddaway v. Banham* (1896) App. Cas. 199; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Coates v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 186, 16 Sup. Ct. 1002; *American Waltham Watch Co. v. U. S. Watch Co.* (Mass.; March, 1899) 53 N. E. 141. We have spoken to the same effect, and with no uncertain sound. *Meyer v. Medicine Co.*, 18 U. S. App. 372, 379, 7 C. C. A. 558, and 58 Fed. 884; *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 399, and 64 Fed. 211; *Mills Co. v. Eagle*, 58 U. S. App. 490, 30 C. C. A. 386, and 86 Fed. 608; *Kathreiner Malzkaffe Fabriken mit Beschraenkter Haftung v. Pastor Kneipp Med. Co.*, 53 U. S. App. 425, 27 C. C. A. 472, and 82 Fed. 321; *Johnson v. Bauer*, 53 U. S. App. 437, 27 C. C. A. 374, and 82 Fed. 662; *Raymond v. Baking-Powder Co.*, 55 U. S. App. 575, 29 C. C. A. 245, and 85 Fed. 231. This class of cases does not proceed upon the ground of an infringement of a trade-mark, but upon the ground of fraud, and that equity will not permit one, aside from any question of trade-mark, to palm off his goods as the goods of another, and so deceive the public, and injure that other. It is not necessary in such cases, in order to give a right to an injunction, that a specific trade-mark should be infringed (*McLean v. Flemming*, 96 U. S. 245, 250), but that the conduct of the party should show an intent to palm off his goods as the goods of another. The allegations respecting trade-marks are in such cases only "regarded as matter of inducement leading up to the question of actual fraud." The court below sustained this bill upon the ground that the word "Elgin" had acquired a secondary signification, and through a long course of business had come, as applied to watches, to designate the manufacture of the appellee, and as an article of approved excellence, and that therefore the word in that connection performed distinctly the function of a trade-mark, and could be registered and upheld as a trade-mark, under the act of congress. In this we think there was error. The word "Elgin" was not, and could not be, made a trade-mark. The fact that the

word had acquired that signification might be forceful if the word was shown to be used to palm off the goods of one as the goods of another, which, coupled with other evidence evincing intent to mislead and to defraud, would be operative to move a court of equity to prevent the wrong. It is said that the evidence in this case is of that persuasive character which irresistibly leads to the conclusion that here was such gross fraud that a court of equity should not stay its hand, but should enjoin the guilty party from further deception and wrong. Unfortunately, however, if we should concur with counsel to the full extent of his contention, we are, as we think, without jurisdiction to grant relief; or, to say the least, that jurisdiction is of so doubtful a nature and so limited in extent, and under an act of doubtful constitutionality, that we must decline to exercise it. The right of the appellee arises under the act of congress, and is limited to a trade-mark. By the statute, the right of action is given to him to recover damages "for the wrongful use of said trade-mark," or he may have his remedy, according to the course of equity, "to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with the Indian tribes." It is only by virtue of that statute, and for the protection of a right arising under the federal law, that the appellee has standing in the federal court, for all the parties to this suit are citizens of the same state. The remedy in equity for fraud, to which we first referred, is one which existed before the statute, and is not given by it. It was not applied to protect the infringement of a trade-mark, but, recognizing the invalidity of the supposed trade-mark, was applied for the prevention of fraud; and, that a federal court may have jurisdiction in such a case, we think there must exist and appear from the record the necessary diverse citizenship of the parties. It may also be remarked that this bill is not framed upon any theory of fraud or fraudulent conduct upon the part of the defendants thereto, except as it is to be inferred from the use of the complainant's registered trade-mark. It is not alleged that they have ever represented or sold their goods as the goods manufactured by the complainant. The one is a manufacturer of watch movements, the other of watch cases. To be sure, it is claimed, and possibly is established by the proof, that the watch cases of the appellants have been used by dealers to contain watch movements of inferior quality to those made by the appellee, and possibly the purchaser deceived into believing that he had purchased a watch manufactured by the appellee. But this is not charged to have been done by the appellants, or with their knowledge or consent, or that they have entered into any scheme or combination to impose upon the public. The only imposition suggested is the possibility that from the general reputation of the watches manufactured by the appellee, and their known designation as Elgin watches, confusion is likely to result, and the purchaser be induced to purchase the one article when he desires another. That might result from the lawful use of a geographical name, and is without remedy, unless coupled with fraud upon the part of the appellants or those acting for and under them. However strong, the proof must respond to the allegations of the bill.

So that, whether we consider the case from the standpoint of jurisdiction, or from the case made by the bill, we are constrained to the conclusion that the decree below was erroneous. The courts of the state furnish ample remedy for the wrong, if any, under which the appellee suffers. We have no right to redress or prevent trespass upon the common-law rights of the appellee, the citizenship of the parties forbidding jurisdiction. If it were allowable to us to assume jurisdiction to grant equitable relief upon the ground of fraud, if the bill were aptly framed to that end, the relief could only extend in restraint of the wrong, so far as it affected foreign commerce and commerce with the Indian tribes. The proofs show that such commerce in the case before us has been so slight as to be practicably immaterial, and that the real controversy is concerning state and interstate commerce in the manufactured article. Complete remedy for the wrongs suffered by the appellee can only be given in the courts of the state in which the parties are resident. It is therefore not becoming, as we think, to assume a doubtful jurisdiction under a statute of doubtful validity. The decree is reversed, and the cause remanded, with direction to the court below to dismiss the bill.

MESINGER BICYCLE SADDLE CO. v. HUMBER et al.

(Circuit Court, S. D. New York. November 19, 1898.)

PATENTS—BICYCLE SADDLES.

The Mesinger design patent, No. 25,423, for a design for a bicycle saddle, differs from prior patents only in the lines shown in the central space or opening in the saddle, and is not infringed by a saddle having a different pattern of such lines.

This is a suit in equity by the Mesinger Bicycle Saddle Company against Humber & Co. for infringement of a patent.

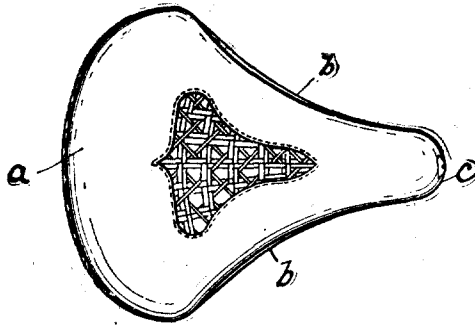
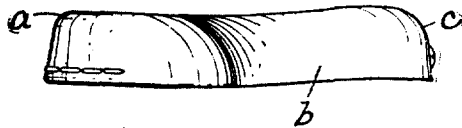
Robert C. Mitchell, for plaintiff.

John C. Dewey, for defendants.

WHEELER, District Judge. This suit is brought for an alleged infringement of design patent No. 25,423, dated April 21, 1896, and granted to Henry Mesinger and Frederick Mesinger, for a design for a bicycle saddle. The specification states that:

"The leading feature of our design consists, in brief, of an outline of general pelecoidal shape, having a centrally disposed opening, whose contour is substantially parallel with said outline. Upon the field inclosed by the outline of the said central opening are displayed lines extending both at right angles and diagonally to each other, said lines being interwoven, as shown.

"The letter a indicates that portion of our design corresponding to the rear end of the saddle, the same being semioval, and, from the extreme ends of said semioval portion, inwardly curved lines, b, b, extend forward, gradually approaching each other, being finally connected by a substantially semi-circular line, c, at the pommel end of the saddle design.

Fig. 1.*Fig. 2.*

"The side walls of the said design extend upward, and curve inward."

The claim is for "the design for a bicycle saddle substantially as herein shown and described."

The case shows, among other patents for such a design, No. 24,988, dated December 17, 1895, and granted to Charles D. Cutting, the specification of which states:

"The leading feature of the design consists of a forwardly projecting pommel on the median line of the saddle, and a triangular opening at the center of the saddle, conforming generally to the outline of the saddle. At the center, the saddle has an opening, D, generally triangular in shape, the walls of which curve to conform to the general outline of the outer edges of the saddle. The design provides a saddle for bicycles which presents to the eye an ornamental, distinguishing, and characteristic appearance, varying from other designs of saddles in several general respects—First, that it is wider than it is long on the median line, that it has a forwardly projecting pommel, and that it has substantially vertical sides and a rounding top."

The patent in suit gives no proportions to the general pelecoidal shape described, which is similar to that of the Cutting patent; and there is no substantial difference between the designs of these two patents except that in the Cutting design the central opening conforming to the outline of the saddle is left vacant, while in that of the patent in suit, whose contour is substantially parallel with the outline of the saddle, lines extending both at right angles and diagonally are shown, interwoven. The later patentees were only entitled to a patent for this improvement or difference. *Railway Co. v. Sayles*, 97 U. S. 554. The alleged infringement does not show any such inter

woven right-angled diagonal lines, but only longitudinal lines, with one or two right-angled lines crossing them at the end of the opening. This display is not that, nor much like that, of the patented improvement, or difference; and infringement does not appear to be made out. Bill dismissed.

MESINGER BICYCLE SADDLE CO. v. HUMBER et al.

(Circuit Court, S. D. New York. May 11, 1899.)

1. DESIGN PATENTS—INFRINGEMENT.

Where the similarity of appearance between designs for bicycle saddles was due rather to the general similarity of such saddles than to the particular similarity between the two saddles in question, and the patent was not of a fundamental character, *held* there was no infringement.

2. SAME—BICYCLE SADDLES.

The Mesinger patent, No. 25,423, for a design for a bicycle saddle having a centrally disposed opening upon which are displayed lines extending "both at right angles and diagonally to each other, said lines being interwoven, as shown," construed, and *held* not infringed.

In Equity.

Robert C. Mitchell, for plaintiff.

John C. Dewey, for defendant.

WHEELER, District Judge. This cause has been reheard on petition, suggesting that the invention sought to be secured by the Mesinger design patent in question, No. 25,423, dated April 21, 1896, for a bicycle saddle, preceded the Cutting design patent, No. 24,988, dated December 17, 1895, held inadvertently to be an anticipation. The Hunt patent, No. 489,308, dated January 3, 1893, for a velocipede saddle, unquestionably antedates the Mesinger invention. It shows "an outline of general pelecoidal shape having a centrally disposed opening, whose contour is" somewhat "parallel with said outline," if not substantially so. It might be thought to be an anticipation but for the provision in the specification of the Mesinger patent that "upon the field inclosed by the outline of said central opening are displayed lines extending both at right angles and diagonally to each other, said lines being interwoven, as shown." As the only claim is for "the design of a bicycle saddle substantially as herein shown and described," this display upon this field is material, and especially so in view of the prior pelecoidal shapes and central openings. The alleged infringement does not display lines at right angles to each other, except at the extreme ends across longitudinal lines, nor lines diagonally to each other at all. If the question about this was as to mechanical equivalents to parts of a foundation patent, these longitudinal lines might perhaps be considered to be such; but, as this is a question of appearance only, and of appearance of this field made essential by the terms of the patent, it does not seem to be such. The similarity of appearance between this and the design of the patent grows out of the general similarity of such saddles, rather than out of the particular similarity of the defendant's saddles to the dif-

ference between the design of the saddles of the patent and those of prior structures. *Tower v. Pencil Co.* (April 4, 1899) 94 Fed. 361; *Playing-Card Co. v. Spalding* (April 24, 1899) *Id.* 822. Bill dismissed.

FARR & BAILEY MFG. CO. v. INTERNATIONAL NAV. CO.

(District Court, E. D. Pennsylvania. April 28, 1899.)

1. SHIPPING—INJURY TO CARGO—SEAWORTHINESS—EFFECT OF HARTER ACT.

Section 3 of the Harter act (2 Supp. Rev. St. p. 81) does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, nor affect his liability for damage to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy, etc. There is no expressed intention in the statute to replace the carrier's obligation under the general maritime law to furnish a seaworthy vessel by the less extensive obligation to exercise due diligence to that end, and it cannot be extended by construction beyond its terms.

2. SAME—FAULT IN MANAGEMENT OF VESSEL.

After a vessel had been out of port only four or five days, and had encountered no severe weather or known accidents, both covers of one of her ports were found to be open, and water had entered and damaged cargo in the compartment into which the port opened. Neither the covers nor the surroundings of the port were injured, and the hatches had been battened down since the beginning of the voyage. *Held*, that neither evidence that the vessel was inspected the day before sailing, and the port believed to be closed, nor even the positive testimony of witnesses that the covers were closed and screwed fast when the vessel sailed, was sufficient to establish such fact, but that, under the rule laid down in *The Sylvia*, 19 Sup. Ct. 7, 171 U. S. 462, the condition of the port did not render the vessel unseaworthy, and the failure to close it before the injury was received by the cargo was a fault or error in the management of the vessel during the voyage, for which the owners are relieved from liability under section 3 of the Harter act.

This was a libel in admiralty to recover for damage to cargo alleged to have arisen from unseaworthiness of the vessel.

John F. Lewis and Horace L. Cheyney, for libelant.

Biddle & Ward and J. Rodman Paul, for respondent.

McPHERSON, District Judge. This action is brought to recover damages to cargo under the following state of facts: The respondent is the owner of the steamship *Indiana*, a vessel plying between the ports of Liverpool and Philadelphia. In May, 1895, 20 bales of bur-laps, in good condition, were received by the vessel in Liverpool, consigned to the libelant in Philadelphia, and a bill of lading was given therefor. The bales were stowed, with some other goods, in compartment No. 3 of the lower steerage deck; but the compartment was not full, only one tier of cargo, two or three feet high, covering the floor, so that access to the ports was easy and unobstructed. Four or five days after the vessel left Liverpool, water was discovered in the compartment; and when the hatches were opened, a day or two later, it was found that the after port on the starboard side was admitting water freely as the vessel rolled. Both covers of the port

were unfastened and open, but there was no sign of injury to either, or to the surroundings of the port. No severe weather had been encountered, and no accident was known to have happened to the vessel. The ports in the compartment were inspected the day before the vessel sailed, and were believed to be closed, but several hours elapsed between the time of inspection and the time of sailing. The libelant's burlaps were injured by the water thus taken into the ship, and the present suit has been brought to determine the respondent's liability.

It is conceded that the case requires the court to decide what bearing the so-called "Harter Act" of July 1, 1893 (2 Supp. Rev. St. p. 81), has upon the rights of the parties; for it is clear that, if this statute has made no change in the respondent's obligation to furnish a seaworthy vessel, the libelant is entitled to recover. As was said in *The Edwin I. Morrison*, 153 U. S. 215, 14 Sup. Ct. 829:

"The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact did not depend on their knowledge or ignorance, their care or negligence. The burden was upon them to show seaworthiness, and, if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using precautions which would demonstrate the fact."

This burden the present respondent also did not sustain, for the evidence before us does not show affirmatively that the vessel was seaworthy when the voyage began. The best that can be said of the proof is that it leaves in doubt the question how and when the port came to be opened, and such uncertainty would not relieve the carrier from liability, under the rule above quoted.

The respondent contends, however, that the third section of the act of 1893 provides the needful relief. The positions are—First, that the respondent used due diligence to make the vessel *Indiana* in all respects seaworthy, and properly manned, equipped, and supplied, and therefore that the respondent cannot be obliged to make good the libelant's loss, because such loss arose from a fault or error in navigation or in the management of the vessel; second, that, even if the loss occurred, not from a fault of navigation or management, but from unseaworthiness at the beginning of the voyage, the act has so modified the respondent's obligation to furnish a seaworthy vessel that, if due diligence was used in that behalf, the respondent is not liable to make good the loss.

Taking up the second position first, it must be conceded that the third section of the statute arouses some such expectation as the respondent supposes to be enacted into law. The section begins by saying "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied—"; and, after this beginning, one naturally expects to hear that, if the statutory condition of diligence be fulfilled, the vessel and her owners shall be relieved from at least some of the liabilities caused by unseaworthiness. But we do not hear this at all. Even if the framers of the statute in-

tended to replace the carrier's obligation to furnish a seaworthy vessel by the less extensive obligation to use due diligence to furnish such a vessel, the intention has not been expressed. The section goes on to provide, not that the carrier's warranty of seaworthiness shall be modified, but merely this: "Neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel; nor shall the vessel, her owner or owners, charterer, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters," or from other causes not now important. In other words, the section does not touch, and therefore leaves unchanged, the carrier's liability for unseaworthiness; and this, as we understand the decisions of the supreme court, has already been decided by that tribunal.

In the case of *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, the general scope of the act was considered, and it was decided that its whole object was "to modify relations previously existing between the vessel and her cargo." It was accordingly held that the general language of section 3, which is broad enough to cover a case of collision, did not relieve an offending vessel from liability for such a wrong, although it was caused by a fault in the navigation or management of the vessel.

In *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, the court say distinctly, referring to section 3:

"The exemption of the owners or charterers from loss resulting from 'faults or errors in navigation or in the management of the vessel,' and for certain other designated causes, in no way implies that, because the owner is thus exempted when he has been duly diligent, thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner, when he has been duly diligent, is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship."

In the latest opinion upon the statute, to be found in *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, the effect of the decision in *The Carib Prince* was stated to be that the act "has not released the owner of a ship from the duty of making her seaworthy at the beginning of her voyage."

These cases furnish a sufficient reply to the respondent's second position. We understand them to rule that the obligation of the owner to furnish a seaworthy ship is now just what it was before the act of 1893 was passed. In order to fulfill that obligation, he must show more than due diligence. He must show, as heretofore, that he has in fact furnished a seaworthy vessel; and, if he fails in his proof, he is still liable for an injury arising from an unseaworthy condition.

This brings us to the consideration of the first position, which might present two questions of fact: First, was the respondent's ship unseaworthy when she left the port of Liverpool, and did this condition cause the loss? And, second, if the loss was caused, not by unseaworthiness, but by faults of navigation or management, had the

respondent used due diligence, as required by the act? As we look at the evidence, it will only be necessary to answer the first question. We have little difficulty in coming to the conclusion that the vessel was a staunch boat, properly manned, equipped, and supplied, and that she was in all respects fit for the voyage, except in the one respect of which the libellant complains,—the condition of the after port on the starboard side in compartment No. 3. Concerning the condition of this port at the beginning of the voyage, the testimony is unsatisfactory. Some of the respondent's witnesses testify with positiveness that both covers were closed and screwed fast when the vessel sailed, and, if this testimony is accepted as true, it establishes the fact that the port was properly fastened. But some of the witnesses upon this point are scarcely credible, and we regard the others as mistaken. The effect of the respondent's testimony is at least balanced, if not overbalanced, by the unquestioned fact that, although the ship had experienced no severe weather, and displayed no mark of injury to the port, nevertheless both covers were found open a few days after the vessel began her voyage. In our opinion, this condition of affairs can only be fairly explained, either by supposing that the witnesses who testified with such positiveness must have been mistaken, and that the port was not properly fastened when the vessel left Liverpool (although they may have honestly supposed it to be in a proper condition), or by supposing that, after the witnesses who testified that the port was closed had seen it for the last time, the covers were opened by some unknown person. Either supposition is more probable than to suppose that the port was broken in by a violence that left no sign, or was opened by a person who forced his way into the compartment after the hatches had been battened down. We therefore find, as a fact, that the port in question was either not fastened at all, or was insecurely fastened, when the vessel left Liverpool. In either event, it follows that the vessel was not seaworthy.

In our view of the case, this finding is decisive of the controversy; and accordingly we direct a decree to be entered adjudging the respondent to be liable for the damage complained of by the libellant, and referring the case to a commissioner to determine the extent of the loss.

On Reargument

(June 22, 1899.)

The only question to be considered upon this reargument is whether the court was right in concluding that the vessel was unseaworthy when she left Liverpool. If the point were now presented for the first time, so that it might be decided in accordance with the reasoning that appeals most strongly to my judgment, I should adhere to the conclusion already stated. It seems to me that, although the owners of the vessel provided the proper equipment for the porthole under consideration, and although the failure to close it properly was due to negligence in the use of such equipment, nevertheless the result was unseaworthiness, because the vessel set sail with a hole in her side that was not only unknown to her officers, but was believed not to exist. She was, therefore, not in a condition to afford due protection

to the cargo in this particular compartment. If the hole had been caused by collision while she lay at her berth, and she had been sent upon her voyage without repair, it could not be successfully asserted that she was seaworthy, although the proper tools and materials might have been among the ship's stores, and the failure to repair might be properly said to have been due to negligence in failing to use the equipment at hand. The state of affairs produced by negligence seems to me to be more important than the character of the negligent act; and therefore, if, at the time when a voyage is begun, there is an open port in a cargo compartment, I should incline to the opinion that one element, at least, of unseaworthiness was present. This might not be decisive, it is true; for another important inquiry, I think, should be this: Was it known to the proper officers that the port was either open or insecurely fastened? Obviously it would be unreasonable to require a vessel to leave her berth with all her portholes closed, and to keep them closed at her peril during the voyage. But a porthole that is known to be open in a cargo compartment, and a porthole that is mistakenly supposed to be closed when the voyage begins, are likely to receive different degrees of attention, and might properly give rise to different degrees of liability. Such a port, when known to be open, must be borne in mind by those responsible for the care of the vessel and of her cargo, and must be promptly closed when danger threatens. Therefore, the port should be readily accessible, so that it may be closed in a few minutes; and the ship would be unseaworthy if the cargo should be so disposed that the port could not be easily reached. But a port in such a compartment, when mistakenly supposed to be closed, while it is actually open or insecurely fastened, is no longer an object of attention or care. Whether, therefore, it be accessible or not, seems to be of little importance; for there is no intention to get to it for any purpose until the voyage is over. Meanwhile the mischief may be doing. The water may be invading the compartment and damaging the cargo, while the master of the vessel is relying upon his mistaken belief that the porthole was closed when the voyage began. Such a mistake, as it seems to me, is not accurately described as a fault or error in the navigation or management of the vessel. Failure to close an accessible port would, no doubt, be such a fault or error in management, if the port was known to be open; but, if the port was mistakenly supposed to be shut when the voyage was begun, this appears rather to be a fault in fitting the ship for the voyage, and a fault that is committed before the vessel sets sail. The master leaves the dock with a cargo compartment supposed to be tightly closed. If he owes to the cargo a duty continually to inspect the ports, and damage is done by reason of neglected inspection, such neglect might be a fault in management. But it has not been suggested that such a duty exists under ordinary circumstances, and I do not clearly see what other duty of management the master can be said to neglect. There is a duty to provide against the danger that water may enter an open port; but, in the case supposed, the master believes that the duty to close was performed before the voyage began, and has no knowledge that the port is open. If, therefore, he has no ground to suspect that the port is open, and is ordinarily under no duty

to inspect continually, it seems more reasonable to rest his liability for whatever injury may be done upon the mistake he made in preparing the compartment for the voyage. There is some force, I think, in the suggestion that such a mistake cannot properly be called a fault or error in navigation or management that had not then been begun. It might, perhaps, be said that the law regards such a mistake as repeated during every moment of the voyage; but I think this would be a subtlety of legal fiction, not necessary for the accomplishment of justice. It is no doubt true that it is not always easy to draw a line between defects that may properly be said to constitute unseaworthiness, and omissions or acts that may be more properly described as faults or errors of navigation or management. Failure to provide a compass, for example, might fall into either class; and so with other instances that might be specified. But this would only be to say again, what courts are continually saying, that no rule could be laid down for all cases, and for that reason I should prefer to confine my attention to the particular question before the court in a given case.

While the foregoing is perhaps a sufficient indication of the reasons that appeal to my judgment in behalf of the disputed conclusion, nevertheless I must admit that further consideration has convinced me that I am not at liberty to allow them to control the decision. Some of the cases cited by the respondent can be distinguished without difficulty, and some are not of binding authority; but I am unable to avoid the effect of the decision in *The Sylvia*, 171 U. S. 462, 19 Sup. Ct. 7. I am afraid that I somewhat more than half shut my eyes to the facts of that case. They are strikingly like the facts in the present controversy; so like, indeed, that I feel myself bound to accept the conclusions drawn from them by the supreme court. I obey the authority of that tribunal, therefore, and now hold that the condition of the porthole when the *Indiana* left Liverpool did not render the vessel unseaworthy. It follows that failure to close the port was a fault or error in management, committed during the voyage, and that the act of 1893 relieves the respondent from liability for such a fault. A decree will be entered dismissing the libel, with costs.

THE EVANGEL

(District Court, D. Washington, N. D. May 26, 1899.)

1. MARITIME LIENS—MONEY SUPPLIED TO VESSEL.

The maritime law gives a lien for money supplied for the use of a ship and necessary to enable her to proceed on her voyage similar in all its essential features to maritime liens for other kinds of necessary supplies.¹

2. SAME—EFFECT OF SALE OF VESSEL IN ADMIRALTY.

All liens upon a vessel, whether impressed by general maritime law or local statutes, or created by bonds or mortgages, are completely and finally extinguished by a sale of the vessel pursuant to an admiralty decree in rem, and no lien for a pre-existing debt can thereafter be created or re-

¹ For maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.

vived, so as to become enforceable against the fund produced by the sale, to the exclusion of creditors whose liens were fixed before the sale.²

3. SAME—SURETY ON RELEASE BOND—SUBROGATION.

The effect of a bond given for the release of a vessel after its seizure by a court of admiralty in a suit in rem is to extinguish the lien of the libellant on the vessel, and a surety on such bond who pays the claim of the libellant after the vessel has been sold in subsequent proceedings to enforce other liens does not by such payment become subrogated to any right in the fund produced by the sale.

In Admiralty.

The steamer *Evangel* having been sold under a decree in admiralty to satisfy maritime liens, and said liens having been paid from the proceeds of the sale without exhausting the fund, the case came on to be heard upon questions as to the disposition to be made of the surplus and remnants.

Will H. Morris, for intervenor United States Fidelity & Guaranty Co.

Morris B. Sachs, for intervenor First Nat. Bank of Port Townsend.
A. W. Buddress, for intervenors Fowler and Katz.

HANFORD, District Judge. This is a suit in rem, against the steamer *Evangel*, to enforce a maritime lien for wages. The steamer, having been arrested under a writ of attachment according to the usual course in such cases, was released upon a bond given pursuant to section 941, Rev. St. U. S.; the United States Fidelity & Guaranty Company, one of the above-named intervenors, being the sole surety upon said bond. After being so released, she was retaken by the marshal under other writs sued out by intervening libellants claiming to have liens for wages and for supplies and materials furnished, and, after being released in a similar manner the second and third time, and again rearrested under similar process sued out by other intervening libellants, she was, pursuant to a decree of this court, sold to satisfy the demands of the intervening libellants who were adjudged to have valid maritime and statutory liens. The court also rendered a decree against the claimant and said surety company for the amounts adjudged to be due to the original libellant and each of the intervening libellants to whom security was given as above stated. After paying all costs, and the several amounts due to the intervening libellants in whose favor the decree was rendered for sale of the vessel, there remains in the registry of the court a balance of several hundred dollars of the proceeds of the sale to be disbursed. Since the sale of the vessel, the above-named surety company has paid the sums decreed against it in full, aggregating an amount exceeding the balance in the registry, and it is now before the court asking for said balance. The argument made in its behalf is founded upon the theory that, having secured the release of the vessel, and afterwards paying demands which were originally enforceable by process in rem, it is, according to principles of equity, entitled to be subrogated to the rights of the original creditors as lienholders,

² For extinguishment of lien by judicial sale, see note to *The Nebraska*, 17 C. C. A. 102.

and to claim the money in the registry in lieu of the liens upon the ship which were displaced by giving the several release bonds above mentioned. Each of the other interveners above named is the owner of a mortgage upon the vessel, given prior to the commencement of this suit, and they claim that the remnant of the fund should be paid to them in satisfaction pro tanto of the debts secured by their mortgages.

Whether or not the equitable doctrine of subrogation has any place in admiralty practice is not a question which must necessarily be decided in this case, because the surety company in whose behalf the doctrine is invoked will not present itself in a more favorable attitude for the purpose of claiming the fund in court, if the doctrine of subrogation shall be applied in this case, than it will otherwise occupy. According to the rule in equity, payment of the debt of another who is primarily liable under force of necessity, or compulsion, is essential to the right of subrogation, and a person, by his own voluntary act in becoming surety for a debtor, does not become subrogated to the rights of the creditor. The only change effected by the giving of the release bonds was to extinguish the creditors' liens upon the ship, and to substitute in place of the ship the personal security of the bonds. Subrogation could only take place when the surety company paid the amounts due to the creditors, and it could only acquire the rights of the creditors existing at the time of the payments; that is, the personal obligation of the signers of the bond.

The maritime law, as understood and administered by the courts in this country, gives a lien for money supplied for the use of a ship and necessary to enable her to proceed upon her voyage. *Thomas v. Osborn*, 19 How. 22-56; *The Grapeshot*, 9 Wall. 129-145. The lien for money advanced is similar in all of its essential features to maritime liens for other kinds of necessary supplies. *Davis v. Child*, Fed. Cas. No. 3,628. However, all liens upon a vessel, of every description, whether impressed by the general maritime law or local statutes, or created by bonds or mortgages, are completely and finally extinguished by a sale of the vessel pursuant to the decree of a court of admiralty in a suit in rem. In this case the rights of the parties now before the court became definitely fixed by the sale of the vessel. After the sale, no lien for a pre-existing debt could be transferred to the surety company, or revived, or enforced. The case may be summarized thus: The fund in court stands in place of the ship. It is insufficient to pay in full the debts for which liens attached to the ship before the sale. Therefore it all belongs to lien creditors. The liens in favor of those creditors who were paid by the surety company were displaced by the release bonds given for that purpose by the surety company. No lien in favor of the surety company for money advanced to pay lien creditors ever attached to the ship, because the money was not advanced until after the ship was sold. The mortgage liens were existing before and at the time of the sale. Therefore the mortgagees are entitled to the balance in the registry.

I have considered the following cases cited by counsel for the surety company: *The Tangier*, Fed. Cas. No. 13,744, *The J. A. Brown*, Fed.

Cas. No. 7,118, and *Carroll v. The T. P. Leathers*, Fed. Cas. No. 2,455. These decisions favor the application of the equitable doctrine of subrogation in admiralty practice, as do many others, but they do not give any countenance to a claim of the right to be subrogated by one who merely aided the owner of a vessel to extinguish liens by becoming a surety, and who did not pay any debt until after all liens for previously existing debts had been completely destroyed by an admiralty sale. The principle which must govern the decision of this case, and the reasons therefor, are concisely and strongly stated in the opinion by Mr. Justice Bradley in the case of *Roberts v. The Huntsville*, Fed. Cas. No. 11,904, and the authority of that case is supported by the decision of Judge Dyer in the case of *The Robertson*, Fed. Cas. No. 11,923, and the decision of Judge Toulmin in *The Madgie*, 31 Fed. 926.

Ordered that the balance in the registry be paid to the above-named mortgagees.

THE JENNIE MIDDLETON.

(District Court, D. New Jersey. May 23, 1899.)

1. MARITIME LIENS—REPAIRS IN FOREIGN PORT.

Where repairs are made in a foreign port by order of the managing owners, the presumption is against the existence of a maritime lien.¹

2. SAME—EVIDENCE.

The refusal of the managing owners to pledge their personal credit for repairs does not justify an inference of the existence of a maritime lien, where the repairer agrees to accept payment out of the earnings of the vessel as they accrue.

Joseph H. Brinton, for libellant.

Flanders & Pugh, for claimants.

KIRKPATRICK, District Judge. The libel in this case was filed to recover a balance due for repairs on the schooner *Jennie Middleton* incurred under the following circumstances; In March, 1898, the schooner *Jennie Middleton* was in the yard of the libelants at Camden, N. J., in need of repairs. The captain did not feel authorized to determine the extent of these repairs, and the shipwrights were referred by him to Messrs. Bartlett & Sheppard, of Philadelphia, who were the managing owners of the schooner, for orders respecting the same. Subsequently Mr. Mathis, one of the libelants, and Mr. Bartlett, one of the managing owners, met at the office of Bartlett & Sheppard, and discussed the matter of the extent of the repairs to the schooner, when Mr. Bartlett directed Mr. Mathis to make only such repairs as he might deem necessary. Mr. Mathis then asked if Messrs. Bartlett & Sheppard would personally guaranty the bill for the repairs, to which they replied, "No." It is asserted by Mr. Bartlett and by Mr. G. W. Sheppard, Jr., who was present at the interview, that Bartlett said to Mathis that, if he (Mathis) took the

¹ As to maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.

job of repairing the schooner, he would be obliged to wait for his pay until the schooner had earned the money, and that to this Mathis agreed. Mathis denies that he did so agree, but I think his denial relates to any express agreement on his part; for I am satisfied that the understanding of the parties was that the repairs should be paid from the earnings of the schooner, as has been their custom in previous dealings. It is not by any one alleged that at this meeting, when the repairs were ordered, anything was said by which it was agreed or suggested that the repairs should be a lien upon the boat. After being repaired, the schooner was permitted to leave the shipyard, and upon her voluntary return there, some months afterwards, this libel was filed. In *The Havanna*, 87 Fed. 487, Judge Butler said that, "where repairs are made in a foreign port on the order of owners, the presumption is against the existence of a maritime lien, and the burden is on the libellant to clearly show a contract." In the case of *The Havanna*, the home port of the vessel was Philadelphia. The repairs were made at Baltimore. The alleged lien was for a balance on repairs ordered by the managing owner. The repairs were charged to the vessel. In the absence of evidence tending to show express agreement for lien, the libel was dismissed. In the case under consideration, the same state of facts exists. The record fails to disclose any evidence of express contract for lien, and the only circumstance from which it could be inferred is the refusal of the managing owners to pledge their personal credit for the repairs. I think such inference, however, unwarranted, in view of the evidence relating to the agreement of the libellant to accept payment for repairs to the schooner out of the earnings as they accrued. In accordance with the principles laid down in *The Havanna*, 87 Fed. 487, affirmed 92 Fed. 1008, and the other cases therein cited, the libel will be dismissed.

RICHARD et al. v. HOGARTH et al.

(District Court, D. New Jersey. May 23, 1899.)

ADMIRALTY JURISDICTION—MARITIME CONTRACTS—SUIT FOR SERVICES IN PROCURING CHARTER.

A court of admiralty is without jurisdiction of a suit to recover compensation for services rendered in procuring a contract of affreightment for a vessel, the contract for such services not being maritime, but merely preliminary to a maritime contract; and it does not become maritime because of a provision of the charter party for the payment of the broker's commission and reciting that it is due by the vessel.¹

This was a suit in admiralty to recover for services rendered for procuring a contract of affreightment for a vessel owned by respondents.

Corbin & Corbin, for libellants.

Convers & Kirlin, for respondents.

¹ For admiralty jurisdiction as to matters of contract, see note to *The Richard Winslow*, 18 C. C. A. 347, and note to *Boutin v. Rudd*, 27 C. C. A. 530.

KIRKPATRICK, District Judge. This libel was filed by Oscar L. Richard and others, composing the firm of C. Richard & Co., against John Doe and Richard Roe, composing the firm of J. Hogarth & Co., to recover compensation for effecting a contract of affreightment for the steamship Folbridge, belonging to respondents. The answer of the respondents admits the rendition of the service by the libelants, but alleges that this court has no jurisdiction over the subject matter of the libel. This objection I consider well taken, and in entire conformity with the practice and decisions of our courts. In *Cox v. Murray*, Fed. Cas. No. 3,304, Betts, District Judge, said:

"Undertakings which are merely personal in their character, or which are preliminary to maritime contracts, do not seem ever to have been recognized as within the admiralty jurisdiction."

In *The Thames*, 10 Fed. 848, the court recognized this distinction between maritime contracts and those for preliminary services leading thereto, and distinctly held that a shipping broker had no lien on a vessel in admiralty for services in procuring a charter party. Services which incidentally benefit the voyage do not thereby become maritime. They acquire that quality only when the matters performed enable or aid the vessel to conduct the same. This doctrine is reaffirmed in *The Crystal Stream*, 25 Fed. 575, and by the circuit court of appeals for the Second circuit in *The Harvey*, and *Henry*, 30 C. C. A. 330, 86 Fed. 656.

It is insisted upon the part of the libelants that, because a clause for payment of broker's compensation was inserted in the charter party, the contract for its payment thereby became maritime in its nature. In this view I cannot concur. The question of jurisdiction does not depend upon the form of the contract, but the substance of the undertaking. The court regards the subject-matter. In order to give the court jurisdiction, the substance of the whole contract must be maritime. "It is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature." *Plummer v. Webb*, Fed. Cas. No. 11,233.

It is also urged that there is jurisdiction in admiralty because, by the terms of the contract, it is stipulated that "a commission is due by the vessel in signing this charter party." This stipulation, however, in my opinion, can impose no additional liability on the vessel, and can confer no jurisdiction on the court which it would not otherwise possess. *Torices v. Winged Racer*, Fed. Cas. No. 14,102.

Let a decree be entered dismissing the libel for want of jurisdiction.

FAIRGRIEVE et al. v. MARINE INS. CO. OF LONDON.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,144.

1. ADMIRALTY JURISDICTION—SUIT BETWEEN FOREIGNERS.

The admiralty courts of the United States have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise if for some special reason it appears to be inexpedient to exercise it, but a suit by a foreign marine insurance company against a vessel within the jurisdiction of the court, based on a right claimed under a policy of insurance issued in the United States, is one of which the court is not justified in declining jurisdiction.

2. PARTIES TO SUIT FOR COLLISION—SUIT BY UNDERWRITERS.

Where a marine insurance company has paid the full value of an injury to a vessel by collision caused by the fault of another vessel, so that there are no other claimants entitled to sue for the tort, it is subrogated to the right of action of the insured, and may maintain a suit against the offending vessel in its own name; but, when the value of the property destroyed exceeds the insurance money paid, the suit must be brought in the name of the insured, who may recover for the entire loss, as trustee for the insurance company as to the amount it has paid, and in his own right as to the remainder.

Appeal from the District Court of the United States for the District of Minnesota.

The Marine Insurance Company, Limited, of London, England, the appellee, libeled the Canadian steamer *Arabian*, in the Fifth division of the United States district court for the district of Minnesota. The libel alleged, in substance, that the insurance company issued a policy of insurance on the Canadian schooner barge *Minnedosa*; that, as the *Minnedosa* was going down the Welland Canal, the *Arabian* was going up the canal, and was so negligently managed that she inflicted on the *Minnedosa* damages to the extent of \$15,000 and more; that the policy contained a clause by the terms of which, in the event of loss or damage paid by the insurance company to the owners, the claim of the insured against any third party liable for the damage was assigned, to the extent of the amount paid, to the insurance company; and that, of the \$15,000 and upwards of damage, the libellant had paid to the owners \$8,051.20, and so by the terms of the policy, and because of such payment, became subrogated and entitled to sue in its own name for that part of the damages which libellant had paid. Before answering the libel, the claimants, J. B. and Hugh Fairgrieve, the appellants, citizens of the dominion of Canada, made protest and application to the district court to decline to entertain jurisdiction, because all the parties were British subjects; the subject-matter, the locality of the tort, and the parties being foreign to this country, and all citizens of the same foreign jurisdiction in which the tort occurred and the property belonged. The *Arabian* being within the jurisdiction of the court, this application was denied, and thereupon the appellants filed their claim and answer. Article 10 of the libel reads: "Tenth. That, under the terms of said policy of insurance, and because of the payment of said sum of \$8,051.20 to the said Montreal Transportation Company on account of said loss, the libellant became subrogated to the rights and claim of said Montreal Transportation Company against said steamer *Arabian*, and became thereby authorized and empowered to file this libel against the said steamer." The answer to this article of the libel is as follows: "(9) Your respondents deny the allegations of article tenth of the libel, and expressly deny the right, either by the terms of the contract or otherwise, of the libellant to file said libel in its own name against the said steamer *Arabian*. (10) Your respondents deny that by reason of the premises, by reason of the allegations in the libel, or for any reason, the libellant is entitled to recover and

receive of the said steamer Arabian the sum of eight thousand fifty-one and $\frac{20}{100}$ dollars, with interest, or any sum whatever, or to prosecute this action therefor in the manner and form as it attempts to do, and admits that the respondents have refused, and do refuse, to pay that sum or any part thereof."

Harvey D. Goulder (Searle & Spencer, on the brief), for appellants.
C. E. Kremer, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts as above). The objection to the jurisdiction of the district court is not tenable. Though the appellee is a foreign insurance company, its policy was issued at Chicago, in the state of Illinois, and no law of comity is violated by litigating any rights claimed under or growing out of the policy in the courts of the country where it was issued and by whose laws its validity must be determined. It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where, for some special reason, it appears to be inexpedient to exercise it, but there is no fact disclosed by this record that would justify the district court in declining to take jurisdiction of this case. 2 Pars. Mar. Law, 543; Taylor v. Carryl, 20 How. 611; The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860; Enos v. Sowle, 2 Hawaii, 332; Warren v. The Benjamin Rush, Id. 478.

It will be observed that the libelant avers that the damage to the Minnedosa was \$15,000 and more, of which the libelant has paid \$8,051.20 only. The remaining damage is due to the assured or other insurers, and there is no averment in the libel that it has been paid or discharged, or is no longer a subject of contention between the insurers and the assured, or those who may be subrogated to the rights of the assured. Upon this state of facts, can the insurance company maintain this action in its own name? The contention that this objection was not raised in the claim and answer is not supported by the record, as plainly appears from portions of the libel and the answer quoted in the statement. Neither the common law nor code practice and pleadings obtain in admiralty. Under the practice in admiralty, the right of the libelant to sue could not be raised by demurrer or plea in abatement, but could be raised only by the answer, as was done. Rule 27 of the rules of practice in admiralty prescribed by the supreme court of the United States requires that "the answer shall be full, explicit, and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel." The answer in this case conforms to this rule, and took issue with the averment in the libel that the libelant was "authorized and empowered to file this libel against the said steamer," and expressly denied the right "of the libelant to file said libel in its own name."

If the libelant can maintain this action in its own name, then a claim arising out of a single tort may be split, and give rise to as many different actions as there may be subrogated underwriters,

and one additional action to the owner for his damages, and these actions may be prosecuted in different jurisdictions, and the tortfeasor called upon to repeat any defense that he may see fit to present in as many different suits in different jurisdictions as there are parties interested. This precise question was before this court in the case of *Norwich Union Fire Ins. Soc. of Norwich v. Standard Oil Co.*, 19 U. S. App. 460, 8 C. C. A. 433, 59 Fed. 984, and we there held that, when an insurance company pays to the insured the amount of a loss on the property insured, it is subrogated in a corresponding amount to the right of action to the insured against any other person responsible for the loss. This right of the insurance company against such other person is derived from the insured alone, and can be enforced in his right only. At common law, it must be asserted in the name of the insured; in a court of equity, or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed; but, when the value of the property destroyed exceeds the insurance money paid, the suit must be brought in the name of the insured. In such an action the insured may recover the full value of the property destroyed from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee, and the wrongdoer will not be permitted to plead a release of the cause of action from the insured, or to set up as a defense the insurance company's payment of its part of the loss. That case was exhaustively argued for the insurance company by able counsel, and received the careful consideration of the court. To the authorities then cited in support of the ruling of the court may be added the case of *Continental Ins. Co. v. H. M. Loud & Sons Lumber Co.*, 93 Mich. 139, 53 N. W. 394. We see no reason to depart from the conclusion then reached. It will be open to the libellant, when the record is returned to the district court, to amend its libel, and show, if it can, that the excess of damages over the sum for which it sues has been paid, released, or otherwise extinguished, so that the claimants are no longer liable to an action therefor at the suit of any one. In the absence of some such showing, the libel will have to be dismissed. Upon this record our judgment in *Norwich Union Fire Ins. Soc. of Norwich v. Standard Oil Co.*, *supra*, is decisive, and the decree of the district court must be reversed and remanded for further proceedings in accordance with this opinion. It is so ordered.

GEORGE et al. v. RIDDLE et al.

(Circuit Court, D. Washington, S. D. May 22, 1899.)

PUBLIC LANDS—NORTHERN PACIFIC RAILROAD GRANT—RIGHTS ACQUIRED BY PRIVATE ENTRY—COMPELLING CONVEYANCE BY PATENTEE.

The provision of section 6 of the act of July 2, 1864 (13 Stat. 365), making a grant of lands to the Northern Pacific Railroad Company, that "the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided by this act," affected only lands within the limits of the grant as fixed by the definite location of the road; and the fact that land at the time of its cash entry by an individual was within 40 miles of the line of road as shown by the map of general route theretofore filed, the lands not having been withdrawn from private entry, did not affect the validity of such entry, where the land was outside the limits of the grant as subsequently fixed by the map of definite location, and was never claimed under the grant by the railroad company. Nor could the purchaser be deprived of the equitable title to such land by the arbitrary action of the land department, taken after the definite location of the railroad, and after his grantees had entered into possession and made improvements, in canceling his entry without notice to such grantees or the return of the purchase money, and in patenting the land to another on a subsequent entry; and where such entry was made with knowledge of the facts, and of the possession and claims of the grantees of the former purchaser, a court of equity will compel a conveyance from the patentee to the equitable owners.

Suit in equity against the holder of a United States patent for land, of which the plaintiffs claim to be the equitable owners, for a decree directing a conveyance of the legal title, and to cancel a mortgage given by the patentee.

Richard H. Ormsbee, Melvin M. Godman, Thomas H. Brents, and Wellington M. Clark, for complainants.

B. L. & J. L. Sharpstein, for defendants.

HANFORD, District Judge. The undisputed facts in this case, briefly stated, are as follows:

On November 8, 1870, the land in controversy appeared upon the plats in the land office for the district in which the same are situated to be vacant, unappropriated public land, offered for sale under the then existing land laws of the United States at private cash entry; and on said date James K. Kennedy made application to purchase the same, and paid the price therefor to the receiver. The officers accepted the application and money, and issued to said purchaser a patent certificate, stating that he had purchased and paid for the land according to law, and was entitled to receive a patent therefor; but no patent has ever been issued to him or to his vendees. Nearly two years after the entry, and before any proceedings to cancel the same had been commenced, said purchaser sold part of the land to one George, and the remaining part to one Bruce; and immediately thereafter these vendees caused their deeds to be properly recorded in the public records of Walla Walla county, in which the land is situated, and inclosed the same by substantial fences, and commenced cultivation thereof, and have made valuable improvements thereon; and they and their successors in interest have, ever

since the date mentioned, held actual, visible, and exclusive possession of said land, except as hereinafter recited; and the plaintiffs now claim to be the equitable owners, as the lawful successors in interest of their ancestors, George and Bruce, the vendees of the original purchaser from the government. The land is part of an odd-numbered section, but not part of the grant to the Northern Pacific Railroad Company, because not within the limits of the granted lands as fixed and determined by the definite location of the line of the railroad, and it has not been selected or claimed by the railroad company as lieu land. Nevertheless the land department has assumed to cancel the above-mentioned cash entry on the ground that at the date of the entry the land was not subject to sale, because situated within 40 miles of the line of the general route of the Northern Pacific Railroad, as indicated on a map filed in the general land office on the 13th of August, 1870. The only authority for canceling the entry claimed by the land department or the defendants is found in the 6th section of the charter of the Northern Pacific Railroad Company (Act July 2, 1864 [13 Stat. 365]), which reads as follows:

"Sec. 6. And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act.

* * *

It was the practice of the land department to promulgate an order withdrawing from sale, and from pre-emption and homestead entries, all odd-numbered sections of land within 40 miles of the proposed line of the Northern Pacific Railroad, after receiving each of the maps of the general route which the company filed, and before the grant had become legally attached to the land within such limits by the definite location of the line of the road; but no order withdrawing the lands in controversy from sale was promulgated until December 8, 1870, which was a month after the above-mentioned cash entry. Before the initiation of any proceedings to cancel said entry, to wit, on February 21, 1872, the Northern Pacific Railroad Company filed in the general land office an amended map of its general route, making such a deviation from the line indicated by the map filed August 13, 1870, as to exclude the land in controversy from the 40-mile limit. The action of the land department in assuming to cancel the entry was initiated after the original purchaser had sold the land and conveyed all his interest therein; and after his vendees had recorded their deeds and entered into actual possession of the land; but notice of such proposed cancellation was not given to them, and they had no actual information thereof, or opportunity to be heard in opposition thereto, and the money paid to the government for the land has not been repaid or tendered to the original purchaser, his vendees, or their successors. In the year 1882 the father of the defendant Riddle purchased George's part of the land on credit, and gave a mortgage upon it for the purchase money, no part of which has been paid; and the mortgage has been duly foreclosed and repurchased by George, who resumed possession. During the time that

the George tract was in possession of said purchaser, he neglected to keep up the fences, and said defendant made entry upon the land in his father's possession, through a gap in the fence, and erected a house thereon, and thereafter filed an application in the land office to enter the entire tract, including the portion in possession of the Bruce family, under the homestead law. At and previous to the time of initiating his homestead claim, said defendant was fully informed as to all the facts in regard to the cash entry and sale of the land to George and Bruce, and their possession, cultivation, and improvement of it, as above recited. In the face of all these facts the land department allowed the entry of Riddle to stand, and a patent for the land has been issued to him. After he received his patent certificate, and before the issuance of the patent, and while Bruce and George were in possession of the land, asserting their ownership, Riddle mortgaged the land to Krutz, his co-defendant.

It seems hardly necessary to make any comment upon the above facts, and the rights of the complainants are so obvious that the ground for discussion of legal questions is very narrow. It seems to me that it would be difficult to imagine a more flagrant case of dishonest land-jumping, and, if the proofs were not indisputable, it would scarcely be believed that the land department could have given support to Riddle's claim. With entire fairness to the defendants, the preliminary part of the argument made in their behalf may be condensed into the simple proposition that the patent is a conveyance of the legal title to the land from the government to the defendant George M. Riddle, and, so far as affects the inquiry in this case, the defendants have a perfect and vested right to the land, unless the complainants show affirmatively that their right to the land is paramount in equity. This much must be conceded in their favor, and the whole controversy must be determined by a decision of the single question whether the cash entry made by Kennedy is valid, notwithstanding the attempted cancellation of it by the land department. The facts being undisputed, the decision of the land department was necessarily a decision of a question of law, and, if erroneous, the court is not precluded from considering the case freely, as if there had been no such attempted adjudication. Individuals who purchase land from the government pursuant to the public land laws of the United States acquire thereby vested rights, which cannot be divested by the mere arbitrary pronouncement of officers of the land department. *Cornelius v. Kessel*, 128 U. S. 456-463, 9 Sup. Ct. 122. The argument against the validity of Kennedy's cash entry rests entirely upon the authority of the decisions in the following cases: *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100; *Railroad Co. v. Orton*, 6 Sawy. 157, 32 Fed. 457; *Knevals v. Hyde*, 6 Fed. 651. These cases are relied upon to support the contention that the clause of the sixth section of the Northern Pacific Railroad Company's charter above quoted must operate by its own force to withdraw from market all odd-numbered sections of land within the specified limits on each side of the line of the general route of the railroad, immediately upon filing the map thereof in the general land office; and the validity of said cash entry is not questioned by the defendants on any other ground than this: that the land was

not subject to sale on November 8, 1870, because it was situated within said limits, as defined by the map of the general route of the Northern Pacific Railroad Company previously filed. If this land was within the limits of the grant as the same had been fixed by the definite location of the line of the Northern Pacific Railroad, the cases cited would require serious attention, and it would be necessary to determine whether, in view of the later declarations of the supreme court, they might be safely followed as trustworthy guides leading to the correct interpretation of the grant. The broad statement in the opinion by Mr. Justice Field in the case of *Buttz v. Railroad Co.*, that "when the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side," is not warranted by the words of the charter, and is inconsistent with recent decisions of the supreme court,—notably, in the case of *Railroad Co. v. Sanders*, 166 U. S. 620-637, 17 Sup. Ct. 671, wherein the court, in the opinion delivered by Mr. Justice Harlan, after quoting from the sixth section the clause which is supposed to invalidate the entry, viz. "the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act," makes the following comment:

"But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section 3, which manifestly contemplates that right of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed, and before the line of definite location was established. * * * The third and sixth sections must be taken together, and, so taken, it must be adjudged that nothing in the sixth section prevented the government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

However, it is unnecessary to review and contrast the different decisions in which this statute has been under consideration, for the reason that the cases cited by counsel for the defendants are so different from the case under consideration that they do not bear at all upon the point to which attention must be directed in this case. It must be kept in mind that the land here in controversy is not within the limits of the grant to the Northern Pacific Railroad Company, as fixed by the definite location of its line, so that the grant never in fact became attached to this land, and no right to the land is being asserted by the railroad company, or by virtue of any purchase from the railroad company. In the case of *Knevals v. Hyde* the court did not have to construe the grant to the Northern Pacific Railroad Company, nor any similar act of congress. The opinion contains no allusion whatever to any map of general route preliminary to the definite location of the railroad, and the decision of the court is to the effect that the line of the railroad had been definitely fixed, that the grant had actually attached to the land in controversy, and the equitable title thereto became vested in the company, prior to the origin of the adverse title claimed by the defendant. In each of the other cases the title of the

railroad company under a grant from congress was involved, the land in controversy being within the limits of the grant as fixed by the definite location of the company's line. These cases are not in point here, for the reason that the lands involved in this case were not granted by act of congress to the Northern Pacific Railroad Company, and therefore are not within the terms of the sixth section, which provides for surveying a strip 40 miles in width on both sides of the entire line after the general route shall be fixed, but says nothing about restricting sales or entries of odd-numbered sections within 40-mile limits. The restricting clause refers only to land granted by the act, and cannot by any rule of construction be extended so as to interfere with the sale by the government of lands not granted. "Any other interpretation would defeat the evident purpose of congress in excepting from railroad grants lands upon which claims existed of record at the time the road to be aided was definitely located." *Railroad Co. v. Sanders*, 166 U. S. 630, 17 Sup. Ct. 674; *Menotti v. Dillon*, 167 U. S. 720, 17 Sup. Ct. 945.

The whole case may be summed up in a few words: Kennedy's cash entry was made in good faith in accordance with the laws existing at the time it was made, and the government has received and retained his money. Naught appears to affect the validity of the entry, except the order canceling it, made upon no other ground than an assumption that it conflicted with the rights of the Northern Pacific Railroad Company under its congressional grant. The entry does not conflict with the grant to the Northern Pacific Railroad Company, because the land is outside of the limits of the grant, and the entry does not even conflict with any regulation or order of the land department in force at the time it was made or at the time the cancellation was ordered. I must therefore conclude that the plaintiffs have established their claims as equitable owners of the land in controversy, and they are entitled to have a decree requiring the defendant Riddle to convey to them the legal title, and declaring the mortgage held by the defendant Krutz to be void in so far as it affects the land in controversy, and to have an injunction forbidding any proceedings to foreclose said mortgage or to enforce any rights thereunder.

SANITARY REDUCTION WORKS OF SAN FRANCISCO v. CALIFORNIA
REDUCTION CO. et al.

(Circuit Court, N. D. California. May 25, 1899.)

No. 12,714.

1. PRELIMINARY INJUNCTION—NATURE OF EVIDENCE BEFORE GRANTING.

The granting of a provisional injunction rests in the sound discretion of the trial court, and it is not necessary that the court should, before granting it, be satisfied, from the evidence before it, that the plaintiff should certainly prevail upon the final hearing of the cause.

2. MUNICIPAL CORPORATIONS—MODE OF GRANTING FRANCHISES AND PRIVILEGES
—STATUTES OF CALIFORNIA.

St. Cal. 1893, p. 299, § 1, prescribing the manner in which franchises and privileges shall be granted by municipalities, and providing that they

shall be granted in the manner therein provided, "and not otherwise," is applicable to the sale of the franchise in this case.

3. SAME—POWER TO MAKE SANITARY REGULATIONS—CONTRACTS FOR CREMATION OF GARBAGE.

Under the constitution and statutes of California, the board of supervisors of the city and county of San Francisco has power to provide for the removal and disposition of garbage and materials about to become nuisances, and may do so by contract giving the exclusive privilege of receiving and cremating such garbage for a term of years to a single person or corporation, and authorizing the collection of a fixed charge therefor.

4. PRELIMINARY INJUNCTION—RESTRAINING INTERFERENCE WITH CONTRACT.

The holder of a contract from a municipality giving it the right to receive and reduce all the garbage therefrom for a term of years, at a fixed charge therefor, on a showing that in compliance with such contract it has built a crematory at large expense, is entitled to a preliminary injunction against third parties, restraining them from collecting and removing garbage to other places, in violation of its contract rights, pending a hearing on its bill for the recovery of damages and for a permanent injunction.

On Order to Show Cause Why an Injunction Pendente Lite should not Issue.

William M. Pierson and Charles L. Tilden, for complainant.

Alfred L. Black, for respondent California Reduction Co.

Garret W. McEnerney, R. T. Harding, and Mich. Mullaney, for other respondents.

MORROW, Circuit Judge. This is an order to show cause why an injunction pendente lite should not issue. Complainant's bill is brought to secure an injunction restraining respondents from carrying away, outside of the city and county of San Francisco, certain garbage and other enumerated materials collected therein, of which complainant claims exclusive right to dispose; also, for the sum of \$25,000 as damages for infringement of complainant's rights. Complainant's bill alleges that it is a corporation duly organized under the laws of California, and that the respondent corporation is organized under the laws of Colorado, and that the other respondents are aliens, residents of the city and county of San Francisco; that a certain order, known as "Order No. 2,965," was duly and finally passed, adopted, and enacted by the board of supervisors of the city and county of San Francisco on February 17, 1896; that another order, known as "Order No. 12" (second series), and one known as "Resolution No. 903" (fourth series), were also regularly enacted in order to carry out the provisions of order No. 2,965 the more effectively; that by virtue of order No. 2,965 a valid contract was entered into between the city and county of San Francisco and one F. E. Sharon, under the terms of which the said F. E. Sharon was to have the exclusive privilege, for the period of 50 years from February 17, 1896, of cremating and reducing garbage and other specified materials collected in the city and county of San Francisco, at a maximum charge of 20 cents per cubic yard, and the said F. E. Sharon, on his part, was to erect a crematory of the capacity of at least 300 tons a day, to reduce the enumerated substances within 24 hours of their receipt, and in such a manner as to avoid the emission of nox-

ious gases; that this contract was assigned by F. E. Sharon to complainant on September 18, 1896; that complainant has carried out the provisions of the contract, having erected a crematory at a cost exceeding \$200,000, and notified the board of supervisors of its readiness to receive garbage for reduction, and that, unless complainant can have the exclusive right of cremating and destroying the materials mentioned, the contract and franchise so entered into will be rendered worthless; that complainant has faithfully discharged the obligations imposed upon it by the contract; that the respondents other than the respondent corporation have hindered complainant in carrying out its contract by diverting large quantities of garbage and other materials from complainant's crematory, and depositing them upon lands in the city and county of San Francisco, and that some of them have been arrested and fined for so doing; that the respondent corporation was organized under the laws of Colorado for the express purpose of depriving complainant of its lawful gains by preventing large quantities of garbage from reaching the crematories of complainant, and shipping it away and depositing it on lands in the county of San Mateo and elsewhere, outside of this city and county; that in pursuance of the same object the other respondents have conspired with the respondent corporation to deliver daily to it large quantities of garbage, thus diverting it from the crematory of complainant, and that in pursuance of this conspiracy the respondent corporation has hired two barges, capable of carrying more than 500 tons, for the purpose of transporting garbage and such materials to the county of San Mateo, and other places outside of this city and county; that, by reason of these acts of respondents, complainant's contract and franchise have been depreciated, and damages have been inflicted upon it to the amount of \$25,000; that many of the enumerated materials, when reduced, are of value as articles of commerce, and that the acts of respondents are depriving complainant of just gains and profits to an amount which it is impossible to state; that complainant is under a contract with the city and county of San Francisco to incinerate all the garbage and enumerated articles, and, if respondents are allowed to divert material from complainant, complainant will be rendered liable for breach of contract, and will thereby suffer great and irreparable injury; that complainant has frequently requested respondents to desist, but they have not done so, and, if they continue to infringe upon complainant's rights, complainant will suffer great and irreparable injury, without any plain, adequate, and complete remedy at law; that respondents have not yet begun to engage in any business except the hiring of barges for the purpose of diverting garbage from complainant; that respondents' acts are contrary to equity; and that complainant has no remedy at law. Complainant therefore asks that an injunction provisional and perpetual issue, and for damages to the amount of \$25,000. A restraining order was issued upon the filing of the bill.

A several answer was filed by the respondent California Reduction Company, and a joint and several answer by the other respondents. Respondents deny the validity of the Order No. 2,965, and that it was ever "duly and finally passed, adopted, and enacted."

Deny that the complainant has cremated the garbage and other materials within 24 hours, in such a way as to create no nuisance, but aver that a nuisance has been created by complainant. Deny that the respondent corporation was organized for the purpose of diverting garbage from complainant; that respondents have been repeatedly arrested and fined for violation of the ordinances named; that any confederacy or conspiracy has been formed for the purpose of interfering with complainant in carrying out the terms of its alleged franchise; that complainant is entitled to all the garbage, etc., collected in the city and county of San Francisco, but aver that it is only entitled to so much as is voluntarily taken to its crematory. Deny that complainant has suffered damage to an extent which it is impossible to estimate; that complainant is bound by any franchise to cremate all the garbage collected in the city and county of San Francisco, and that it will be liable for violation of the alleged franchise if it does not do so; that they have unlawfully combined, confederated, and conspired as charged in the bill. Admit that they have not yet begun to engage in any business other than the hiring of barges, as stated in the bill, but deny that this is being done in pursuance of any contract. Respondents also offer various affirmative defenses, by which respondent corporation avers that it is engaged in a lawful occupation, from which it would be deriving large profits, were it not for the stay order issued herein; that complainant can claim nothing under the franchise, as not having complied with the requirement that no nuisance shall be created in the reduction of the materials named; and because complainant has charged a sum in excess of 20 cents per cubic yard for the cremation of such materials. Respondents other than respondent corporation also offer affirmative defenses, in which they state that the Order No. 2,965 is null and void, in that the franchise was not granted to the highest bidder; that complainant has no rights under the franchise, because it has not complied with the conditions requiring the cremation of the specified materials without creating a nuisance, and has charged in excess of 20 cents per cubic yard of garbage brought for reduction; that respondents are scavengers, and were engaged in delivering materials to respondent corporation, and that they are prevented from lawful gains by the stay order granted herein; that the respondents are householders, and create large quantities of the materials enumerated; that these materials are of value to them, and they claim the right to dispose of them in such a way as not to cause a nuisance. Respondents ask for a dissolution of the stay order, and that no injunction be issued.

The argument of counsel has followed the wide range of the affirmative defenses set up in the respondents' answers. To determine these defenses now would, in effect, dispose of the case upon its merits,—a result not contemplated by the rules governing courts of equity in granting preliminary injunctions. "The order for such an injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to preserve the existing state of things until the case has been fully

heard by the court, and the entry of a final decree therein. And it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the court in *Georgia v. Brailsford*, 2 Dall. 402, 'a probable right, and a probable danger that such right will be defeated, without the special interposition of the court,' is all that need be shown as a basis for such an order. See, also, *Blount v. Société Anonyme du Filtre Chamberland Système Pasteur*, 3 C. C. A. 455, 53 Fed. 98, and cases therein cited." *Southern Pac. Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 691. Under these circumstances, the affirmative defenses set up by respondents cannot be considered as factors in determining this order to show cause.

Complainant's claims to an injunction are based upon the franchise alleged to have been granted by the terms of the order known as "Order No. 2,965 of the Board of Supervisors of the City and County of San Francisco," and in accordance with the provisions of an act of the legislature entitled an "Act providing for the sale of railroad and other franchises in municipalities and relative to granting of franchise," approved March 23, 1893. St. Cal. 1893, p. 288. The first section of this act reads:

"Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other public privilege whatever hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city or county, city, town or district, within this state, shall be granted upon the conditions in the act provided, and not otherwise."

Respondents maintain that the franchise alleged to have been granted to complainant is invalid, because it was not granted according to the provisions of the consolidation act of the city and county of San Francisco (St. Cal. 1856, p. 164), section 68 of which provides that every ordinance or resolution of the board of supervisors granting any privilege, or involving the lease or appropriation of public property or the expenditure of public moneys (except for sums less than \$500), must be published, with the ayes and nays, in a city daily newspaper for five successive days before the board take final action, and every such ordinance must be presented to the president of the board for his approval. If he approve, he shall sign it; and, if not, he shall return it to the board, with suggestions in writing, within 10 days. The board shall then enter the objections on the journals, and publish them in some city newspaper. If at any stated meeting thereafter two-thirds of the board—changed to three-quarters (St. Cal. 1867-68, p. 702)—vote for such ordinance or resolution, it shall then, despite the objections of the president, become valid. The consolidation act, it is argued by respondents, was not superseded by the act of 1893, and the franchise claimed by complainant should have been granted in accordance with its terms. The act of 1893, however, provides very clearly that such franchises as are specified, and "any

other public privilege whatever hereafter proposed to be granted by the board of supervisors, * * * shall be granted upon the conditions in the act provided, and not otherwise." In the case of *People v. Board of Sup'rs of Contra Costa Co.*, 122 Cal. 421, 55 Pac. 131, it was decided by the supreme court of this state that a franchise for the construction and maintenance of a wharf should have been granted under this act of 1893. The court said, speaking of the act quoted above:

"This language is broad in its terms. It is difficult to imagine language broader in its significance, and more explicit upon the subject with which the act is dealing. It includes the franchise here before us."

And again:

"It is insisted that the board made a grant of the franchise under certain provisions of the Political Code, and therefore it is claimed that the act of the legislature passed in 1893 cannot furnish a test upon which to base a decision as to an exercise or nonexercise of judicial function on the part of the board in granting the franchise. This position cannot be maintained. This franchise should have been granted by the supervisors under the provisions of the act of 1893."

In face of this decision of the supreme court, respondents' contention in regard to the invalidity of order No. 2,965, as based solely upon the act of 1893, cannot be sustained.

In the constitution of 1849 it was provided, in article 11, § 5:

"That the legislature shall have power to provide for the election of a board of supervisors in each county, and these supervisors shall jointly and individually perform such duties as may be prescribed by law."

By the act of April 25, 1863 (St. Cal. 1863, p. 540), it was provided that:

"The board of supervisors of the city and county of San Francisco shall have power, by regulation or order; * * * to authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide, by regulation, for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of said city and county."

And in the constitution of 1879 it was provided, in article 11, § 11, that:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In the case of *Alpers v. City and County of San Francisco*, 32 Fed. 503, Mr. Justice Field, in speaking of the power of the municipality of San Francisco to make provision for the removal of nuisances, said:

"There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city; its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations."

* * * The contract in question does not appear to be open to any serious objection. None is alleged against its provisions. It imposes no burden upon the municipality. The removal of the dead animals is to be made without any expense to it. The compensation of the party making the removal is to be found in the uses to which the animals are or may be put. Their hides are converted into leather, from some of which shoes, from others gloves, are made. Of their bones, buttons or handles for knives may be manufactured; from their flesh and fat, various oils may be distilled for use in the arts. And, in case of horned animals, glue from their hoofs and combs from their horns may be made. Indeed, all parts of the animals may be put to some useful purpose. It requires, however, for such uses, special and somewhat expensive machinery, and also, it is said, the employment of hands trained to the business. All these facilities, the bill alleges, have been provided by the plaintiff."

Fertilizer Co. v. Lambert, 48 Fed. 458, was a suit brought by the assignees of the above *Alpers* to restrain respondents from infringing upon the exclusive right of complainant under the contract. Judge Hawley quoted the language of Justice Field in the *Alpers* Case, and gave the complainant the injunction asked for.

These authorities establish the doctrine that the board of supervisors has the power to provide for the removal of garbage and materials about to become nuisances. The decision of the board of supervisors that various enumerated materials are nuisances is conclusive of the fact.

In *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, the petitioner had been convicted and imprisoned for violating a city ordinance of the city of Los Angeles which provided:

"No person or persons shall establish or conduct any steam shoddy machine, or steam carpet-beating machine, within one hundred feet of any church, school-house, residence or dwelling-house."

It was contended that the ordinance was void on the ground that it interfered with certain of the petitioner's inalienable rights, vouchsafed to him by the constitution. On the part of the city it was claimed that the passage and enforcement of the ordinance was but the exercise of a police power granted to it by the constitution of the state, in terms. The supreme court passed upon the question in controversy as follows:

"Conceding the business covered by the provisions of this ordinance not to constitute a nuisance per se, and to stand upon different grounds from powder factories, street obstructions, and the like, still the case is made no better for petitioner. This is not a question of nuisance, per se, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances per se, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc.,—a class of business undertakings in the conduct of which police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say, 'I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact.' In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities, and decided against petitioner and all others similarly situated."

See, also, *Ex parte Casinello*, 62 Cal. 538; *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207.

The charge of 20 cents per cubic yard of garbage brought for re-

duction to the crematory cannot be regarded as in the nature of a tax or assessment, or as a charge which the board of supervisors has no right to impose. This question was before the court in the case of *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, and 39 N. E. 869. An ordinance was there under consideration providing that garbage should be collected only by the city's licensed agent, and that the parties producing garbage should place it in boxes for removal provided by such agent at their expense, and a contract empowering the contractor to collect such garbage and to charge a specified price per pound for its removal. It was contended that the provision for payment by the householder for the removal of the garbage was an assessment against him or his property, and, as the charter did not confer the power to make an assessment of this kind, it could not be made. The court said:

"Whatever else it may be, it is certainly not an assessment. It has not a single element of an assessment, for the reasons—First, that, except by the voluntary act of the householder, nothing is to be paid at all; second, no definite amount, in any event, is to be paid; third, nothing is made a charge upon the property. The whole arrangement is simply a provision by the ordinance—First, that garbage shall be collected and carted through the streets only by the licensed agent of the city; second, that parties producing the garbage needing to be thus carted away shall place the same in proper vessels, convenient for the removal by such agent; and, third, that such agent shall charge not exceeding the price named for removing the same. It is no more an assessment than is the provision of the ordinance fixing the rate of payment for gas or water, or street-car fare."

The law as established by the *Slaughter-House Cases*, 16 Wall. 36, is clearly decisive as to the question of the right of a municipality to impose a reasonable charge for the removal of a nuisance, and it is not claimed in the present case that the charge imposed by the ordinance is excessive. The court in that case said:

"Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are unable to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are, on the whole, exorbitant or unjust."

Respondents maintain that their acts do not injure the complainant; but, if complainant is entitled to the whole of the garbage created in the city and county of San Francisco,—and such is its claim,—it is obvious that the continual shipment of it must necessarily be injurious to its interests, and to a degree which would render an injunction pendente lite appropriate, under the circumstances. Let a preliminary injunction issue in accordance with the prayer of the bill of complaint.

HASELTON v. FLORENTINE MARBLE CO.

(Circuit Court, D. Vermont. May 12, 1899.)

1. MORTGAGES—RIGHT TO FORECLOSE—AGREEMENT FOR EXTENSION.

An agreement between mortgagor and mortgagee, after condition broken, that the time for making payment might be deferred, but not for any definite time, will not defeat the right of entry given by the terms of the mortgage, nor bar proceedings for foreclosure.

2. ATTORNEY AND CLIENT—POWERS OF ATTORNEY.

The relation of attorney and client alone will not confer on the attorney authority to bind his client by an agreement to extend the time for payment of a mortgage debt owned by the client.

In Equity. On motion for the appointment of a receiver.

Chas. M. Wilds, for plaintiff.

Frederick H. Button and Eleazer L. Waterman, for defendant.

WHEELER, District Judge. This bill is brought for foreclosure of a mortgage on, and sale of, marble lands and quarries, "and all and every and each of the engines, boilers, derricks, channeling machines, ropes, pulleys, gang saws, mills, houses, machinery, and appliances, and all the railroad tracks, switches, sidings, leases, and all and singular the real and personal property of the said Florentine Marble Company, in the state of Vermont, which it now owns, or which it may hereafter own, in connection with the operation of its business in said state of Vermont," to secure six notes of the defendant, dated September 1, 1897, by whomsoever held,—one of \$3,659.86 and one of \$6,340.14, due in one year from date, and four of \$10,000 each, due, respectively, in two, three, four, and five years from date, with interest semiannually. The condition of the mortgage is:

"Now, if default be made in the payment of said six promissory notes, or any part thereof, the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste, or non-payment of taxes or assessments upon said premises, or a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest secured by the said six promissory notes shall thereupon, at the option of the legal holders of any of said notes, become immediately due and payable; and on the application of the legal holder of said promissory notes, or either of them, it shall be lawful for the said grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues, and profits thereof, and operate said quarries and business in his own name, as such trustee, and in his own name or otherwise to file a bill or bills, in any court having jurisdiction thereof, against the party of the first part, its successors or assigns, and obtain a decree for the appointment of a receiver, and for the sale and conveyance of the whole or any part of said premises for the purposes herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale, and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and reasonable attorney's and solicitor's fees, to be fixed by the court, and also all other expenses of this trust, including all moneys advanced for abstracts of title, for insurance, taxes, and other liens or assessments, with interest thereon at six per cent. per annum; then to pay the principal of said first maturing notes due one year from the date thereof, and the balance upon the

four notes, of ten thousand dollars each, due two, three, four, and five years from date, respectively."

The bill and answer show that Martha E. Worthy, at whose request this suit is brought, holds and owns all the notes but that of \$6,340.14, which is held and owned by Samuel A. Tolman. The interest has been paid as it fell due. The answer sets up an agreement with the attorney of Mrs. Worthy and with Mr. Tolman to extend the time of the two first notes one year, which, with authority to make it, as to the one held by Mrs. Worthy, is denied by her. A motion for a receiver has now been heard on bill, answer, and affidavits.

The alleged agreement to extend time is relied upon to defeat the motion for a receiver. If there was such valid agreement, before condition broken, to extend the time beyond when the bill was brought, it might save the breach upon which the bill is founded. But no agreement to extend any definite time appears, or is claimed to have been made, before the first two notes fell due. There was talk about it before, and correspondence after, which, however, appear to have never amounted to more than a loose understanding that payment might then be deferred, but not for any definite time. This would not divest the right of entry accrued by the breach of condition, nor bar proceedings of foreclosure. Authority to make such an agreement would need to be shown, beyond the relation of attorney and client, which is not only not shown, but the want of it is made to appear.

The option to have the whole debt become due on default of part was attempted to be exercised after the next installment of interest was paid, and after this suit was begun. Question has been made in argument whether the attempt was seasonable. That question is not material, however, on this motion; for the orator had the right to enter upon the mortgaged premises and property, and take the rents and profits to apply on the debt, and to have a receiver appointed for that purpose, upon any breach of condition, according to the terms of the mortgage. That question may properly arise when payment of that part of the debt is reached in the course of the proceedings.

By the terms of the mortgage, the mortgagor had the right to the possession and control of the property, and "to quarry and sell marble therefrom, and carry on the business," in the ordinary way, so long as the conditions of the mortgage should be performed. Question is also made whether the mortgage covers marble quarried by the mortgagor in possession. The words, "all and singular the real and personal property of the said Florentine Marble Company, in the state of Vermont, which it now owns, or which it may hereafter own, in connection with the operation of its business," would seem broad enough to cover this marble, if operative upon it. The other property could be mortgaged, mostly or wholly, as real estate could. V. S. § 2269. This would be personal property, but a mortgage of it as if real estate would seem to be valid against the mortgagor; and, with possession, against all. Section 2252. The temporary receiver appointed on consent is understood to be now in

possession of the property, with the rest, which would perhaps be sufficient. This possession should be continued, but without prejudice to the rights of the defendant in any proceeding concerning it that may be advised.

The answer sets up the want of Mrs. Worthy as a party as an objection to the bill; but as the plaintiff is the mortgagee, and by the terms of the mortgage authorized on application of any holder of any of the notes to take possession, and to file a bill in his own name, this objection does not now seem to be in any wise well founded. Temporary receiver continued till further order.

LYNCH v. WRIGHT.

(Circuit Court, S. D. New York. June 10, 1899.)

1. DAMAGES—BREACH OF CONTRACT TO CONVEY REALTY—LOSS OF RESALE.

On the breach of a contract for the sale of real estate, special damages resulting to the purchaser from the failure to make a resale are only recoverable where the contract for resale was brought to the knowledge of the defendant, and by reason of such knowledge he impliedly undertook, in case of his failure, to make conveyance to pay such special damages by way of indemnity.

2. SPECIFIC PERFORMANCE—CONTRACT TO SELL REAL ESTATE—RENTS AND PROFITS—INTEREST.

On a decree for the specific performance of a contract to convey real estate at suit of the purchaser, he may elect to pay interest on the purchase money since the time the conveyance should have been made, and take the rents and profits received by the defendant, or to allow the defendant to retain such rents and profits, in which case he will be exempted from payment of interest.

3. SAME—DAMAGES FOR DETERIORATION OF PROPERTY.

Where residence property has been allowed by the defendant to remain unoccupied during the pendency of a suit by a purchaser to enforce a specific performance of a contract for its sale, in consequence of which it deteriorates in condition, the complainant is entitled on a decree in his favor to an allowance for such deterioration.

This was a suit in equity for the specific performance of a contract to convey real estate and to recover damages for its breach.

Abram Kling, for complainant.

Olcott & Olcott and Geo. N. Messiter, for defendant.

TOWNSEND, District Judge. This case was argued at final hearing upon the following stipulation:

"That a decree directing specific performance, as prayed in the complaint, be entered herein, and that if, in the opinion of the court, after the examination of the record herein, the complainant shall be entitled to any costs, damages, or compensation herein, by reason of any acts of defendant, such costs, damages, or compensation may be assessed by the court upon the testimony, properly admissible, now before the court, without prejudice to the right of either party to appeal."

The sole question, then, is as to the amount of damages, if any, to which the complainant is entitled. On April 27, 1896, the defendant agreed to sell his house to complainant for \$11,000,—\$200 cash on execution of contract, and \$10,800 on delivery of deed

Complainant paid the \$200, and on May 11th, the day agreed on for delivery of the deed, tendered the \$10,800, and demanded the deed, when it appeared that there was a *lis pendens* on the property. Complainant thereupon refused to accept the deed, unless the defendant would furnish a satisfaction piece or would accept \$1,000 cash and a mortgage for \$10,000, payable on cancellation of *lis pendens*. Defendant's agent declined to furnish said satisfaction piece or to make such allowance for said *lis pendens*, and the sale was not effected. Defendant canceled said *lis pendens* on April 21, 1898. Complainant alleges that upon April 29, 1896, she agreed to sell said property to one Paul P. Todd for \$13,500, but, by reason of said incumbrance, was unable to carry out said agreement, and that said property has depreciated in value, so that it is not now worth more than \$10,000. On May 11, 1896, this suit was brought.

Complainant claims that she is entitled to recover as damages—First, the amount of depreciation in or waste to the property during the time that she has been kept out of possession by the defendant; second, the loss sustained by her inability to carry out said contract of sale to Todd for \$13,500; and, third, the value of the use and occupation of the premises from the date of the contract, and that defendant should not be allowed interest on the purchase money.

The defendant is not liable for damages for the failure of the sale to Todd. The evidence as to such alleged sale is uncertain and insufficient. The contract is not offered in evidence, and it does not definitely appear what the written agreement was which is said to have been lost, nor why no copy thereof was produced by complainant. But, irrespective of this question, the damages for the failure to resell were remote or speculative in character, and were not such as would naturally have resulted from said breach. In such cases the rule is well settled that only the natural and ordinary damages can be recovered, and that special damages resulting from a failure to make a resale can only be recovered where the contract for resale was brought to the knowledge of the defendant, and where, by reason of his special knowledge of the circumstances, he impliedly undertakes, in case of his failure to make the conveyance, to pay such special damages by way of indemnity. *Wallace v. Ah Sam*, 71 Cal. 197, 12 Pac. 46; *Hadley v. Baxendale*, 26 Eng. Law & Eq. 398; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *Masterton v. Mayor, etc.*, of City of Brooklyn, 7 Hill, 61; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500; *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577; *Boyd v. Fitt*, 14 Ir. C. L. 43; *Griffin v. Colver*, 16 N. Y. 494; *Hamilton v. McPherson*, 28 N. Y. 72.

It appears from the evidence that the premises have been without a tenant since the date of the original contract, and that the depreciation therein is largely due to this fact, and there is no evidence that the defendant has made any effort to rent these premises. The vendee may elect to pay the interest on the purchase money during the time he has been wrongfully deprived of possession, and take the rents and profits received by the vendor, or he may allow the vendor to retain the rents and profits, in which case he will be exempted from the payment of interest. *Worrall v. Munn*, 53 N. Y. 185. In

this case, therefore, the complainant should not be held liable for the payment of interest during the time that she has been wrongfully deprived of possession. The general rule is that courts of equity will as far as possible put the parties in the condition in which they would have been if the contract had been duly performed according to its terms. In the case at bar, had the contract been carried out, the property, presumably, would not have deteriorated in value by being left unoccupied during said period. An allowance should be made for such deterioration. *Worrall v. Munn*, supra; *Bostwick v. Beach*, 105 N. Y. 661, 12 N. E. 32; *Sedg. Meas. Dam.* (8th Ed.) § 1021; *Esdalie v. Stephenson*, 1 Sim. & S. 122.

Complainant's testimony is to the effect that the depreciation in value is directly due to defendant's negligence. While the failure of defendant to introduce testimony upon any of these questions makes it difficult for the court to exactly estimate the damages, yet, in view of all the evidence and of the statement of counsel that they desire to simplify the questions so as to obtain an equitable disposition of the matter by the court, I think a decree should be entered directing a specific performance of said contract, and that from the sum of \$10,800, agreed to be paid by the complainant, there should be deducted the interest on the \$200 originally paid, and the sum of \$1,000 for the deterioration in the value of the property, and complainant's costs.

MERCHANTS' NAT. BANK OF HELENA, MONT., et al. v. SCHOOL DIST.
NO. 8, OF MEAGHER COUNTY, MONT.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

1. NATIONAL BANKS—INSOLVENCY—TRUST FUNDS.

A national bank received funds of a school district which it had no right to receive as an ordinary deposit, or to mingle with its own funds, and which it undertook to hold for the special purpose of paying certain bonds of the school district, and no other. It did in fact mingle the funds with its own, and became insolvent, none of the bonds having been presented for payment. It had on hand, at the time it suspended business, cash in excess of the amount of such deposit, which came into the hands of its receiver. *Held*, that such deposit constituted a trust fund, which was recoverable by the school district from the receiver; the presumption being that so much of the cash on hand as equaled the deposit was the money of the school district.

2. SAME.

Neither a bank nor its receiver can deny the receipt of money deposited with the bank as a trust fund on the ground that no money was actually deposited, where it received and accepted credit for the amount with a correspondent, and received the money thereon in due course of business.

3. SAME—CLAIMS DISALLOWED BY RECEIVER—INTEREST.

No interest is recoverable against the fund in the hands of the receiver of an insolvent national bank on recovery in a suit to establish a claim against the bank, made necessary solely by the disallowance of the claim by the receiver. The receiver is required to exercise his judgment as to the allowance of claims, and other creditors are not chargeable with interest because of an error on his part.

Appeal from the Circuit Court of the United States for the District of Montana.

McConnell & McConnell, for appellants.

H. G. McIntire, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The facts in this case, as they were found by the master in chancery, to whom the cause was referred to make findings and report conclusions of law, are, in brief, as follows: On July 1, 1896, certain coupon bonds of school district No. 8, of Meagher county, Mont., which it had issued in the aggregate sum of \$14,000, became due and payable. Prior to that date, and for the purpose of refunding and paying the said bonds, the school district issued a second series of coupon bonds in the aggregate sum of \$13,000, and sold them to H. B. Palmer, of Helena, Mont., for \$13,056. On July 11, 1896, Palmer deposited with the Merchants' National Bank of Helena, Mont., "as a special deposit to the credit" of the school district, the sum of \$13,056, under an agreement between Palmer and the officers of the bank that said sum should be paid out only in the redemption and payment of said prior coupon bonds, which matured on July 1, 1896, and that an account should be opened therefor, known as the "Redemption Account White Sulphur Springs School District Bonds." In pursuance of said agreement, an account was opened upon the books of the bank, designated "Bonds of Meagher County." The officers of the bank knew that the \$13,056 so received from Palmer was the proceeds of said refunding bonds, and that the same was applicable only to the redemption of said matured bonds. The coupon bonds maturing upon July 1, 1896, had not been presented by the owners thereof for redemption and payment, but were outstanding and unpaid. On February 13, 1897, the bank became insolvent, and the receiver took possession of its property and assets, among which was cash in the sum of \$19,533, and the receiver collected thereafter from other assets \$200,000. The bank has not money or assets sufficient to pay its indebtedness in full. Upon these facts it was held, among other conclusions of law, that said sum of \$13,056 was a "special deposit" with the bank to the credit of the school district, to be applied solely to the redemption and payment of the prior bonds. A decree was entered, ordering that the receiver pay over to the school district the said sum, with interest from the date of the commencement of the suit. On the appeal it is contended that, in any view of the facts of the case, the court erred in decreeing payment to the appellee of the full amount of \$13,056, and erred in allowing interest on the same. The deposit with the bank of the funds realized upon the sale of the school district's bonds was prohibited by section 1811 of the Political Code of Montana, which provides as follows:

"All moneys arising from the sale of said bonds shall be paid forthwith into the treasury of the county in which said school district is located and shall be immediately available to apply to the purpose authorized and no other purpose."

Section 1817 denounces the penalty for the violation of the statute. Under the terms of the statute, the bank could not lawfully receive the moneys of the school district as an ordinary deposit, or mingle the same with its own funds. The bank had knowledge of

the nature of the funds, and was chargeable with knowledge of the statute. That it did understand the rights of the school district in that regard is shown by the facts as they were found by the master. The bank undertook to receive the money as a trust fund for an express purpose, and for no other. It is immaterial that in the findings the deposit is designated a "special deposit." The true nature of the transaction is disclosed by the facts. The money was to be treated as the funds of the school district, and not as the funds of the bank, and, in the light of that understanding, it is clear that the bank had no right to commingle the money with other funds. The fact that it did place it with other funds, and that at the time when its doors were closed there was not in its possession a separate fund in accordance with the understanding had when the deposit was made, cannot prejudice the rights of the appellee, so long as it can be shown that a sum of money equal to the amount so deposited remained in the possession of the bank, and was there when the receiver took possession. It will be presumed that of the funds so on hand \$13,056 belonged to the appellee. *Moreland v. Brown*, 30 C. C. A. 23, 86 Fed. 257; *National Bank v. Insurance Co.*, 104 U. S. 54; *Capital Nat. Bank v. Coldwater Nat. Bank* (Neb.) 69 N. W. 115.

It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of \$13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3d the Helena bank had with the Boston bank a credit of \$39,011.60, against which it drew on that day the sum of \$10,000, leaving a balance of \$29,011.60, which was not further reduced until July 13th, when a draft for \$8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for \$13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the arrangement which was consummated. Neither

the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of \$13,056, and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district. In *Bank v. Armstrong*, 148 U. S. 58, 13 Sup. Ct. 533, the court quoted with approval the language of Mr. Justice Miller in *Marine Bank v. Fulton Bank*, 2 Wall. 252, in which it was said:

"All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand."

The school district could not, and did not, part with its title to the money, nor did it lend the same to the bank. The general principles which govern this case were considered by this court in the cases of *Spokane Co. v. First Nat. Bank of Spokane*, 16 C. C. A. 81, 68 Fed. 979, and *Moreland v. Brown*, 30 C. C. A. 23, 86 Fed. 257. In the former case it was held that the depositor of a fund intrusted to a bank, by which it has been misapplied, is not entitled to a general lien upon the assets of the bank for the repayment thereof, but that he can follow the same, so far as it can be traced in the possession of the bank, either in its original form or in forms to which it has been converted, or into a general fund, with which it has been commingled, and that his right to recover it in the latter instance will depend upon whether or not a sum of money still remains in the possession of the bank equal to the amount so due him; it being the presumption of the law that, if moneys have been disbursed out of such fund, it was the money which the bank had the right to pay out, and not the money which was intrusted to it in a fiduciary capacity. In *Moreland v. Brown* the facts were these: A debtor had deposited in a New York bank the amount which he owed to a creditor in Helena. The New York bank telegraphed the Helena bank to pay the debt, and charge the same to its account. The Helena bank refused to pay in any way, except by exchange on New York, which the creditor refused to accept. The creditor refused also to permit the amount to be placed to his credit in the Helena bank. He then accepted a draft on the New York bank to be a payment only if honored. The Helena bank closed its doors, and the draft was not paid. The court held that the refusal of the creditor to accept the draft in payment, or to permit the amount to be placed to his credit, fixed the character of the deposit in the Helena bank as a special de-

posit for him, subject to the law governing such deposits, and that the relation of debtor and creditor was not established between him and the bank. We find no error in the decree of the circuit court that the receiver pay the appellee the full amount of the fund so deposited to its credit.

But the objection which is urged by the appellants to the allowance of interest on the claim must be sustained. The receiver disallowed the claim, and the suit was brought to obtain a decree for its payment. No interest is chargeable against the fund in the receiver's hands, based upon his erroneous action in disallowing claims. It is his function, by and under the direction of the comptroller, to disburse the fund according to law. In the matter of the allowance or disallowance of claims he must exercise his judgment. If he make an erroneous decision, the law does not contemplate that the other creditors shall suffer therefor. If interest is allowed to the appellee, the dividends payable to the other creditors will by that amount be reduced. In *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686, Mr. Chief Justice Waite said:

"The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown, by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date, before the percentage of dividend is calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratably, as the law requires."

The demand for interest in this case is not based upon any action of the bank itself before insolvency. It rests solely upon the disallowance of the claim by the receiver. The cause will be remanded to the circuit court, with instructions to so modify the decree as to disallow the interest upon the appellee's claim. In other respects the decree will be affirmed.

In re DUNNING.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1899.)

No. 538.

APPEAL AND ERROR—ASSIGNMENT OF ERRORS.

Where, on appeal from a final order of the district court granting a discharge to a bankrupt, no assignment of errors is filed in such court, as required by rule 11 of the circuit courts of appeal (31 C. C. A. cxlvi., 90 Fed. cxlvi.), the judgment of the district court will be affirmed.

Appeal from the District Court of the United States for the Southern District of California.

Milton K. Young, for appellant.

Franklin P. Bull, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The appeal was taken in this case from the final order of the district court granting Eber T. Dunning a discharge from all debts and claims which were made provable by the acts of congress relating to bankruptcy which existed on the 3d day of September, 1898. No assignment of errors was filed in the district court, and the requirements of our rule 11 in that respect were wholly disregarded. On account of such failure to comply with the rule, the judgment of the district court will be affirmed. *U. S. v. Goodrich*, 4 C. C. A. 160, 54 Fed. 21; *Insurance Co. v. Conoley*, 11 C. C. A. 116, 63 Fed. 180. We place our judgment of affirmance wholly upon the ground indicated, in the hope that attention may be drawn to the necessity of compliance with the rule. It may be added that upon the hearing of the cause not only was no "plain error not assigned" suggested, but, upon the contrary, the court was convinced that upon the merits the decision of the district court was not erroneous.

EMBLEM v. LINCOLN LAND CO. et al.

(Circuit Court, D. Nebraska. June 23, 1899.)

1. PUBLIC LANDS—CONTROL OF DISPOSITION—POWERS OF CONGRESS.

The paramount control over the disposition of the public lands of the United States remains in congress, and the fact that a contest over the right of entry of such lands is pending before the land department, a creation of congress, and not of the constitution, does not deprive congress of such paramount control, and it may at any time, by an act passed for that purpose, withdraw such contest from the jurisdiction of the department and itself determine the rights of the parties.

2. SAME—DECISION OF CONTEST BY SECRETARY—RIGHT OF SUCCESSOR TO ANNUL.

A secretary of the interior has no power to annul a decision of his predecessor which determines the rights of the parties to a contest for entry of public lands; such determination being a judicial act, which can only be reviewed by the courts.

3. SAME—CONTEST OF ENTRY—RIGHTS OF CONTESTANT.

Section 2 of the act of May 14, 1880 (21 Stat. 140), giving a contestant who has paid the land-office fees and procured the cancellation of a prior entry of public lands a preferred right to enter the same, gives such contestant no vested rights in the land until the cancellation of the existing entry; and hence, where the decisions of the land officers, so far as a contest had progressed, were adverse to the contestant, and during the pendency of the proceedings congress deprived the land department of further jurisdiction by the passage of a special act confirming the title of the entryman, the contestant acquired no vested rights in the land which a court can recognize or enforce.

4. SAME—PAYMENT OF CONTEST FEES.

The payment of contest fees and costs by a contestant of an entry of public land gives him no right in the land, unless the contest results in the cancellation of the prior entry.

On Demurrer to Amended Bill.

T. J. Mahoney and E. R. Duffie, for complainant.

J. W. Deweese and F. E. Bishop, for defendants.

SHIRAS, District Judge. In the bill demurred to it is averred that on September 19, 1885, one George F. Weed made a cash pre-emption

entry of the S. E. $\frac{1}{4}$ of section 22, township 2 N., of range 48 west, at the land office of the United States in the city of Denver, Colo.; that on the 4th day of October, 1888, the complainant entered a contest against this entry, on the ground that the entryman, Weed, had not complied with the requirements of the law with respect to his residence on the premises, and that in fact the entry was made for speculative purposes, the intent being to establish a town thereon; that the purpose of complainant in making such contest was not only that the laws of the United States regulating cash pre-emption entries on the public lands should be complied with on part of said Weed, but that, by defeating the entry made by Weed, the complainant might be enabled to enter the land under the provisions of section 2 of chapter 89 of the Statutes of the United States approved May 14, 1880 (21 Stat. 140); which section reads as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands; provided, that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

It is further averred in the bill that a hearing upon the contest made by complainant against the entry made by Weed was had before the register and receiver of the land office at Denver, who, on May 21, 1889, ordered a dismissal of the contest, on the ground that the allegations on which the same was based were not sustained by the evidence; that thereupon the contestant, being the complainant herein, appealed to the commissioner of the general land office at Washington, as he had the right to do, and upon the hearing of the appeal the commissioner sustained the same; that thereupon George F. Weed moved before the commissioner for a rehearing on the evidence, and the officials and inhabitants of the town of Yuma, which it was shown had been located on the premises, asked leave to intervene for the protection of their rights; that the commissioner ordered a rehearing of the matter before the register and receiver; that, before this rehearing was had, a new land district was created at Akron, Colo., the land in question being within the new district thus created; that the receiver and register of the new district ordered the rehearing to take place at Akron on the 16th day of September, 1890; that the contestant did not appear at this time, but filed objections to the jurisdiction of the local offices at Akron, averring that the receiver at Akron was an interested party, being the owner of a part of the town of Yuma, under title derived from Weed, the pre-emption claimant; that the officers of the land district of Akron overruled the objections to the jurisdiction, and, upon hearing the evidence adduced on behalf of Weed, found in his favor, and dismissed the contest; that thereupon complainant appealed to the general land office at Washington, and the commissioner affirmed the action of the local land office, from which ruling complainant further appealed to the secretary of the interior, John W. Noble, by whom the action of the local officers and of the commissioner was affirmed by a decision entered January 9, 1893, and subsequently com-

plainant filed a motion for review before Secretary Smith, upon the hearing of which it was ordered by the secretary of the interior that a rehearing of the whole contest should be had before the local officers, and, in obedience to this order, the register and receiver of the land office at Akron set the case for hearing on the 3d day of January, 1894, at which time Weed and the parties interested obtained a continuance of the hearing, it being charged in the bill that this continuance was obtained for the purpose of procuring the passage of an act of congress confirming the title of the original entryman, George F. Weed, which act was in fact passed and approved December 29, 1894 (28 Stat. 599), the same being in the words following:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the pre-emption cash entry numbered 4,990, of George F. Weed, made at the district land office at Denver, Colorado, on the 19th day of September, 1885, for the southeast quarter of section twenty-two (22), township two (2) north, of range forty-eight (48) west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma county, Colorado, be, and the same is hereby, confirmed, and that patent of the United States issue therefor to the said Weed."

Complainant further avers that, while this bill was pending before the houses of congress, full information was furnished them of the exact status of the contest over the title to the land; that, when the bill was passed, the question of the title thereto was pending in the land department, which, under the constitution and laws of the United States, is solely charged with the duty of determining the rights of pre-emption and contestants, and that congress had no right or power to adjudicate on the question of the title to the premises in dispute, and, furthermore, that, under the provisions of section 2 of the act of congress of May 14, 1880, hereinbefore cited, complainant had a vested right to enter the land upon the determination of the contest then pending between himself and Weed, and that, if complainant had been permitted to carry through the contest to a final determination, he would have succeeded in procuring a cancellation of the Weed entry, and that the passage of the act of congress above cited and the issuance of the patents thereunder deprived complainant of a vested right without due process of law. It is also averred in the bill that in the year 1886 the town of Yuma was located on part of the premises, and a large number of lots have been sold to various parties named as defendants to the bill, it being charged that these parties had full knowledge of the facts when they bought under the titles based on the Weed entry. The prayer of the bill, in substance, is that the several defendants be decreed to hold the title to the property in trust for the use and benefit of complainant, and that it be decreed that the patent issued under the act of congress to George F. Weed conveyed no title in the premises, as against the rights of complainant. To this amended bill a demurrer is interposed on behalf of the principal defendants, thereby presenting the question whether the matters recited in the bill entitle the complainant to any relief in the premises. The bill admits that the legal title to the land has never vested in the complainant, and that, by virtue of the patents issued under the provisions of the act of congress adopted De-

ember 29, 1894, the title to the realty has passed to the defendants; but the contention of complainant is that the act of congress is unconstitutional and void for two reasons: First, that, as the contest over the title to the land was pending before the land department, congress had no jurisdiction over the land, and could not confirm the entry made by Weed; and, second, that by initiating the contest over the validity of the Weed entry, and by payment of the costs and expenses incurred in making the contest, complainant had obtained a vested right or interest in the land of which he could not be deprived by legislative action. The denial of the power of congress to confirm the entry made by Weed, because of the pending of the contest before the land department, seems to be based in the allegations of the bill upon the assumption that, under the constitution and laws of the United States, the land department is solely charged with the duty of determining the rights of pre-emptors and contestants, and therefore congress cannot legislate with respect thereto. In view of the fact that the different branches of the land department are the creation of congress, and not of the constitution, it must certainly be true that the paramount control over the disposition of the public lands of the United States remains in congress, and the mere fact that a contest was pending before the tribunal created by congress to hear and determine the same did not nullify this paramount control bestowed by the constitution itself upon congress to dispose of the public lands belonging to the United States. It is within the power of congress to terminate the existence of the land department, or to declare that it shall no longer exercise jurisdiction over contests pertaining to the right to enter or pre-empt any of the public domain, and, when congress passed the act of December 29, 1894, it in effect declared that the jurisdiction of the land department over the question of the validity of the Weed entry was at an end. It cannot be questioned that it is within the power of congress to change or terminate the jurisdiction of the district or circuit courts over given subjects, and, in the absence of a saving clause in the act, jurisdiction over pending cases ceases upon the taking effect of the act. *Insurance Co. v. Ritchie*, 5 Wall. 541; *Railroad v. Grant*, 98 U. S. 398; *Gurnee v. Patrick Co.*, 137 U. S. 141, 11 Sup. Ct. 34. The same effect must be given to a statute which intends to put an end to further contest over a disputed title. Thus in *Re Hall*, 167 U. S. 38, 17 Sup. Ct. 723, it appeared that, acting under authority previously conferred on it by congress, the court of claims had rendered judgment in favor of one Hall against the District of Columbia for the sum of \$8,644.19, with interest thereon from January 1, 1877. Upon appeal to the supreme court, it was held that there was error in the matter of allowing interest from that date, and the judgment was reversed, and the case was remanded to the court of claims for correction of this error. The mandate was filed in that court; but, before a new judgment had been entered in conformity with the opinion of the supreme court, congress passed an act depriving the court of claims of jurisdiction, and the supreme court held that "the effect of the passage of the repealing

act was to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed. This the congress had the power to do." The general rule applicable to cases of this character is laid down by the supreme court in *Frisbie v. Whitney*, 9 Wall. 187, in which it is held that, except in cases of vested rights, the power of congress to control the disposition of the public lands is absolute, and the contention of complainant that the control of congress over the disposition of the land in dispute had ceased to exist, because there was pending before the officers of the land department a contest over the validity of the Weed entry, cannot be sustained. Do the facts averred in the bill show that complainant had obtained such a vested right in or to the land in dispute that thereby the same had ceased to be within the control of congress, a vested right of such a character that the court can enforce it by a decree conveying the title of the land to complainant? The history of the case, as recited in the bill, shows that the decision of the register and receiver at Akron, dismissing complainant's contest and affirming the validity of the Weed entry, had, upon appeal, been confirmed by the commissioner at Washington, and, on appeal, had been finally confirmed by the secretary of the interior, John W. Noble, under date of January 9, 1893.

The averments of the bill further show that, after John W. Noble had been succeeded in office by Secretary Smith, a petition for a review of the order made by Secretary Noble was filed in the office of the secretary of the interior, and was by him entertained and granted, and the case was sent back to the local land office for a further hearing on the facts. What effect upon the rights of the parties had this order granted by Secretary Smith, whereby it was sought to nullify and set aside the final judgment of the land department upon the question of the validity of the Weed entry, evidenced by the order of Secretary Noble confirming, on appeal, the action of the commissioner of the general land office, which in turn confirmed the decision and findings of the register and receiver? Is it open to each succeeding secretary of the interior to rehear cases decided by his predecessor in office? In *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, it is said:

"A revocation of the approval of the secretary of the interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void. As was said, by Mr. Justice Grier, in *U. S. v. Stone*, 2 Wall. 525: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.'"

It is clear from the averments of the bill that the complainant has never yet succeeded in obtaining an adjudication holding that the Weed entry is invalid; but, as already stated, it is shown that up to this time the adjudications of the land department have sustained the validity of the Weed entry. If it be held that it was open to Secretary Smith to annul the finding and decision of his predecessor in office, and to send the case back to the local land office for a rehearing upon the facts, yet, as the local officers have not taken further action,

there is no decision holding the Weed entry to be invalid, and until that is done no right exists in complainant to make entry of the land, and thereby acquire an interest in the same. Under the provisions of the act of congress of May 14, 1880, upon which complainant relies, before a contestant becomes entitled to enter land, he must procure a cancellation of the pre-emption or other entry which he contests, and, until this is done, no right to make entry thereof exists in his behalf. The complainant herein does not aver that he has ever succeeded in obtaining a cancellation of the Weed entry, but, on the contrary, the facts averred in the bill show that this entry yet remains uncanceled. The real contention of the complainant is that, if he had been permitted to continue the contest in the land department, he would have succeeded in obtaining a cancellation of the entry, and that congress had no right to terminate the jurisdiction of the land department, and thus deprive him of the privilege of continuing the litigation over the validity of the Weed entry. By filing the present bill the complainant practically admits that the jurisdiction of the land department over the matter is at an end, and therefore complainant now appeals to the court upon the theory that he has such a vested interest in the land that he is entitled to a decree conveying to him the legal title of the premises, and cites the cases of *U. S. v. Fitzgerald*, 15 Pet. 407, *Smith v. U. S.*, 10 Pet. 330, *Delassus v. U. S.*, 9 Pet. 133, and *Magann v. Segal*, 34 C. C. A. 323, 92 Fed. 252, in support of his contention; but an examination of these cases shows that none of them give support to the rule contended for by complainant. As is pointed out in *Frisbie v. Whitney*, 9 Wall. 187-196:

"The courts may very properly correct the injustice done by the land officers in refusing to accord rights, however inchoate, which are protected by laws still in existence, while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they are founded. The argument is urged with much zeal that, because complainant did all that was in the power of any one to do towards perfecting his claims, he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashley*, 6 Wall. 142, that the rights of a claimant are to be measured by the acts of congress, and not by what he may or may not be able to do, and, if a sound construction of these acts shows that he acquired no vested interest in the land then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

The act of congress upon which complainant relies in this case conferred upon him the privilege of entering the land in dispute when, and only when, he should succeed in canceling the prior entry in favor of Weed. This he has not yet succeeded in doing. He entered the contest against Weed in October, 1886, but never obtained a cancellation of the entry; the decisions of the land department being adverse to him until in December, 1894, congress passed an act confirming the Weed entry, and thus made it impossible for the land department to further entertain the contest over the validity of the Weed entry. That entry therefore remains uncanceled, and therefore a right to enter the land has never become vested in the complainant. He has never made an entry upon the land, nor has he perfected a right to make an entry thereof by securing a cancellation of the Weed entry, and therefore he has no vested right or interest

in the land of which he can avail himself to defeat the operation of the act of congress confirming the Weed entry. Some reliance is placed, in argument, upon the fact that complainant has paid the costs of the contest and certain fees to land-department officials. These payments were made with full knowledge of the fact that they would not affect the right to the land, unless the Weed entry was canceled. The payments were not made with the expectation that, by reason thereof, the land department would convey the title to the complainant, but they were made in aid of the contest which complainant initiated against the Weed entry, and complainant well knew that these payments would not give him any right to enter the land, unless he succeeded in procuring a cancellation of the previous entry made by Weed; and, as he has failed in his effort to procure a cancellation of this entry, he has not established a right to enter the land by the mere payment of the costs and fees. Under the act of May 14, 1880, it is the procurement of a cancellation of a previous entry and the payment of the land-office fees that creates the right to a preference in the entry of the land upon the part of the contestant. A performance of one only of the conditions is not sufficient. Both conditions are essential in the creation of the right. The complainant admits that he has not secured the cancellation of the Weed entry, and therefore has failed to show that he has become entitled to enter the land. He never has entered the same, and therefore has no right in the land. He has not perfected a right to enter the land, having failed to secure a cancellation of the Weed entry, and therefore there is no ground shown upon which the court could base a decree that the defendants hold the legal title for his benefit. The utmost he can claim, in view of the facts recited in the bill, is that, if he had been permitted to prolong the contest over the Weed entry before the land department, he might have succeeded in ultimately procuring a cancellation of the entry; but this court cannot accept, as ground for its action, a possibility of this kind, in view of the requirements of the act of congress that the contestant must succeed in procuring a cancellation of the existing entry before he becomes entitled to create a right in the land by making entry thereof. The demurrer is therefore sustained, and the amended bill is dismissed on the merits at the cost of complainant.

ANDERSON v. CONDUCT et al.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 538.

RAILROAD FORECLOSURE—SALES SUBJECT TO CLAIMS AGAINST RECEIVER.

Where a decree for the sale of railroad property in a foreclosure suit contains an independent and unconditional provision that the sale shall be subject to all current liabilities of the receiver, the purchaser takes the property subject to such condition, without regard to the question of priority between such liabilities and the liens under which the sale is made.

On Petition for Rehearing.

For former opinion, see 93 Fed. 349.

Alfred H. Gross, for appellant.
Levy Mayer, for appellees.

WOODS, Circuit Judge (concurring in the overruling of the petition for a rehearing). The twenty-eighth paragraph of the decree contains the clause, "and also subject to all current liabilities of the receiver incurred." That is an independent and absolute provision, unqualified by anything that precedes or follows it. What precedes has reference to such claims and allowances as shall be adjudged prior in lien or superior in equity to the receiver's certificates and the mortgage foreclosed, and what follows to obligations assumed or imposed by order of the court which should be adjudged superior in equity to the mortgage. The thirty-first paragraph has no reference to current liabilities incurred by the receiver, but only to claims superior to any of the liens or claims provided to be paid from the proceeds of the sale. In other words, the sale was to be subject unconditionally to the current liabilities of the receiver, without question of essential priority, but, in respect to other claims, "subject to the payment only of the amount allowed upon such of said claims so filed within said 90 days as shall be found entitled to priority over the lien of the trust deed herein foreclosed and which the court may further find should be paid by said purchaser or purchasers." Whether the court erred in preferring current liabilities to the receiver's certificates is a question which does not arise upon this record, and which in no event could be raised by a purchaser under the decree.

ANGLE et al. v. CHICAGO, ST. P., M. & O. RY. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 501.

RAILROADS—ISSUANCE OF STOCK—TRUSTS.

A holder of railroad stock, issued to him as full paid, in payment of an undisputed claim, takes it free of all trusts created in favor of the railroad company by previous contracts to which he was not a party.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

B. W. Jones and M. I. Southard, for appellants.
Thomas Wilson, for appellees.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge. For a statement of the averments of the bill in this case reference is made to the opinion of the supreme court on demurrer thereto in *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240. This appeal is from a final decree on the merits dismissing the bill for want of proof of the alleged conspiracy and fraud. Before the hearing was had which resulted in that decree, another suit, against the Omaha Company and the Portage Com-

pany, wherein a bill averring the same facts as are here alleged was brought by the Farmers' Loan & Trust Company, as trustee of a mortgage executed by the Portage Company, for the purpose of charging the lands embraced in the disputed grant with the lien of that mortgage, had been determined in favor of the defendants on evidence which the court below deemed to be substantially the same as the evidence in this case, and on appeal that decree had been affirmed. *Farmers' Loan & Trust Co. v. Chicago, P. & S. R. Co.*, 163 U. S. 31, 16 Sup. Ct. 917. The opinion in that case shows that three propositions were claimed to be established by the evidence, any one of which it was contended entitled the plaintiff to the relief prayed for. The first two of those propositions, placing the second first, are in essence the same as the following, which are insisted upon here: First. The evidence establishes that the Omaha Company became the sole or controlling stockholder of the Portage Company, and as such stockholder caused to be transferred to itself all of the property of the Portage Company, including its land grant, so as to deprive Angle, a creditor of the Portage Company, of payment of his debt. By thus wrongfully acquiring the property of the Portage Company, the Omaha Company became trustee of the property for the satisfaction of the judgment. Second. The evidence establishes that the Omaha Company wrongfully, unlawfully, unconscientiously, maliciously, or fraudulently interfered and prevented Angle and the Portage Company from completing the work of construction under the Angle contract, and from earning the land grant, and took over to itself the property of the Portage Company, including the land grant. It thereby became liable to Angle for the damage done to him as measured by complainants' judgment against the Portage Company, and became trustee *ex maleficio* of the land grant and its proceeds for the satisfaction of the judgment. These propositions both rest upon the charge of conspiracy and fraud. To use the language of the supreme court:

"Involved in and essential to the plaintiff's case is the specific charge that the Omaha Company bribed certain officials of the Portage Company (in whose hands was, perhaps, the only valid outstanding stock of the Portage Company, and held by them in trust) to dispose of that stock, so that the Omaha Company, with knowledge of the trust attending the stock, and in breach thereof, became the controlling, if not the sole, stockholder in the Portage Company."

It is said in the brief for appellant that "this declaration is clearly limited to the trust character of the Jackson stock," but the language used, the context and other parts of the opinion, do not seem to warrant so narrow a construction. The opinion proceeds immediately to state the fact of the transfer of the Jackson stock to Cable, and then says, "This transaction is challenged, and its honesty and good faith are primary matters of inquiry." Then follows a review of the evidence, ending on page 44, 163 U. S., and page 922, 16 Sup. Ct., with the following statement of the court's conclusion:

"In short, to sum up this branch of the case, from the testimony in this record it is, we think, clear that Jackson was guilty of no breach of trust in

selling this stock; that it belonged, both legally and equitably, to J. C. Barnes and himself; that they had a full legal and moral right to sell it to any one who would pay their price; and it equally follows that the Omaha Company and Cable, in making the purchase, were themselves guilty of no wrong."

This is followed with a brief consideration of the charge that the Omaha Company wrongfully prevented the Portage Company from earning the land grant. The conclusion of the opinion is of present importance:

"No creditor of the Portage Company had any legal or equitable right to any portion of those lands; and if the legislature had simply revoked the grant, and resumed possession on behalf of the state, there would be no pretense of a claim that any such creditor could subject the lands, or any interest therein, to the satisfaction of his debt. There is no intimation of a contrary doctrine in the opinion filed in *Angle v. Railway Co.*, supra. All that was there held was that the legislative action did not condone, and was not intended to condone, any wrongs done by the Omaha Company; and that, if the Omaha Company had been guilty of any fraudulent conduct, in consequence of which the Portage Company had been prevented from earning the grant, and the legislature thereby induced to revoke it, and bestow it upon the Omaha Company, the party wronged by those acts of the Omaha Company was entitled to redress. But here, as we have seen, although the charges are the same, yet the testimony fails to make good those charges, or to show any fraudulent or wrongful conduct on the part of the Omaha Company. The legislative act condoned no wrong, for there was no wrong to condone. It neither placed nor continued any burden upon the land grant, and hence the mortgage creditors of the Portage Company, having no lien, legal or equitable, cannot pursue the lands in the hands of the Omaha Company. There is this substantial difference between the *Angle Case* and the present: While in each are charges of grievous wrong on the part of the Omaha Company, in consequence of which property which otherwise would have been subjected to the payment of the plaintiff's claims was obtained by the Omaha Company, in the *Angle Case* the Omaha Company demurred, saying there was no remedy, notwithstanding the wrongs alleged. We held that, if such wrongs as were alleged had been committed, the law did furnish a remedy. In this case the Omaha Company took issue upon the charge of having committed such wrongs, and the testimony shows that it did not commit them."

On the appeal in this case it was said:

"But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit is brought. * * * The wrong was not done by the state, or in the act of the legislature in taking away the land grant, but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. * * * The property was in the Portage Company for the purpose of aiding in the construction of this road. Work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company, and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property."

"In considering the evidence in this case," it is said in the last brief for the appellant, "the court can get no light from the opinion in the bond case as to the effect of the fraudulent and criminal lobby contract upon Angle's rights, as to the frauds practiced upon the legislature by means of this lobby contract, or by the false representations and concealments which are charged in the bill, and which are fully proved in this case. Nor can it learn, from the opinion, what interpretation the supreme court put upon the sell-out contract, Exhibit L. Upon these and other points there is new and highly important evidence in this case. And with respect to the one point which they most fully discuss, namely, the question whether the Jackson stock was subject to the trust pro-

vision of the reorganization contracts, we repeat that we shall show, by evidence almost wholly new, that the conclusion which the supreme court arrived at is clearly untenable in the case at bar."

The evidence in this case touching the lobby contract and the sell-out contract, and the uses to which they were put in order to influence the legislature, though fuller, is not essentially different from the corresponding evidence in the trust company case, which counsel have called the "Bond Case"; and we agree with the court below "that, where there is a difference, as in the testimony of Porter, Spooner, and Peck, that difference makes rather in favor of the defendant than the plaintiff." There is certainly nothing to justify a departure from the views of the supreme court.

Upon the question which is most strenuously contested—whether the Jackson stock was subject to a trust which was violated by the transfer to Cable—the new evidence seems to be of little moment. The most that can be said of it is that it tends strongly to show that the entries on the stubs showing an issue of stock to J. C. Barnes were not made at the time they bear date, but at a much later date. An inference that the Barnes stock was not the trust stock may or may not be justified, but either way it does not follow that the Jackson stock must have been under the trust. That inference is not necessary nor admissible. The purpose to create such a trust as that provided for may have been abandoned or modified, or it may have been postponed, and allowed to go by default; but, what is more to the point, and conclusive, to impose upon the Jackson stock the conditions of the alleged trust would be distinctly inconsistent with the contract between Jackson and the railway company, evidenced by his proposition and by the resolution of acceptance, by force of which Jackson became entitled to the immediate issue and unqualified delivery to himself of the stock and bonds specified. The Price resolution, whatever the supposable purpose of its adoption, does not purport to modify, and cannot be deemed to affect, the explicit contract so executed, and in force between the parties when that resolution was adopted. It may well be conceded that the bonds and stock issued to Jackson come within the description of the bonds and stock which, according to the agreements of September 20, 1880, and January 26, 1881, were to be put in special deposit; but Jackson was not, nor were his assignors, party to, or in any way bound by, those contracts. He was therefore at liberty to exact such terms as he chose for the surrender and liquidation of his claims; and, the very explicit terms which he proposed having been accepted as they were, the attempt to import from other writings between other parties, and not referred to in his proposition or in the resolution of acceptance, inconsistent and restrictive conditions, cannot be sanctioned. The claims which Jackson surrendered were long past due, and in lieu thereof he bargained for bonds and stock to be delivered forthwith, and yet, if the position of the appellant is true, both bonds and stock were to be put in special deposit under a trust, one condition of which was that before delivery of any of the bonds, which might not happen for two years or more, past-due interest coupons should be cut off and canceled

While further consideration of this phase of the case is not necessary, it would seem that, if the alleged trust were conceded, the transfer of the stock to Cable was not a wrong to the appellant's intestate. It is not alleged in the bill that the trust was intended for, or was of a nature to inure to, the advantage of general creditors of the Portage Company, or that Angle, before entering into his contract for the construction of the roadbed, knew of and relied upon the trust, or supposed that it could in any way affect his rights or interests. Indeed, it is upon its face a hardly credible proposition that parties planning, as were Gaylord, Schofield, and the investment company, to construct a railroad, and, under the necessity of procuring outside aid, should have put their scheme in such shape at the beginning, when their efforts were necessarily tentative, that no change of plan could be made without the consent of any creditor or contractor to whom meanwhile some liability or obligation should have been incurred. No such trust could reasonably have been intended, and none such, it is clear upon the face of the contracts, was created. To those contracts Gaylord, the investment company, and Schofield were the only parties, and, acting in good faith, it was their privilege at any time, notwithstanding the contract of Angle with the railway company, to change or annul their agreements, releasing, if they chose, bonds and stocks already impounded thereunder. The entire title and beneficial interest in the stock was confessedly in Jackson and Barnes, and, if the trust ever attached, it affected only the possession and control. In no event was it possible by mere force of the trust that Jackson and Barnes should lose, or that Angle should acquire, an interest in the stock. He had no interest, as the supreme court has already said; and if, knowing of the proposed transfer, he had sought to obtain an injunction or restraining order, he could have had no standing in court; and it is equally clear that his administratrix may not complain of the assignment or its consequences.

The averment in the bill that the Jackson stock was permitted, "by inadvertence" of the president of the company, to pass into the hands of J. C. Barnes, the vice president, is supported by no evidence. Schofield, the president, signed a formal written order for the delivery of the stock by the trust company to Barnes, and the fair inference is that he did it understandingly, on the ground that by the resolution of the board accepting Jackson's proposition an immediate delivery was obligatory, as the order recites, "without regard to any of the conditions or limitations contained or specified in said orders," according to which stock properly in trust was to be delivered.

It is contended that Jackson had no lien on the stock, but held only under a naked trust for Barnes. On the entire evidence we deem it clear that he held it as collateral security for the payment of liabilities to himself, Ruger, and Sloan, which Barnes had assumed to pay; and as a result of his relation to Ruger and Sloan he would probably have been answerable to them for the amount of their demands if he had refused or failed to accept payment in the mode proffered.

Many minor points have been discussed, but these considerations, in view of the opinions of the supreme court referred to, are deemed determinative of the case; but, it may be added, we agree with the

judge below "that the final collapse of the Portage Company in the winter of 1882 was not caused by any wrong (if wrong were conceded to have been) committed by Jackson, or J. C. Barnes, or Porter or Cable, or the Omaha Company," but was attributable, as the evidence shows beyond reasonable doubt, to other causes, for which the Omaha Company was in no way responsible. The decree below is affirmed.

GROSSCUP, Circuit Judge, by reason of sickness, did not share in the final consideration of this case.

MERCANTILE TRUST CO. v. BALTIMORE & O. R. CO. et al.

(Circuit Court, S. D. Ohio, E. D. April 17, 1899.)

No. 889.

CONTRACT BY DEBTOR FOR BENEFIT OF CREDITOR—RIGHT OF CREDITOR TO ENFORCE.

Where a railroad company leased the road of another company, contracting to pay as a part of the rental the interest on the bonds of the lessor; the holders of such bonds, who, in reliance on such contract, accepted bonds of a new issue, are entitled to the benefit of the contract, and on the insolvency of the lessee, and the appointment of receivers by a federal court, who operated its road, including the leased line, thus becoming liable for subsequent rentals, such bondholders may be permitted to come in and directly assert their claims to interest against the fund in the hands of the court for the payment of rentals, notwithstanding the previous appointment of a receiver for the lessor by a state court, with power to collect the rentals due the company; nor is it necessary that the bondholders should be represented in such matter by the trustee in the mortgage securing the bonds, where no action has been taken by him to foreclose the mortgage, as no question relating to the mortgaged property is involved, and the trustee has no concern with the rentals until he has asserted his right to take possession of the road.

In the matter of the intervening petition of Mark T. Cox, Arthur P. Sturges, and William Church Osborn.

Cox, Sturges, and Osborn, on behalf of themselves and all other bondholders of the Sandusky, Mansfield & Newark Railroad Company, as reorganized, who should come in and contribute their share of the expenses of this proceeding, have filed a petition in this case, by leave of court, against the Baltimore & Ohio Railroad Company, John K. Cowen and Oscar G. Murray, the receivers of the Baltimore & Ohio Railroad Company, the Central Ohio Railroad Company, Intervener, and the Mercantile Trust Company. The Baltimore & Ohio Railroad Company is a corporation of Maryland and West Virginia, and owns and operates a railroad running from Baltimore west to the Ohio river, at Wheeling and Parkersburg. It has operated for many years under lease the railroad of the Central Ohio Railroad Company from Bellaire, opposite Wheeling, to Newark. The Central Ohio Company has leased from the Sandusky, Mansfield & Newark Railroad Company a railroad 116 miles in length from Newark to Sandusky. The Central Ohio Company, in turn, has leased this line of road, with the line of road which itself owns under its lease, to the Baltimore & Ohio Company. The Baltimore & Ohio Railroad Company got into financial difficulties, and a creditors' bill was filed in the circuit court of the United States for the district of Maryland against the company, under which receivers were appointed to operate the property of that company, together with its leased lines west of the Ohio river. Upon an ancillary bill in this court, the same receivers were appointed, and entered into occupation of the leased lines, and have operated them since their appointment. The Central Ohio Rail-

road Company has filed an intervening petition in this cause to compel the receivers either to pay the rentals under the lease, on the ground that they have assumed the obligation of the lease, or, if that prayer be not granted, to compel an accounting for the net earnings of the leased property while operated by the receivers. The present intervening petitioners are the holders of mortgage bonds issued by the Sandusky, Mansfield & Newark Railroad Company, secured by a mortgage issued by that company to the Union Trust Company of New York. The intervening petitioners hold 463 \$1,000 bonds of that issue, which is not a majority of the entire issue. In their petition they claim that by virtue of the terms of the lease, to which the Baltimore & Ohio Railroad Company, the Central Ohio Railroad Company, and the Sandusky, Mansfield & Newark Railroad Company were all parties, it was stipulated by the Central Ohio Company as principal, and by the Baltimore & Ohio Railroad Company as guarantor, that a part of the rent under the lease should be paid to the bondholders of the Mansfield Company in full payment of the interest as it should fall due semiannually; that this payment should be made out of, and credited as part payment of, the rent provided for under the lease of the Mansfield Company. The contention is that the bondholders are now entitled, under that provision, to apply to this court—which, it is claimed, has a fund applicable to the payment of rent under the lease, or, at least, of compensation for use and occupation of the Mansfield road—to distribute from that fund a sufficient amount to pay the interest due on the bonds of petitioners. To this intervening petition the Central Ohio Railroad Company has filed a plea setting forth the fact that, upon the petition of certain of the stockholders of the Sandusky Railroad Company, the common pleas court of Huron county, Ohio, in a suit against the Mansfield Company setting up its insolvency, appointed receivers. Neither the trustee of the bondholders nor the bondholders themselves were made parties. The prayer of the petition was that all the property of the railroad company might be sold, and the proceeds thereof applied to its indebtedness, according to the priority of the liens thereon, and the surplus, if any, to be applied to the payment of the debts of the unsecured creditors pro rata. The receivers were appointed by consent of the Sandusky Company, were directed to collect all the rents especially from the Baltimore & Ohio Railroad Company and its receivers, and were authorized to seek an accounting with the receivers of the company as to the earnings of the same since it went into their possession. The plea sets forth that from the facts thus stated the rights of the petitioners can only be worked out in the receivership cause pending in the common pleas court of Huron county, and to that court, and that alone, the petitioners must apply. The Baltimore & Ohio Railroad Company answers the intervening petition, setting up as one of its chief defenses the same facts which are set forth in the plea of the Central Ohio Railroad Company.

The following facts appear from the stipulation of counsel and the admitted averments of the plea: In 1869 the Baltimore & Ohio Railroad Company, in possession of the Central Ohio Railroad Company under a lease previously made and entered into, made a tripartite agreement with the Sandusky, Mansfield & Newark Railroad Company and the Central Ohio Railroad Company, whereby the Sandusky Company leased its road to the Central Ohio Company for a term of years, at an annual rental of \$174,350 yearly, which sum "the said second party agrees to pay in two equal installments, half yearly, on the 30th day of June and the 31st day of December, or in such sums as may be required at that date, and thereafter to meet the interest or coupons of said party of the first part, and the balance of said installment required to pay said coupons that shall not be called for at the expiration of each six months shall be paid to the party of the first part." "And it is further agreed that the said second party will pay over, out of said moneys so due on said rent, to some bank or depository, as may be directed by the first party from time to time, an amount of money sufficient to pay the interest that may accrue on the mortgage debt then outstanding, evidenced by the bonds and coupons aforesaid, on said 30th day of June and 31st of December, annually, which sum includes the government tax thereon; and the balance of said rent shall be paid semiannually on said days to such officer of the party of the first part as may be authorized to receive the same." By the sixteenth article of the agreement, the Baltimore & Ohio Railroad Company guaranteed that the Central Ohio Company should "in good faith do, keep, and perform all and singular, the matters and things and the cove-

nants and agreements which the said second party has hereinbefore covenanted and agreed to do; and more especially that said second party will pay, in the manner above specified, all the rents it has agreed to pay during the continuance of this lease, or any extension or continuance of the same, as above provided." Thereupon the Baltimore & Ohio Railroad Company took possession of the Sandusky Company's property under the lease. The lease provided that the outstanding mortgage debt of the Sandusky road should be funded into a new issue of mortgage bonds, amounting to \$2,300,000, and after the execution of the lease a mortgage was executed to the Union Trust Company of New York to secure these bonds, and upon the inducement furnished by the execution of the lease and the guaranty of the Baltimore & Ohio Railroad Company the holders of the outstanding bonds of the Sandusky road surrendered the same, and received in exchange therefor bonds of the new issue. At the first meeting of the board of directors of the Sandusky Company after this lease was executed, resolutions were passed authorizing the treasurer of the company to receive the rent payable under the lease in excess of the amount of the interest due semiannually upon the new mortgage bonds, and designating the Union Trust Company of New York as the trustee to whom the lessees of the lease were to pay the amount due semiannually on the coupons of the bonds. Thereafter, and until the appointment of the receivers, the Baltimore & Ohio Company paid out of the rental due from the Central Ohio, and guarantied by the Baltimore & Ohio, to the Sandusky Company, a sum sufficient to pay the accruing semiannual interest on the bonds of the Sandusky Company. After their appointment, the receivers paid the amount necessary to meet two coupons accruing next thereafter to the same trustee. Default was made on the payment of the coupons on July 31, 1897, and no further sums have been paid to the bondholders since that time, or to any one else, on account of rental or compensation for use and occupation of the Sandusky road. In a supplemental agreement made between the three railroad companies in February, 1880, it was agreed that the lease of 1869 should be extended from the expiration of the original term for an additional 20 years, and a further term of 20 years thereafter, and that, at or before the maturity of the \$2,300,000 bonded debt of the Sandusky Company, the Baltimore & Ohio Railroad Company should "have the privilege and option, if it so desires, to renew the same by a new issue of first mortgage bonds of the party of the first part at a lower rate of interest, or by extension of the old bonds at the low rate of interest, if the same shall be deemed expedient by the party of the first part, * * * and the difference of annual interest saved shall, to the extent of such difference, lessen the annual rental stipulated to be paid under article 5 of the lease aforesaid."

Geo. W. Wickersham and William Church Osborn, for Mark T. Cox and others.

George K. Nash and Louis G. Addison, for Central Ohio R. Co.
Edward Colston, for receivers of Baltimore & O. R. Co.

TAFT, Circuit Judge (after stating the facts). The intervening bondholders here are the creditors of the Sandusky Company. As part of the rental for its property, the Sandusky Company has secured from the Central Ohio and the Baltimore & Ohio Companies an agreement to pay the interest due upon the bonds of the intervening petitioners. As between the three railroad companies, with reference to the obligation to pay the interest on petitioners' bonds, the Sandusky Company is only a surety. The Central Ohio Company and the Baltimore & Ohio Company are principals. The Sandusky Company, which is the debtor of the intervening petitioners, has therefore the security of the obligations under a lease made by the Baltimore & Ohio Company and the Central Ohio Company to pay the interest due to the intervening petitioners. In equity, a creditor may have the benefit of any obligation or se-

curity given by the principal to the surety for the payment of the debt; and it is held by the supreme court of the United States in the case of *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, that this principle applies in favor of the creditors, even where there is no privity of contract between the creditor and the principal, and where the surety is the sole debtor of the creditor. Mr. Justice Gray, who delivered the opinion of the court in that case, said:

"In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that, as between the parties to the agreement, the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place, for the purpose of compelling such principal to pay the debt."

In the case cited, which was in equity, the complainant, the holder of a note secured by a mortgage upon land in Washington, had filed a bill against a grantee of the mortgagor to compel that grantee to pay the amount due on the note. The bill was based on a clause in the deed to such grantee by which, as between him and the mortgagor, he assumed payment of the mortgage. The land had been sold under a prior mortgage, and no surplus remained with which to pay the mortgage of the complainant. It was held that in equity the complainant was entitled to subject to the payment of her claim against the mortgagor the obligation of the grantee of the mortgagor to him to pay her debt, treating it as a security held by the surety, who was the debtor of the complainant, for the payment by his principal of the debt. It seems to me that the present case comes clearly within the principle of *Keller v. Ashford*, and that the bondholders to whom it was provided, between the Sandusky Company and the Baltimore & Ohio Company, that the latter should pay their interest on the bonds of the Sandusky Company, may, in equity, compel the Baltimore & Ohio Company to pay that interest.

The first objection to the sufficiency of this petition is that "the individual bondholders, as such, have no right to interfere, in any litigation concerning the property covered by the mortgage securing their bonds, until the trustee either incapacitates himself from acting or refuses to act in their behalf." To this objection it is sufficient to answer that the petitioners here are not seeking to foreclose the mortgage given to their trustee to secure the payment of the principal and interest of their bonds. They are only seeking to subject a security held by their debtor for the payment of the interest on the bonds which is not included in the mortgage. The Central Ohio Company and the Baltimore & Ohio Company did not agree to pay the rent to the trustee under the mortgage for the benefit of the bondholders, but only to pay it to the bondholders themselves. The rule of practice, therefore, which requires that, in a foreclosure of the mortgage, the trustee in whom is the legal title shall represent the creditors secured by the mortgage, has no application whatever to the present litigation.

The next objection is "that neither the United States court for the district of Maryland, nor the courts acquiring ancillary juris-

diction over the Baltimore & Ohio Railroad Company, in connection, with said suit, had any power or authority to assume control over the Sandusky, Mansfield & Newark Railroad Company as against the mortgage of that railroad company." To this objection the clear answer is that the petitioners do not seek to have the court exercise any power over the railroad covered by the mortgage given by the Sandusky Company. The petition shows that there is a fund in this court either of rental under the lease, or of compensation, accruing for the use and occupation of the railroad of the Sandusky Company, due from the receivers to some party in interest. The petitioners claim that they are that party in interest, and that they have the right to the fund, and ask that it be distributed to them. This court must make some order with respect to the distribution of the fund, and every claimant to that fund has a right to be heard in this court, upon due petition filed. The officers of this court are alleged to owe some one money on a certain account, and the petitioners claim that the money on that account is due to them. The decision by this court of the validity of the petitioners' claim is certainly not an assertion of any jurisdiction over the fee of the Sandusky Company upon which it executed its mortgage. It is true that that mortgage covers rents and profits, but it is well settled, and, indeed, is urged upon the court by the counsel upholding the plea, that, until the mortgagee asserts its rights under the mortgage to the possession of the road by filing a bill of foreclosure, and by taking possession, either through its trustee or by receiver of the court, it has no right to the earnings and profits. It follows, of course, therefore, that the mortgagee's rights under the mortgage are not in the slightest degree affected by the present proceeding. The trustee under the mortgage has not, as yet, taken possession of the road or asserted its right to the possession of the rents and profits. The proceeding in the Huron common pleas court is a proceeding by a stockholder, to which the mortgagee and the bondholders are not parties, and it is doubtful whether, under such a petition, the receivers appointed can be said to take possession of the property and the profits for the benefit of the mortgagee. But, even if it be conceded that the receivers are in possession for the benefit of the mortgagee and all others as their interest may appear, this would still not prevent the petitioners from asserting the right which they do assert here. Their claim is that, as bondholders, they have an equitable right to subject the obligation which the Baltimore & Ohio Company and its receivers are under to pay rent to the satisfaction of their claims for interest, and that this lien does not grow out of the mortgage, but is acquired by virtue of the lease, and the terms thereof, against the Baltimore & Ohio Railroad Company. They are not claiming the rent as mortgagees out of possession, but they are claiming it under an agreement by the lessee with the lessor that the rent shall be paid directly to them,—an agreement which they may in equity enforce against the lessee. It is an appropriation of the rent to their use, and the cases which may hold that the mortgagee may not take the

rents until he takes possession of the property have no application to the case of a specific agreement by which the rents are expressly appropriated each year during the pendency of the debt to the payment of the interest thereon.

Finally, it is said "that after the receivers were appointed for the property covered by the mortgage, as indicated above, the receivers are the proper parties to assert any claim for rent due on the lease, if any is due, and that the bondholders, if aggrieved, must make their complaint to the court appointing the receivers, and seek their relief there; that, the common pleas court of Huron county having acquired jurisdiction over this property, no other court, with either co-ordinate or concurrent jurisdiction, can interfere with the management or control of it, or acquire jurisdiction of the subject-matter of investigation." Enough has been said to answer this objection, but it is proper to point out a little more fully its insufficiency. It is true that all persons interested in the property in the custody of the receivers of the Huron county common pleas court, if they desire any relief with respect thereto, must apply to that court, and have their equities in the property worked out, with the assistance of that court. The weakness of the contention in the present case, however, is that the subject-matter of dispute is a fund which is not in the possession of the Huron county common pleas court, but is in the possession of this court. It is true that the receivers of the Huron county common pleas court are given authority in their appointment to collect any amount which may be due from the receivers of the Baltimore & Ohio Railroad Company to them, but, in order to collect that amount, they must come to this court for relief, because the property which they seek is in this court, and not in the court of their appointment. The petitioners claim an interest, not in the property in the custody of the Huron common pleas court, but in the fund in this court, and say that they are entitled in this application to the payment of interest on their bonds. The conclusion reached seems to be sustained by the decision of the court of appeals of the Second circuit in *Bank v. Smith*, 30 C. C. A. 133, 86 Fed. 398.

It may be—I do not decide that question now—that, in order to grant the relief which the petitioners ask, namely, that of compelling the Baltimore & Ohio Company and the Central Ohio Company to pay the interest on their bonds to the extent of the rental due under the lease, or compensation due for use and occupation, of the Sandusky Railroad Company, the Sandusky Company and its receivers should be made parties to this proceeding. But the ground of the plea here under consideration is not that the petition does not make them necessary parties, but it is that, on the face of the petition, taken with the facts recited in the plea concerning the litigation of the Huron county common pleas court and the appointing of receivers there, this court has no jurisdiction of the controversy sought to be made by the petition. Upon that issue it seems to me that the plea is bad. Leave will be given to the petitioners to make parties defendant to their

petition the Sandusky Company and the receivers appointed by the Huron common pleas court. As the lessees are receivers of a court, they cannot be brought in here as parties, except with the permission of the court appointing them. If that permission is withheld, it will then become a question whether they are such necessary parties as to prevent this court from proceeding to adjudicate who are entitled to the rental fund now in possession of its receivers. I cannot suppose that receivers in a state court or the court appointing them will decline to permit them to be made parties to this proceeding when the purpose of their appointment was the collection of rent from the receivers of the Baltimore & Ohio Railroad Company appointed by this court. If, however, it is not deemed proper to allow them to become defendants to this petition, it may become a matter of serious consideration whether they can be granted leave to file a petition herein against the receivers of this court.

The issue made on the plea of the Central Ohio Company to the petition is with the petitioners, the plea is overruled, and leave is given to answer. Leave is also given to the petitioners to make new parties.

HARRISON et al. v. FARMERS' LOAN & TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 816.

1. CREDITORS' SUITS—RIGHT TO MAINTAIN.

Simple-contract creditors cannot come into a court of equity to obtain a seizure of property of the debtor in satisfaction of their claims.

2. SAME—FOLLOWING STATE PRACTICE.

This is so though a statute of the state may authorize such a proceeding in a state court.

3. SAME—DISMISSAL WITHOUT PREJUDICE.

When a simple-contract creditor files a creditors' bill, the dismissal should be without prejudice.

4. SAME—MODIFICATION OF DECREE ON APPEAL.

When a decree dismissing a bill absolutely is erroneous, in that the dismissal should be without prejudice, the court will modify it on appeal, though complainant does not urge the error.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

J. E. Gilbert and E. B. Perkins, for appellants.

H. B. Turner and Frederick Geller, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The appellants were simple-contract creditors of the Greenville Water & Electric Light Company. Their claim had not been reduced to judgment, and they had no express lien, by mortgage, trust deed, or otherwise. It is well settled by the supreme court that such creditors cannot come into a court of equity to obtain a seizure of the property of a debtor, and its application to the satisfaction of their claims; and this, notwithstanding

a statute of the state may authorize such a proceeding in the courts of the state. *Hollins v. Iron Co.*, 150 U. S. 371, 378, 14 Sup. Ct. 127; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. It follows that the demurrer was properly sustained in the circuit court.

The decree dismissing the bill was absolute, and, although the appellants have not objected on that account, it should be modified. *Lacassagne v. Chapuis*, 144 U. S. 119, 126, 12 Sup. Ct. 659. The decree of the court below dismissing the bill is so modified as to declare that it is without prejudice to an action at law, or to the assertion by the appellants in the suit by the Farmers' Loan & Trust Company v. The Greenville Water & Electric Light Company of any equity they may have under the statutes of the state of Texas providing for the appointment of receivers against corporations; and as so modified the decree is affirmed.

HOPKINS v. NORTHWESTERN LIFE ASSUR. CO.

(Circuit Court, E. D. Pennsylvania. June 7, 1899.)

No. 87.

1. LIFE INSURANCE—SCOPE OF CONTRACT—SUICIDE.

It is a term of every policy of life insurance, implied if not expressed, that the insured will not die by his own willful and deliberate act, and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured; and the fact that the beneficiary is a person other than the insured himself cannot enlarge the scope of the contract, nor authorize a recovery thereon.

2. SAME—PRESUMPTION OF SANITY.

Where it is shown that an insured person committed suicide, in the absence of evidence that he was insane at the time, his sanity will be presumed.

On Motion by Defendant for Judgment Notwithstanding the Verdict.

Bernard Gilpin, for plaintiff.

Ira J. Williams and Simpson & Brown, for defendant.

McPHERSON, District Judge. In April, 1892, John S. Hopkins made a contract with the defendant,—then called the Northwestern Masonic Aid Association,—which for present purposes we shall assume to have been a contract of life insurance. By this policy his life was insured for \$10,000 upon the assessment plan, the beneficiaries named therein being his wife, the plaintiff, if living, and, in case of her death, his children, or his heirs at law. The policy provided that a "change of beneficiaries can be made at any time, without charge, upon complying with the by-laws." It contained no express condition against suicide. In December, 1897, Mr. Hopkins decided to abandon the assessment plan, and accordingly applied to the company for a new policy of \$10,000, similarly payable to his wife or children, but providing for the payment of a defined annual premium during a period of 20 years. The substitution

was made, the first policy was surrendered and canceled, and the second policy was delivered to Mr. Hopkins in the month just named. Mrs. Hopkins neither knew of nor consented to the change. The second policy contained the following condition: "If the insured shall die by his own hand or act, whether sane or insane, within two years from the date of this policy, * * * then this policy shall be void, and cease to be binding upon said company, except for the amount which the insurer has paid in premiums on account hereof." In March, 1898, Mr. Hopkins killed himself, the death occurring within two years from the date of the policy. The company tendered before suit, and has paid into court, the premiums paid by the insured.

The present suit is brought by Mrs. Hopkins upon the first contract, her position being that, because she did not consent to the substitution, she is not bound by the second policy, but may treat the first as still in force. To this the company objects, and devotes much of its argument upon this motion to the support of its objections. We do not think it necessary, however, to consider the argument upon this branch of the case. For the purposes of the motion now before the court, we shall adopt the plaintiff's position, and shall regard the first contract as still in force. We shall also regard it as a policy of insurance, and not a mere certificate issued by a mutual benefit association. The defendant avers that when the first contract was made it was a mutual benefit association, and not a life insurance company, and that the contract in suit is merely a certificate of membership, expressly providing for a change of beneficiaries at any time, in which Mrs. Hopkins could therefore have no vested interest to be prejudiced by the subsequent substitution of another policy upon a different plan. As already stated, however, we shall not consider this objection, but shall assume the contract to be a policy of life insurance, properly so called. Treated as a policy, it is silent concerning suicide, and the single question to be determined is whether, in the absence of such a condition, the contract covers the risk of deliberately self-inflicted death. There is no averment or proof that the insured was insane, and the presumption of sanity must, therefore, prevail.

Since the decision in *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, we do not think the question is open for discussion in the federal courts. In that case the application contained a warranty that the insured would not die by his own act, whether sane or insane, during a period of two years from the date of the policy; but the application was excluded by the trial judge, and the case was heard and considered by the supreme court upon the policy alone, which contained no such provision. Without quoting from the opinion, it is enough to say briefly that the decision is put upon the ground that, although the policy contained no condition against suicide, nevertheless such a condition is an implied term of the contract; and therefore, if the insured does commit suicide, there can be no recovery. It is true that in *Ritter's Case* the policy was made payable to the assured himself, or to his ex-

ecutors or administrators, while in the case before us the policy was made payable to the wife of the assured; but, in our opinion, this difference is not important. In either event, the terms, whether express or implied, of the contract, must control the right to recover; and, if these terms exclude the risk by which death is caused, no person whatever can have an enforceable right based upon such a death. We think it may be misleading to speak of the contract as being "avoided" in case of suicide. Such language is often used in policies, and finds its way thence into the decisions of the courts; but it seems to be more accurate to say that the contract does not insure at all against death by suicide. It is a term of the policy, express or implied, that the assured will not die by his own willful and deliberate act; and therefore, if he does die by such act, his life is terminated by a risk against which the company has not insured. Suicide does not "avoid" the policy; against this event, the policy does not exist.

It seems to follow that the quality and extent of the beneficiary's interest in the contract is of no importance. The question is, does the policy forbid suicide? If so, death by that act is a risk that is not insured against, and can therefore furnish no ground for recovery. The fact that the beneficiary is some other person than the insured himself cannot enlarge the scope of the contract. This, we think, is the answer to the reasoning of the supreme court of Pennsylvania in *Morris v. Assurance Co.*, 183 Pa. 563, 39 Atl. 52, in which a different conclusion was reached upon the point now before us. With much respect for the opinion of that court, we are constrained to believe that this view of the contract was not sufficiently considered, for it is not discussed, and the decision appears to rest mainly upon the ground that the insured cannot defeat the gift to the beneficiary by his own fraudulent conduct afterwards. It seems to us that this begs the question. The beneficiary does not receive a gift of a policy against suicide, for the contract does not cover death by such an act, and therefore the insured does not take away what he did not and could not give. But, whatever weight should be allowed to this case in the courts of the state, we are bound to follow the decision in *Ritter v. Insurance Co.*, and this is founded upon the principle that recovery cannot be had because the company has not insured against this particular risk. The principle is formally stated in the following sentence at the close of the opinion on page 160, 169 U. S. and page 307, 18 Sup. Ct.: "For the reasons we have stated, it must be held that the death of the assured * * * was not a risk intended to be covered, or which could legally have been covered, by the policies in suit." As it seems to us, it must follow inevitably that the beneficiary can have no more extensive right of recovery than the personal representative of the assured; for in either case the suit must be upon the contract, and must be restricted to the subject-matter of the contract.

We direct judgment to be entered for the defendant upon the reserved point, notwithstanding the verdict. Exception to the plaintiff.

MONONGAHELA COAL CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 817]

INDEMNITY—BREACH OF SURETYSHIP BOND—EVIDENCE.

Under a bond for indemnity given on behalf of an employé appointed as agent for the sale of merchandise on commission, which by its terms declares that its true intent and meaning are that the surety "shall be responsible for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employé," proof that on a settlement of accounts between them there was an indebtedness from the employé to the employer is not of itself sufficient to authorize a recovery by the employer against the surety, as such indebtedness may have been authorized by agreement between the employer and employé, or by their course of dealing, and may have been incurred without any fraud or dishonesty on the part of the employé.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This is an action brought by the plaintiff in error against the J. B. Donnally Company, Limited, and the defendant in error, on a bond of insurance or indemnity. The said plaintiff in error had judgment against the J. B. Donnally Company, Limited, for \$6,634.15; but the circuit court directed a verdict for the defendant in error, and judgment was rendered in its favor. Whether or not the court erred in directing a verdict for the Fidelity & Deposit Company of Maryland is the question for consideration here.

The petition, leaving out formal parts, is as follows:

"First. That on the 10th day of March, 1896, It entered into a contract of agency with said defendant [the J. B. Donnally Company, Limited] to sell Pittsburg coal of plaintiff in the state of Louisiana upon the terms, under the conditions, and for the commissions set forth in the agreement thereof, made part hereof; same expiring on the 31st of December, 1896. Second. That said contract was in writing, renewed for one year to the 31st day of December, 1897, as per renewal thereof annexed hereto as part hereof. Third. That, during the course of the business relations so existing between petitioner and said defendant, certain lots of coal were sold by said defendant, the proceeds thereof collected for account of petitioner by said defendant, and not paid over, and same amount to the sum of six thousand six hundred thirty-four and $\frac{15}{100}$ dollars, with six per cent. per annum interest from the 1st October, 1897, as will more fully appear by the statements annexed as part hereof. Petitioner further represents that demand has been made upon said defendant for the payment of said sum aforesaid, without avail. Your petitioner further represents that the Fidelity & Deposit Company of Maryland, a corporation created under and by virtue of the laws of the state of Maryland, and a citizen of said state, domiciled at Baltimore, Maryland, and having a legal representative and doing business in this district, did, by its bond No. 30,901, in consideration of the premium therein expressed and paid, bind and obligate itself unto your petitioner, in the sum of ten thousand dollars, that it would save, defend, and keep harmless your petitioner from and against all loss and damage whatsoever, of any nature or kind, and from all other legal costs and expenses, direct or indirect, incidental thereto, which petitioner shall or may at any time sustain or be put to in the premises, and against all and any pecuniary loss sustained by petitioner of moneys belonging to petitioner, in the possession or custody of the said J. B. Donnally Company, Limited, of New Orleans, or for the possession of which it is responsible, under their contract of agency and renewal hereinbefore set forth, which said bond is signed on the 20th of March, 1896, for a period of time of one year expiring the 20th March, 1897, and which bond was continued in full force and effect thereafter, for due

consideration paid, for one year, to the 20th March, 1898, all of which will more fully and at large appear by reference to said bond and said continuation certificate, hereto annexed and made part hereof. Petitioner further represents that the amount so due and owing as aforesaid by the said J. B. Donnally Company, Limited, is a loss sustained under and by virtue of the terms and provisions of the bond, and the continuation thereof aforesaid, and has been duly demanded of the said Fidelity & Deposit Company of Maryland, which company has heretofore declined payment thereof."

The defendant's answer was a general denial, and an averment that it was not liable on the bond, except for pecuniary loss caused by the larceny or embezzlement of the employé, the J. B. Donnally Company, Limited; that the respondent was discharged from liability on the bond by reason of a false certificate given by the plaintiff that it had examined the books of the employé, and found them correct, etc.

The bond sued on is as follows:

"Whereas, the J. B. Donnally Company, Limited, New Orleans, Louisiana, hereinafter called the 'employé,' has been appointed to the position of agents in the service of the Monongahela Coal Company, Pittsburg, Pennsylvania, hereinafter called the 'employer,' and has been required to furnish a bond for his honesty in the performance of his duties in said position; and whereas, the employer has delivered to the Fidelity and Deposit Company of Maryland, a corporation of the state of Maryland, hereinafter called the 'company,' certain statements and declarations relative to the duties and accounts of the employé, the manner of conducting the business of the employer, and other matters, which, together with any statements or declarations hereafter required by or lodged with the company, do and shall constitute an essential part and form the basis of this contract: Now, therefore, in consideration of the sum of seventy-five and ⁰⁰/₁₀₀ dollars paid as a premium for the period from March twentieth, 1896, to March twentieth, 1897, at 12 o'clock noon, and upon the faith of the said statements and declarations as aforesaid by the employer, it is hereby agreed and declared that, subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this bond, the company shall at the expiration of three months next after proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer to the extent of the sum of ten thousand dollars, and no further, all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property belonging to the employer in the possession or custody of the employé, or for the possession of which he is responsible, directly occasioned by larceny or embezzlement on the part of the employé in connection with the duties of the office or position in the service of the employé hereinbefore referred to, as the same have been stated in writing by the employer to the company, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, or within six months from the death or dismissal or retirement of the employé from the service of the employer within the period of this bond, whichever of these events shall first happen: provided, always, that said company shall not be liable by virtue of this bond for any mere error of judgment or injudicious exercise of discretion on the part of said employé in and about all or any matters wherein he shall have been vested with discretion either by instruction or rules and regulations of the said employer. And it is expressly understood and agreed that the said company shall in no way be held liable hereunder to make good any loss that may accrue to the said employer by reason of any act or thing done or left undone by the said employé in obedience to or in pursuance of any direction, instruction, or authorization conveyed to and received by him from said employer, or its duly-authorized officer in its behalf; and it is expressly understood and agreed that the said company shall in no way be held liable hereunder to make good any loss by fire, robbery, theft, or otherwise that said employer may sustain, except by the direct act or connivance of the said employé. The following provisions also are to be observed and binding as a part of this bond: That the company shall be notified in writing, addressed to the president of the company, at its office, in the city of Baltimore, state of Maryland, of any acts of omission or of commission on the part

of the employé, which may involve a loss for which the company is responsible hereunder, immediately after the occurrence of such act shall come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the president of the company as aforesaid, immediately after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim this bond shall wholly cease and determine, as regards any liability for any act or omission of the employer committed subsequent to the making of such claim, and it shall be surrendered to the company on payment of such claim. That if the employer shall at any time hold, concurrently with this bond, any other bond or guaranty of surety from or on behalf of the employé, the employer shall be entitled, in the event of loss by default of the employé, to claim hereunder only such proportion of the loss as the amount covered by this bond bears to the whole amount of security carried, whether valid or not. That if the company shall so elect, this bond may be canceled at any time by giving one month's notice to the employer, and refunding the premium paid, less a pro rata part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond which may have been committed by the said employé up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for. That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be in its power, at the cost and expense of the company, for the purpose of prosecuting and bringing the said employé to justice, or for aiding the company in suing for and making effort to obtain reimbursement from the employé, or his estate, of moneys which the company shall have paid or become liable to pay by virtue of this bond. That the company shall not be liable under this bond for the amount of any balance that may be found due the employer from the employé, and which may have accrued prior to the date hereof, and which may be discovered within the period hereof; it being the true intent and meaning of this bond that the company shall be responsible aforesaid for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employé within the period specified in this bond. That this bond will become void as to any claim for which the company is responsible hereunder to the employer, if the employer shall fail to notify the company of the occurrence of such act immediately after it shall have come to the knowledge of the employer. And if, without previous notice to and consent of the company thereto, the employer has intrusted or shall intrust the employé with moneys, securities, or other personal property, after having discovered any act of dishonesty, or condones any act for which the company may be liable hereunder, or makes any settlement with the employé for any loss hereunder, this bond shall be null and void, and any willful misstatement or suppression of facts in any claim made hereunder renders this bond void from the beginning. That no suit or action of any kind against the company for the recovery of any claim upon, under, or by virtue of this bond shall be sustainable in any court of law or equity unless such suit or action shall be commenced, and the process served on the company, within the term of twelve months (365 days) next after the presentation of such claim; and, in case any suit or action shall be commenced against the company after the expiration of the said period of twelve months, the lapse of time shall be deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. That the company, upon the execution of this bond, shall not thereafter be responsible to the employer under any bond previously issued to the employer on behalf of said employé, and, upon the issuance of any bond subsequent hereto upon said employé in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company. That no one of the above conditions, or the provisions contained in this bond, shall be deemed to have been waived by or on behalf of said company unless the waiver be clearly expressed in writing, over the signature of its president and secretary, and its seal thereto affixed. And the said employé doth hereby, for himself, his heirs, executors, and administrators, covenant and

agree to and with the said company that he will save, defend, and keep harmless the said company from and against all loss and damage, of whatever nature or kind, and from all legal and other costs and expenses, direct or incidental, which the said company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this bond, and without notice to him thereof), or for or by reason or in consequence of the company having entered into the present bond. In witness whereof, the said J. B. Donnally Company, Limited (the said employé), has hereunto set his hand and seal, and the said company has caused this bond to be signed by its president and its acting secretary, and its seal to be hereunto affixed, this twentieth day of March, one thousand eight hundred and ninety-six.

"Signed, sealed, and delivered by the said employé in the presence of

"J. B. Donnally Co., Ltd.

"[Signed]

J. B. Donnally, President. [Seal.]

"Employé.

"[Signed] P. W. Dyer. [Signed] Edwin Warfield, President.

"[Signed]

Tho. L. Berry, Acting Secretary. [Seal.]"

The depositions of O'Neill and Theis, officers of the plaintiff company, showed that there was found due from the employé to the plaintiff in error the sum of \$6,634.15 on settlement of accounts. The bond sued on was renewed, as averred in the petition, on the 1st day of May, 1897; the renewal to begin March 20, 1897, at the expiration of the bond as first given, and to continue till March 20, 1898. O'Neill and Theis admitted that before this renewal was granted they gave the defendant in error a certificate in substance as follows:

"To the Fidelity and Deposit Company of Maryland: This is to certify that on the 17th day of March, 1897, the books and accounts of the J. B. Donnally Co., Limited, in our employ as agents, were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued. His salary is now commissions, and he is employed as agents.

"Dated at Pittsburg, Pa.

"[Signature]

Monongahela Coal Company,

"Wm. W. O'Neill, Prest.

"April 20th, 1897."

They both testified that the books had not really been examined as stated in the certificate. Other facts are stated in the proper connection in the opinion.

The court, on request, instructed the jury to find for the defendant the Fidelity & Deposit Company of Maryland. The court said:

"The certificate must be taken as true, so far as this surety company has a right to take it, as to them, whether as a matter of fact it was false to O'Neill or not. There was nothing done by the surety company to mislead O'Neill into giving this certificate. The inclosing the blank was a mere form, but it was essential that he should give the certificate, if he expected the renewal of the contract of indemnity. Therefore he chose to give it. It may have been false that they never examined the books, but the indemnity company had a right to take the fact stated as true; and the suggestion that it was a trick of the indemnity company does not count for anything, unless it be shown that O'Neill was misled into a condition of things, which does not appear by the testimony. It was a voluntary contribution of O'Neill's. He could have declined to send it, or that he would not send it, because he had not examined the books; but, when he did say that he examined the books and found them correct, the indemnity company had a right to take that fact to be true, and did take it for true, and acted upon it. Unquestionably, as between these contracting parties, O'Neill is estopped from denying that certificate, in law. He cannot be heard to deny it to screen himself from it, in law, as between the two contracting parties. Of course, that would cover all antecedent matters. But, further, the inducement to the surety company to enter into the second contract was a false inducement. That inducement was in the statement of O'Neill that he had examined the books and found them correct. I think there must be a verdict for the indemnity company."

Verdict and judgment were rendered for the defendant the Fidelity & Deposit Company of Maryland. The plaintiff in error assigns as error the instructions of the court.

W. S. Benedict, for plaintiff in error.

Harry H. Hall and P. M. Milner, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case, delivered the opinion of the court.

The bond sued on is one of indemnity, but it is a contract imposing different obligations on the several makers. The plaintiff in error is called in the bond the "employer," the defendant in error the "company," and the J. B. Donnally Company, Limited, the "employé." These terms will be used for brevity. The contract first recites that the employé "has been required to furnish a bond for his honesty in the performance of his duties in said position" (meaning as agent for the employer). After reciting the consideration, and making other recitals not material here, the agreement is that "the company shall * * * make good and reimburse to the employer, to the extent of the sum of ten thousand dollars, * * * all and any pecuniary loss sustained by the employer, of moneys, securities, or other personal property, belonging to the employer in the possession or custody of the employé, or for the possession of which he is responsible, directly occasioned by larceny or embezzlement on the part of the employé in connection with the duties of the office or position. * * *" The employer, if required by the company, is to give aid and information "for the purpose of prosecuting and bringing the said employé to justice. * * *" It is declared by its terms that the "true intent and meaning" of the bond are "that the company shall be responsible * * * for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employé. * * *" These provisions all relate to the obligations of the company. From them it appears that the liability of the company is restricted to claims based upon the larceny, embezzlement, or at least the dishonesty, of the employé. The obligation of the company does not cover every liability or claim which might accrue in favor of the employer and against the employé. A loss by carelessness or inattention to business might be the foundation of a just claim against the employé by the employer, which would impose no liability on the company by the terms of its obligations in the bond. If, with the consent of the employer, expressed or implied from the course of dealings between it and the employé, the latter used or retained moneys, charging itself with them, it would be no obligation covered by the insurance or indemnity of the company. It follows, therefore, that the fact that the account between the employer and the employé shows an indebtedness from the latter to the former is not sufficient of itself to support a claim on the bond against the company. To recover in an action on a bond, defense being made, there must be an allegation of a breach of it, sustained by evidence. There is neither allegation nor proof that the employé has, through fraud or dishonesty, diverted from the employer moneys,

securities, or other property, nor that it has committed larceny or embezzlement of such property. O'Neill and Theis, the only witnesses, testify that the course of business between the employer and employé was for the latter to transmit the notes of the purchasers for coal sold on credit, and subsequently out of cash sales to retain commissions on account of the sales for which the notes were given. Such dealings made it necessary to keep accounts of debit and credit. Fraud and dishonesty are not to be presumed. The law presumes that every man acts honestly, till the contrary is shown. No fact is shown tending to prove that the debt originated in the fraud or dishonesty of the employé. As late as the 20th of April, 1897, O'Neill, the president of the employer company, furnished a certificate that the employé had performed its duties in an acceptable manner, "and that we know of no reason why the guaranty should not be continued." The amount of the debt of the employé to the employer is \$6,634.15. Part of this sum (\$1,088.64) was collected in 1896. The remainder was collected in April and June of 1897. J. B. Donnelly, Sr., the president of the employé company, died August 29, 1897. The fact that on settlement the employé owed the employer was discovered November 24, 1897, nearly three months after Donnelly's death. Under the circumstances, the fact that the employé, on settlement, is found to owe the employer, is not sufficient to show that the debt originated in fraud or dishonesty, in embezzlement or larceny.

It is alleged in the petition that the company—

"Did bind and obligate itself unto your petitioner, in the sum of ten thousand dollars, that it would save, defend, and keep harmless your petitioner from and against all loss and damage whatsoever, of any nature or kind, and from all other legal costs and expenses, direct or indirect, incidental thereto, which petitioner shall or may at any time sustain."

The bond sued on does not contain this or any similar obligation on the part of the company to the employé. Such language, in substance, is in the latter part thereof, but it is the obligation of the employé (the J. B. Donnelly Company, Limited) to the company (the Fidelity & Deposit Company of Maryland). That part of the bond is as follows:

"And the said employé doth hereby * * * agree that he will save, defend, and keep harmless the said company from and against all loss and damage of whatever nature and kind, and from all legal and other costs and expenses, direct or incidental. * * *"

This part of the bond is the agreement of the employé to reimburse the company if it has to pay anything to the employer by reason of the contract. It contains no such obligation of the company to the employer.

There was no evidence, in our opinion, before the jury, to sustain the allegations of the petition, or to justify a recovery in the case. It was proper to direct a verdict for the Fidelity & Deposit Company of Maryland. The judgment of the circuit court is affirmed.

SOUTH SHORE LUMBER CO. v. C. C. THOMPSON LUMBER CO.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 559.

BOUNDARIES—RIPARIAN OWNERS, ON COVE OR BAY—FRONTAGE ON LINE OF NAVIGABLE WATER.

Under the rule that the frontage of a riparian owner on the line of navigable water within a small bay or cove shall bear the same ratio to his shore frontage as the entire length of the line of navigable water within the cove bears to its shore line, a court cannot declare the boundary between two adjoining owners on the line of navigable water as a matter of law, where the evidence as to the limits of the cove is conflicting; and in such case there is sufficient uncertainty, so that the boundary may be fixed by the agreement or acquiescence of the parties.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

W. M. Tompkins, for plaintiff in error.

C. A. Lamoreux and H. H. Hayden, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error is the plaintiff in the action. The complaint shows that the parties own severally adjacent lands, on which they operate sawmills, the land of each fronting upon Chequamegon Bay, and that for use in connection with its land and mill each has erected docks and piers extending to the line of navigable water. It is charged "that the defendant's docks and structures encroach on the water frontage of the plaintiff," and the question for determination at the trial was of the proper location of the common boundary from the water's edge to the line of navigability. The trial was by jury, and, on the verdict rendered, judgment was given for the defendant.

Error is assigned upon the refusal of each of the following requests for special instructions:

"(1) The cove or bay in which the properties of the parties are situated is the one bounded by the lines A-B and C-D on the map marked 'Plaintiff's Ex. X.' (2) The evidence shows that the riparian boundary line between the properties passes over the docks of the defendant at points on line P-Q in plaintiff's Ex. X. (3) The plaintiff is entitled to a verdict in its favor, the only question for the jury being what amount of damages plaintiff shall recover. (4) There is no such uncertainty as to the boundary line between the dock properties as to raise a question which can be settled by agreement or acquiescence."

The first and second requests, it is evident, were in effect the same as the third. It is agreed that the rule for fixing boundary lines in a small bay or cove, as declared in *Inhabitants of Deerfield v. Arms*, 17 Pick. 41, and approved in *Jones v. Johnston*, 18 How. 150, *Johnston v. Jones*, 1 Black, 209, and *Land Co. v. Bigelow*, 84 Wis. 157, 54 N. W. 496, is:

"First, determine the outside boundaries of the cove or headlands. Run out lines from these headlands at equal angles to the shore to the line of navigable waters. Between these headlands draw a line upon the general course of the navigable waters. Then apportion this line of navigable water to the shore

line in the same proportion that the navigable water line bears to the shore line."

The evidence touching the limits of the cove in question is not undisputed, and the court could not rightfully have withdrawn the question from the jury. It follows, necessarily, that the true location of the disputed line was a proper subject of negotiation and agreement between the parties or their grantors, and the court did not err in refusing the fourth request. The judgment below is affirmed.

GROSSCUP, Circuit Judge, by reason of sickness, did not share in the final consideration of this case.

TENNENT-STIBLING SHOE CO. v. ROPER.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 743.

1. SUNDAY CONTRACT—VALIDITY AS TO THIRD PARTIES—EFFECT OF RATIFICATION.

A debtor cannot defeat the collection of a valid debt by an assignee, on the ground that it was sold and assigned to him on Sunday, in violation of the laws of the state, where the transfer was subsequently ratified by the assignor, and became binding between the parties to it; and such ratification renders it valid from the date of the actual assignment for the purpose of an attachment thereon procured by the assignee on that day.

2. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where an action in a federal court is based on several accounts, exhibited with the declaration, the amount of the accounts in the aggregate is the amount in dispute; and, when it exceeds \$2,000, the court is not deprived of jurisdiction, though the defendant successfully attacks the validity of the transfer of one of the accounts to the plaintiff, reducing the amount remaining below the jurisdictional limit.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Rice T. Fant, for plaintiff in error.

James Stone and C. L. Siveley, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. 1. This is a suit for \$2,336.64, begun by attachment by the Tennent-Stribling Shoe Company, a corporation chartered under the laws of Missouri, against W. E. Roper, a citizen of Mississippi. Of this sum \$920.90 is an account which the plaintiff in error holds against the defendant in error for goods sold to him. The remainder of the sum sued for is composed of accounts which were held against the defendant in error by citizens of states, or by corporations organized and chartered in states, of which neither the plaintiff in error nor the defendant in error was a citizen. The assignee of such claims, if in the aggregate they reach the jurisdictional amount, can sue on them in the United States courts. *Chase v. Roller-Mills Co.*, 56 Fed. 625; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752; *Bergman v. Inman*, 91 Fed.

293. Of the total sum sued for, \$644.96 is an account against the defendant in error and in favor of Wm. R. Moore & Co. The other several accounts were transferred, in writing, to the plaintiff in error for a valuable consideration on the "20th of November, 1897." There is no controversy in the case, as shown in the evidence, except as to the transfer of the Wm. R. Moore & Co. account. That account is transferred in this language:

"Transfer of the account of Wm. R. Moore & Company. Nov. 20, '97. For value received, we hereby sell, transfer, and assign unto Tennent-Stribling Shoe Company, of St. Louis, Mo., the within account versus W. E. Roper.

"Wm. R. Moore & Company."

The attachment suit was brought on these several claims November 21, 1897. This was on Sunday, but the statutes of Mississippi permit the issuance and levy of attachments on Sunday. Ann. Code, § 139. A declaration was duly filed in the case. Subsequently, on the 8th of December, 1897, the defendant in the suit, W. E. Roper, moved the court to dismiss the case "because this court has no jurisdiction; because, at the time of suing out this attachment, defendant was only due or owed to the plaintiff the sum of \$920.90." The case was tried and disposed of on this motion. The bill of exceptions shows that the "defendant, to sustain said motion to dismiss, by his counsel offered in evidence the declaration in attachment, with bills of particulars attached thereto, and the transfers on the bills of particulars." We have already given the contents of the transfer of the Wm. R. Moore & Co. account, dated November 20, 1897. The defendant then offered the evidence of one witness, O. C. Armstrong. His examination related alone to the transfer of the Wm. R. Moore & Co. account. Witness was a member of the firm of Wm. R. Moore & Co. To understand the case, it is necessary to give the material parts of Mr. Armstrong's statement:

"Q. What time did you actually and in fact close the sale of your firm's accounts with plaintiffs? A. That was actually done, I would say, about 4 o'clock Sunday evening, November 21st. Q. Was any part of the purchase money paid before Monday, the 22d, or on Monday, the 22d? A. No, sir. Q. Had any memoranda in writing been signed before or on Monday, the 22d of November? A. Any memoranda in writing? Q. Yes, sir,—evidencing the sale. A. No, sir. Q. I believe you stated in your direct examination that your firm owned the account after it was transferred to the plaintiff up until Monday, November 22d. Please explain what you mean when you state that your firm were the owners of the account until that day. A. When I made that statement, I forgot a telegram that passed Sunday evening, and I now remember that it did secure it Sunday evening. I was merely mistaken. Q. Then the sale was made on Sunday, was it not? A. Yes, sir. Q. When did you first deliver your account to the agent of the Tennent-Stribling Shoe Company, or the plaintiffs? A. I don't know, sir. It was done as soon as the clerks could make it out and put it in order. Q. That was some time after the 22d of November, was it not? A. Yes, sir."

On cross-examination, Mr. Armstrong testified that on the evening of November 20th he went on the train with Mr. Fant, the attorney for the plaintiff in error, to Byhalia; that the trip was made to investigate W. E. Roper's affairs; that witness had with him an itemized statement of the account of Wm. R. Moore & Co. against W. E. Roper; that it was on that evening agreed that the plaintiff in error could buy the account for 50 cents on the dollar

(witness referred to this agreement as an "option"); that the option was finally closed on Sunday evening.

On this evidence, the court granted the motion, dismissed the cause, taxed the plaintiff with the costs, and ordered that certain moneys in court (the proceeds of the sale of part of the attached property) be paid to the defendant, W. E. Roper. The several assignments of error are directed to the action of the court in dismissing the case and entering the judgment described.

It is claimed by the defendant in error that the transfer of the Wm. R. Moore & Co. account was made in violation of the Sunday laws, and that such transfer is therefore void. It is a misdemeanor in Mississippi to engage in work on Sunday. Ann. Code, § 1291. Mr. Armstrong testifies that he and the plaintiff in error's attorney had a conversation on Saturday about the sale of the claim. It seems that the effect of the conversation was that the plaintiff in error was to have the account, if he wished to take it, at 50 cents on the dollar. This agreement is referred to by the witness as an "option." On Sunday there was evidently further communication on the subject, and on direct examination the witness says, in effect, that the account was not drawn off till some days later, probably about the 22d of November, and that the sale was not completed till 4 o'clock Sunday afternoon, November 21st. But, on cross-examination, the witness says that he had the account with him itemized on Saturday, the 20th, at the time of the conversation with plaintiff's attorney. The account offered in evidence is transferred on "November 20th." If this is not the true date of the written transfer, no date is given by the evidence. We are not unmindful of the fact that the witness holds to the proposition that the sale was not concluded, as he understood it, till Sunday afternoon; but the date of the written transfer would indicate that the telegraphic correspondence on Sunday was to ratify what was already done. If it be conceded that the transfer was made on Sunday, we cannot agree that the defendant in error can take advantage of it. The action is not brought on the contract of assignment. The defendant in error is not a party to the contract of assignment. His contract was with Wm. R. Moore & Co. to pay the account. That account, with the other claims, is now the property of the plaintiff in error. It sues on the account. The assignment of it is the means by which it became the owner of it. If it was assigned to it on Sunday, if the assignor afterwards ratified the assignment, and the assignee claims under it, it is binding between them. A third person, not a party to the contract of assignment, should not be permitted to avoid the payment of the debt by pleading the illegality of a contract that can be and is ratified by the parties to it. The defendant in error could not be again made to pay it if this assignee recovers it. No one else claims, or can successfully claim, the debt. A member of the firm of Wm. R. Moore & Co. was in court as a witness, ratifying and approving the assignment. If the defendant in error can defeat the collection of the claim of the plaintiff in error, then no one can collect it. As both the assignor and the assignee are satisfied with their contract, and the same having

become executed by the payment of the purchase money and the delivery of the account with the written assignment, the defendant in error, who is not a party to it, and whose contract is not subject to any infirmity, should not be permitted to appeal to the Sunday laws to avoid the payment of his own legal obligations. The intention with which these laws were enacted will be better promoted by not permitting their use to be extended to defeat just obligations not contracted on Sunday. A third person, not a party to the contract of assignment, cannot dispute its validity on the ground that it was made on Sunday. *Richardson v. Kimball*, 28 Me. 463; *Foster v. Wooten*, 67 Miss. 540, 7 South. 501; *Adams v. Gay*, 19 Vt. 358.

2. The following is a statement of the claims sued on, as appears by the record:

Exhibit A, Tennent-Stribling Shoe Company.....	\$ 920 90
Exhibit B, Wm. R. Moore & Co.....	644 96
Exhibit C, Memphis Grocery Company.....	488 35
Exhibit D, Goodman Bros!.....	129 75
Exhibit E, Marks & Fader.....	152 68
Aggregate	\$2,336 64

The plaintiff is the original owner of the first account, and the others are transferred to it as before stated. The affidavit is made to secure an attachment to collect these claims, the writ is issued and levied, and declaration filed, each showing an amount, in the aggregate, within the jurisdiction of the circuit court. If it be conceded that the evidence in the case shows that the plaintiff, for some reason, cannot maintain its title to, or right to recover on, one of the accounts, and that deducting that account from the aggregate of the amounts sued for reduces the sum below \$2,000, does such evidence defeat the jurisdiction of the circuit court? The circuit court so held. Concluding that the plaintiff's title to the Wm. R. Moore & Co. account was defective, and deducting that sum from the aggregate, it reduced the amount for which plaintiff could obtain judgment below \$2,000, and the court therefore dismissed the case for want of jurisdiction. Unless the matter in dispute in a case exceeds \$2,000, the court is without jurisdiction. In *Lee v. Watson*, 1 Wall. 339, the court said:

"By 'matter in dispute' is meant the subject of litigation,—the matter for which the suit is brought,—and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount as stated in the body of the declaration."

In discussing the question of appellate jurisdiction, in *Hilton v. Dickinson*, 108 U. S. 166, 2 Sup. Ct. 424, the court held: "The amount stated in the body of the declaration * * * must be considered in determining the question of jurisdiction." Cases of course do arise when the amount stated in the declaration would not govern, as, for example, a suit for \$15,000 damages for the breach of a \$1,000 bond. The amount of the bond would be the limit of the recovery, and so the extent of the matter in dispute. In an action, however, on accounts exhibited with the declaration, the amount of the accounts

in the aggregate is the amount in dispute. The fact that some defense may be made, or is, in fact, made, which will make the recovery fall below the jurisdictional amount, does not defeat the jurisdiction of the court. It occurs in the practice that judgments are sometimes entered for a less sum than suit could have been brought for. Statutory provision as to costs is made for such cases:

"When, in a circuit court, a plaintiff in an action at law originally brought there * * * recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, * * * he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs." Rev. St. U. S. § 968.

This statute, at least, shows that the congress does not so construe the statutes conferring jurisdiction on the court that the same will be defeated, if, by defense, the amount claimed in the action should be reduced below \$2,000. In *Hardin v. Cass Co.*, 42 Fed. 652, a suit was brought for a sum exceeding the jurisdictional amount. The statute of limitations was successfully pleaded as to part of the claim. This part of the suit being defeated, the amount left collectible was less than the jurisdictional amount. The defendant insisted that the case should be dismissed. The court, however, granted judgment for the remainder of the claim, although it was for less than \$2,000. The case of *Green v. Lister*, 8 Cranch, 106, was a suit for a large tract of land, alleged to exceed the value which then fixed the jurisdiction of the court. The recovery was for less in value. Mr. Justice Story, delivering the opinion of the court, said:

"As to the first question, we are satisfied that the circuit court had jurisdiction of the cause. Taking the eleventh and twentieth sections of the judicial act of 1789 (chapter 20) in connection, it is clear that the jurisdiction attaches when the property demanded exceeds \$500 in value; and if, upon trial, the demandant recovers less, he is not allowed his costs, but, at the discretion of the court, may be adjudged to pay costs."

See, also, *Levinski v. Banking Co.*, 92 Fed. 449.

The judgment of the circuit court is reversed, and the cause remanded, with direction to reinstate said cause on the docket, and to proceed in conformity with this opinion; and it is so ordered.

NATIONAL ACC. SOC. OF CITY OF NEW YORK v. DOLPH.

(Circuit Court of Appeals, Third Circuit. May 17, 1899.)

No. 12.

1. INSURANCE—ACTION ON ACCIDENT POLICY—EVIDENCE.

The Pennsylvania act of May 11, 1881, which provides that no application or constitution or by-law of the company shall be admitted in evidence as part of a contract of life or fire insurance, or as having any bearing thereon, unless a copy thereof shall have been attached to the policy, does not apply to contracts of accident insurance.

2. REVIEW—HARMLESS ERROR.

A judgment will not be reversed on account of the erroneous exclusion of evidence which was merely cumulative, and where the fact sought to be shown thereby was proved by other evidence without dispute, and properly submitted for the consideration of the jury.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

H. D. McBurney, for plaintiff in error.

G. M. Watson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. In May, 1887, the National Accident Society of New York accepted Samuel Dolph as a member of said society, and issued to him a policy of insurance, which provided that, in the event of the death of the insured resulting from accidental bodily injuries, the society would pay the principal sum of \$4,000 to Mindwell Dolph, wife of said assured. It appears from the record that, in the application which he made for this policy of insurance, said Dolph stated his occupation to be that of a professional salesman in a lumber yard and a foreman of men, and that his risk was rated as one engaged in such employment. In his said application the assured agreed that, for injury sustained by him when doing an act or thing pertaining to any occupation or exposure classed by the society as more hazardous than those so stated in the application, he or his beneficiary should be entitled to recover only such amount as the society paid for such increased hazards. It was expressed in the policy issued on said application that, if the member of said society (the assured) should be fatally injured while engaged temporarily or otherwise in any occupation classed as more hazardous than the occupation under which the certificate was issued, he should be entitled only to the indemnity or death loss of the division in which the occupation in which he had sustained the injuries was classified. The insured received an injury at the mill at which he was employed, and subsequently died. It was insisted at the trial, on the part of the defendant, that the injury so received was not the cause of death, and that, if it were such injury, it was received by assured while he was engaged in the occupation and performing the duties of an "off-bearer," which were classed by the society as more hazardous than those under which the assured was rated. The evidence on these points was contradictory. It was fairly submitted by the court to the determination of the jury. In the charge of the court in this respect, as well as in its neglect or refusal to charge as requested by the defendant, we find no error. Upon the trial of the cause, the learned judge refused to receive in evidence the application which was the basis of the policy of insurance, basing his refusal so to do upon the statute of the state of Pennsylvania enacted May 11, 1881. This court has held, however, in the case of Insurance Co. v. Carroll, 58 U. S. App. 76, 30 C. C. A. 253, and 86 Fed. 567, that the statute upon which the learned judge relied was not applicable to accident insurance. In accordance with the views therein expressed, we are of the opinion that in such refusal the learned judge erred.

In the record brought to the court the application refused by the learned judge is set out at length, and the fact is disclosed that the

only matter contained therein, pertinent to the issue raised, was contained in section 17, and related to the amount which the plaintiff would be entitled to recover, in case the assured at the time of the accident was engaged in business more hazardous than that in which he had by his representations then made been classed or rated. Clause 4 of the policy sets out the agreement made by the insured in regard to rating as expressed in the application, and expressly provides for the contingency of injury to the assured while engaged temporarily or otherwise in any occupation classed by the society as more hazardous than the occupation under which the certificate or policy was issued. The defendant's manual containing their classification of risks was also received in evidence, so that there was nothing in the application relevant to the issue which was not brought to the attention of the jury. The learned judge clearly set forth to the jury in his charge that, if the assured had met with his accident and consequent injury while engaged in a more hazardous occupation than that in which he had been rated, the plaintiff would not be entitled to recover the full amount named in said policy, but only the \$500, which the policy provided should be paid to one engaged in the more hazardous occupation. The jury had before them for consideration all the evidence which was necessary to enable them fairly to determine all the questions of fact which were properly submitted to them. We fail to see how anything in the excluded application would have aided them, or tended to have changed the result,—at most, its evidence would have been but cumulative. Under these circumstances, there was no reversible error in refusal to receive the same. "The court will not reverse for error which it is evident has done no injury to party complaining." *Chase v. Hubbard*, 99 Pa. St. 226. To the same effect is the case of *Galbraith v. Zimmerman*, 100 Pa. St. 374. We are of the opinion that the verdict should not be disturbed, and that the judgment of the circuit court should be affirmed.

CLUNE v. RISTINE.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1899.)

No. 1,032.

1. RAILROADS—OBSTRUCTION ON TRACK—NEGLIGENCE.

A rock weighing some 200 tons, which was embedded in the face of the slope of a railroad cut along the side of a mountain, slid from its place, in the night, upon the track, and an engine attached to a train, coming in collision with it, was wrecked, and the engineer killed. The cut was through a formation known as "slide," consisting of loose boulders embedded in clay or gravel and the slope stood at an angle of about 45 degrees. The road had been built about eight years, during which time no change had been made in the slope, and the only inspections had been made by observations from passing trains or hand cars. The bank was regarded as safe by the company's engineers. There had been no recent rains, and no night patrol of the cut was being made at the time. *Held*, in an action against the railroad company to recover for the death of the engineer, that such facts did not warrant a peremptory instruction for the defendant, but that the question whether it had exercised ordinary

care to construct and maintain its track in a reasonably safe condition was one for the jury.

2. DAMAGES—ACTION FOR WRONGFUL DEATH—EVIDENCE IN MITIGATION.

In an action for wrongful death the defendant is not entitled to prove in mitigation of damages that plaintiff has received insurance on the life of the deceased from a collateral source wholly independent of defendant. Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Edmund F. Richardson (Thomas M. Patterson and Horace N. Hawkins, on the brief), for plaintiff in error.

Henry T. Rogers (Lucius M. Cuthbert, Daniel B. Ellis, and George C. Preston, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This record presents the general question whether a peremptory instruction to return a verdict in favor of George W. Ristine, receiver of the Colorado Midland Railroad Company, the defendant in error and the defendant below, was properly given. At the conclusion of the plaintiff's testimony the facts which had then been established were substantially as follows: On August 21, 1894, J. B. Blocker, who was the son of Mary E. Clune, the plaintiff in error, and the plaintiff below, was employed as a railroad engineer, and was engaged in running freight trains over the railroad of the Colorado Midland Railroad Company, between Colorado City and Leadville, Colo. On the night of that day, as he was running his train through Eleven Mile cañon, which is some distance west of Florence, Colo., and had proceeded up the cañon about eight miles, his engine came in contact with a large rock that had slid down upon the track from the slope on the south side of the track in which it had been embedded, the result being that the engine was overturned, and the plaintiff's son was instantly killed. The rock in question was a granite boulder from 22 to 25 feet long, and was found to be from 5 to 6 feet high, when it landed upon the track, and weighed many tons. The mountain on the south side of the track abreast of where the accident occurred rose at a sharp angle to the height of about one thousand feet, and the foot of the mountain had been scored away so as to form a berm, or shoulder, on which to lay the track. The river or stream which flowed through the cañon was on the north side of the track, and immediately adjacent thereto. The grading that had been done at the foot of the mountain on the south side of the stream to form the roadbed was through a formation known as "slide" or "wash," and consisted of boulders of various kinds embedded in clay or gravel. The rock which occasioned the accident slid out of the slope at the south side of the track, which had been made when the grading was done. This slope lay at an angle of about 45 degrees. The bottom of the rock as it lay in the slope before it moved was from 20 to 30 feet from the track, according to the testimony of the plaintiff's witnesses, and at a height vertically of about 6 or 7 feet above the track. In its descent it pushed out of place the track, which was there laid on a fill. It had rained a very little on the night of the accident as the train left Flor-

ence, but there had been no unusual storm or flood or seismic disturbance of any kind, either that night or for some time previously. The night of the accident was not unusually dark. The moon appears to have shone at intervals, but at the place where the accident occurred the track lay in the shadow of the mountain, which made it difficult to see. The headlight of the engine, for some reason, had not burned very brilliantly on the night of the accident. The deceased was at his post when the accident occurred, and saw the rock a moment or so before the collision, and signaled for brakes, but not in time to prevent the disaster.

The defendant did not demur to the case which was made by the plaintiff's testimony, but introduced further evidence, which was to the following effect: The railroad in question had been in operation about eight or nine years previous to the accident. After the contractors who constructed the road turned it over to the Colorado Midland Railroad Company, that company sent a gang of men into Eleven Mile cañon to dress up the track through the cañon and flatten the slopes. They left the particular slope where the accident occurred at an angle of about 45 degrees, which was deemed safe. No special examination had ever been made of the rock which eventually slid out of place, to ascertain if it was safe, except such visual examination as could be made by an inspector or engineer traveling through the cañon on a moving train or hand car. To an inspector thus traveling through the cañon and viewing the rock in question, it extended lengthwise of the cut about 22 feet and up the slope about 16 feet. It was nearly half as large as a freight car, and the lower edge of the rock nearest to the track seemed to have a bearing on other broken rock. From its bottom or lower edge the rock appears to have formed the face of the slope to the height of 16 feet, but it jutted out therefrom a few feet. At its lowest point it was 5 or 6 feet higher than the track, and from 10 to 20 feet distant therefrom. Its weight was about 210 tons, and the soil in which it was embedded was known to be "wash" from the mountain. When the rock slid out of place on the night of the accident, it was found to be wedge-shaped; that is to say, the under side of the rock upon which it rested was not flat, but inclined upwards to some extent, so that it would more readily slide out of place. The chief engineer of the railroad, who had been through the cañon as often as six times a month for several years prior to the accident, and had made a visual examination of the road on such occasions, testified, in substance, that he had seen nothing at the place of the accident which led him to believe that the rock in question was insecure. Another witness testified, in substance, that it would have been impossible to tell whether the rock was insecure by sounding it with a hammer, owing to its great size, and that its peculiar wedge shape was not manifest until it had slid out of place. The testimony for the receiver further showed that about August 1, 1894, he had withdrawn the night track walkers from Eleven Mile cañon, and that from that time forward until after the accident occurred, the cañon was not patrolled but once a day, and then by daylight. This was because the rainy season was supposed to be over, and a night patrol was not deemed necessary.

Upon this showing the trial court directed a verdict for the defendant, holding, apparently, that the facts heretofore recited could not give rise to any difference of opinion, and that all reasonable men would, of necessity, agree that the defendant was without fault. We are not able to concur in that view of the case. It is an elementary rule that a railroad company is under an obligation, both to its employees and to the traveling public, to exercise ordinary care both in the construction and maintenance of its track and roadbed, to the end that they may be reasonably safe for the passage of trains; and the proper discharge of that obligation makes it the duty of a railroad company to be observant of all objects in close proximity to its track, which in the ordinary course of events may impair its safety. If rocks overhang its track, or loose rock is embedded in the slopes of cuts through which its track runs, in such a position that they may be displaced by the ordinary action of the elements, and precipitated upon its track, it should either remove them, or take other adequate precautions to guard against the danger, and render its track reasonably safe. In the case in hand we are unable to say that all reasonable men, listening to the evidence which was adduced at the trial, would have concluded that the receiver had performed his full duty with respect to caring for the safety of the track intrusted to his charge, and was not chargeable with any negligence. The rock which occasioned the accident was known to be a loose rock. It was also known to be embedded in slide or wash on the face of a steep slope, and that it was of enormous weight. If it did not rest upon a secure foundation, it was certain to fall sooner or later, and in its descent was sure to wreck the track, and might occasion great loss, both of life and property. Besides, the continuous action of frost and floods, and the vibration caused by moving trains, would have a tendency to render it more insecure each year unless it rested upon a rock foundation. In view of these considerations, and in view of the fact that the evidence showed that the track through the cañon was not patrolled at night, although trains ran at night as well as by day, it is very probable, we think, that many persons would have reached the conclusion that in the exercise of ordinary care the defendant should have taken the precaution to have ascertained with greater certainty upon what sort of a foundation the rock rested, and should not have trusted to a visual examination, made hastily and at intervals from the platform or window of a moving train. It is manifest from what was discovered when the rock slipped from its place that the defendant would have been guilty of gross carelessness if the true nature of its foundation had been known prior to the accident, and it had been allowed to remain in the slope unsupported. Inasmuch as a demurrer to the evidence was not interposed at the conclusion of the plaintiff's evidence, the case seems to have been tried below, both by the court and counsel, upon the theory that the fall of the rock from a position in close proximity to the track, without any immediate cause except its own weight, would, in itself, warrant an inference of negligence. The receiver accordingly introduced testimony, as above stated, to rebut such inference, and to show from the appearance of the rock while in place that his servants and agents had not been guilty of any

negligence. But whether the testimony thus offered in behalf of the receiver was entirely trustworthy, and whether, if in all respects true, it showed the exercise of ordinary care, and absolved the receiver from all blame, were each questions for the jury. In a given case it is generally the province of the jury to decide, in the light of their knowledge and experience, whether ordinary care has been exercised, since ordinary care is that degree of circumspection which persons of average prudence and intelligence would usually exercise under like circumstances. In a certain class of negligence cases the standard of duty has been so well defined and established by judicial decisions that a court is entitled to declare that a given act or series of acts do or do not amount to culpable negligence. But we are of opinion that the case at bar does not fall within the latter class of cases, and that it was the province of the jury to decide the questions above indicated.

On the trial of the case the plaintiff seems to have claimed that on the night of the accident there was some defect in the headlight of the locomotive, or in the oil which was being used, by reason of which fact it did not give the usual amount of light, and in that way contributed to some extent to the accident. But, as that branch of the case was not discussed on the oral argument, and as the assignments of error predicated thereon were practically abandoned, we do not consider it necessary to notice them, and shall refrain from doing so.

In the course of the trial the court permitted the defendant to prove, by way of mitigating the damages which the plaintiff might recover, that she had collected from an insurance company, after the death of her son, the sum of about \$2,000, and for that reason was not entitled to recover to the full extent of her loss. An exception was taken to the admission of such evidence. We think that the testimony should have been excluded, and that the objection thereto was well taken. When an action is brought against a wrongdoer, he is not entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself. This doctrine is well established by the authorities, and is applicable to the case in hand. *Suth. Dam.* (2d Ed.) § 158, and cases there cited. On the second trial the evidence complained of should be excluded. The judgment below is accordingly reversed, and the case is remanded for a new trial.

SANBORN, Circuit Judge (dissenting). I am unable to resist the conclusion that there is no evidence in this case of any negligence on the part of the receiver. The test of absence of ordinary care here is: Would a man of usual prudence and sagacity have anticipated, and have taken steps to guard against, the fall of this rock, under all the circumstances of this case? The rock which slid upon the track was half as large as a car. It was so embedded in the side of the mountain that it was visible only to the extent of 18 inches. No ordinary inspection or test by the use of hammer or bar could determine that it would ever fall. The railroad had been constructed eight years before this accident occurred, and no cutting or grading or change in the face

of the mountain about the rock had been made during all this time. No flood, storm, or other disturbance of the earth or of the elements occurred shortly before its fall, which might have caused it. A state of things once proved to exist is presumed to continue. When the face of a mountain is changed by grading, cutting, or filling, a duty of watchfulness and care is imposed during the first few months thereafter in order to guard against the natural effects of such acts. But the longer a rock or a mountain side remains in the same position and condition, the less becomes the need, and hence the duty, of watchfulness, until finally the probability that they will not move or change in the absence of some warning, and of some active and apparent cause, becomes conclusive. This rock had remained embedded in the mountain side unmoved through the storms and changing seasons of eight years after the railroad was built and the grading done about it, and I have been forced to the same conclusion as the trial judge that a man of ordinary prudence would not have anticipated that it would fall without apparent cause or warning, and would not have taken any steps to fasten it in its position, or to inspect it more carefully than the receiver did. An injury that could not have been foreseen or reasonably anticipated as the probable result of an act or omission lays no foundation for an action (*Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 5 C. C. A. 347, 350, and 55 Fed. 949, 952), and it seems to me that there was no human probability that this rock would slide from its mountain bed after it had remained in the same situation for eight years, and that no man could have anticipated its fall as the natural or probable result of a failure to inspect or secure it.

NATIONAL ACC. SOC. v. SPIRO.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 23.

JUDGMENT AS EVIDENCE—AUTHENTICATION OF RECORD.

A judgment of a federal court may be proved in another federal court by an exemplified copy of the record containing the judgment, under the seal of the court and authenticated by the certificate of the deputy clerk. Every federal court is presumed to know the seal of every other federal court, and it will also be presumed in favor of the certificate of the deputy that the clerk was absent when it was made.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error by the defendant in the court below to review a judgment for the plaintiff, the action having been brought upon a judgment in favor of the plaintiff and against the defendant rendered by the circuit court of the United States for the Eastern district of Tennessee.

Roger A. Pryor, for plaintiff in error.

Hamilton Wallis, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

PER CURIAM. The only question which has been argued at the bar is as to the validity of the objection made to the admission in evidence of the record of the judgment of the circuit court of the United States for the Eastern district of Tennessee. The record purports to be an exemplified copy of the original proceedings in the cause, including the judgment itself, is attested by the seal of the court, and is authenticated by the certificate of the deputy clerk of the court. Whether the record is sufficiently authenticated, pursuant to the provisions of section 905 of the Revised Statutes of the United States, is a question which need not be considered. The statute provides the mode of proof of the records and judicial proceedings of the courts of any state or territory, and has no application to those of the courts of the United States. Records may be proved by exemplifications (copies under seal), by office copies, and by sworn copies. Greenleaf states that "copies of records in judicial proceedings, under seal, are deemed of higher credit than sworn copies, as having passed under a more exact critical examination." 1 Greenl. Ev. § 503. The rule is that every country recognizes the seals of its own tribunals without any further proof accompanying them. *Delafield v. Hand*, 3 Johns. 313. Each circuit and district court of the United States is presumed to know the seals of every other circuit and district court of the United States, as each state court within a state is presumed to know and recognize the seal of every other court of record within the same state. In *Turnbull v. Payson*, 95 U. S. 424, it was held that the record of a district or circuit court of the United States may be proved in any other circuit or district court of the United States by a certificate of the clerk, under the seal of the court, without the certificate of the judge that the attestation is in due form.

Although the certificate here was made by the deputy clerk, that officer is by statute authorized, in the absence of the clerk, to do and perform all the duties pertaining to the office; and, in general, a deputy of a ministerial officer can do every act which his principal might do. *The Confiscation Cases*, 20 Wall. 111. We are at liberty to presume, in favor of the proper discharge of official duty, that the clerk was absent at the time. *Rankin v. Hoyt*, 4 How. 327; *U. S. v. Crusell*, 14 Wall. 1; *Doughty v. Hope*, 3 Denio, 253, 1 N. Y. 79; *Mosher v. Heydrick*, 45 Barb. 549. The objections were correctly overruled, and the judgment is affirmed, with costs.

SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD v. BECK.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1899.)

EVIDENCE—SHIFTING BURDEN OF PROOF.

Where a defendant in an action on a policy of life insurance pleads as a defense that the insured committed suicide, by reason of which the policy became void, the burden of establishing such defense rests upon the defendant throughout the trial. The fact that the plaintiff introduces in evidence the proofs of death furnished the defendant, containing the statement that the insured committed suicide and the verdict of a coroner's jury to that effect, while such evidence is entitled to its weight, and, standing

alone, would establish the fact of suicide prima facie, does not shift the burden of proof on the issue, so as to require the plaintiff on the whole case to prove, by a preponderance of evidence, that death resulted from other causes.

In Error to the Circuit Court of the United States for the District of Montana.

Albert I. Loeb, for plaintiff in error.

C. B. Nolan, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. On the 1st day of April, 1895, one Frank E. Beck made application for membership in the endowment rank, Knights of Pythias, which is the insurance branch of that society's business. The application was accepted. The applicant's wife, Lillian H. Beck, the defendant in error here, was named as beneficiary. The by-laws of the society pertinent to the present case provide:

"If the death of any member of the endowment rank heretofore admitted into the first, second, third, or fourth class, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hand of justice, or violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission to the endowment rank; the expectation of life based upon the American Experience Table of Mortality in force at the time of such death to govern."

On the night of the 31st day of October, 1896, by the discharge of a double-barreled shotgun, which Beck at the time carried, he was killed. A coroner's inquest was held, and the verdict declared that the insured "came to his death, on the 31st of October, 1896, by shooting himself in the head with a double-barreled shotgun, with the purpose and intent of committing suicide, while temporarily insane, due probably to the use of intoxicants; that he threatened to kill his wife before killing himself." Pursuant to the by-laws of the society, proofs of death were presented to it, which were signed and sworn to by the beneficiary, in which the statement was made that the death of the insured was caused by suicide. Annexed to the proofs was a copy of the coroner's verdict, together with a certified copy of the testimony upon which it was based. In due time, after the presentation of the proofs of death, a tender of \$138 was made by the society, which was refused, and thereafter the present suit was commenced against the plaintiff in error to recover the sum of \$3,000, which was the amount of the insurance. While the complaint alleges that the plaintiff furnished the defendant with proof of the death of the insured, it contains no mention of the manner of his death. In defense of the action, the defendant alleges "that the death of said Beck resulted from self-destruction, and that he committed suicide; that, prior to said Beck taking his own life, said Beck was attempting to violate, and did violate, the criminal laws of the state of Montana." The answer made a tender to the plaintiff of \$138, and asked that the defendant be dismissed with its costs. The case came on for trial before the court with a

jury, and resulted in a verdict for the plaintiff in the sum of \$3,000.

It is first claimed on behalf of the plaintiff in error that there is no evidence to sustain the verdict; in other words, that the court should have directed a verdict for the defendant. A careful examination of the evidence and consideration of the circumstances surrounding the killing satisfies us that the trial court would not have been justified in doing so, but that it was a case proper to be submitted to the jury, under appropriate instructions.

Complaint is next made of instructions given and refused, the substance of which complaint is that because, in the proofs of death presented by the beneficiary, which were introduced in evidence by the plaintiff, were the verdict of the coroner's jury and the statement of the beneficiary to the effect that the deceased committed suicide, the burden which theretofore rested on the defendant to prove that fact, which it alleged, as a defense, was thereby shifted, and that it then became incumbent upon the plaintiff to show, by a preponderance of evidence, that the death of the deceased was from accident or natural causes. Undoubtedly the preliminary proofs furnished the defendant by the plaintiff, and introduced in evidence by her, constituted *prima facie* proof that the deceased committed suicide, and, standing alone, would have defeated any recovery on her part. But they were of such a nature as that, since it was not made to appear that the insurer was prejudiced in its defense by relying upon the representations contained in the proofs, it was open to the plaintiff to show by other proof, or by the facts and circumstances of the case, that those representations were made under a misapprehension of the true facts, or in ignorance of material matters subsequently ascertained. *Insurance Co. v. Newton*, 22 Wall. 32; *Hanna v. Insurance Co.*, 150 N. Y. 526, 44 N. E. 1099; *Walther v. Insurance Co.*, 65 Cal. 417, 4 Pac. 413. In all cases where such showing is satisfactory, such an admission is overcome. The burden of proof and the weight of evidence are, as said by the supreme court of Massachusetts in *Bridge Co. v. Butler*, 2 Gray, 132, "two very different things. The former remains on a party affirming a fact, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the strength and nature of the proofs offered in support or denial of the main fact to be established." In *Heinemann v. Heard*, 62 N. Y. 455, the court of appeals of New York said:

"During the progress of a trial, it often happens that a party gives evidence tending to establish his allegation,—sufficient, it may be, to establish it *prima facie*,—and it is sometimes said that the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial."

See, also, *Spencer v. Association*, 142 N. Y. 509, 37 N. E. 625; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Clark v. Hills*, 67 Tex. 141, 2 S. W. 356; *Powers v. Russell*, 13 Pick. 76; *Tarbox v. Steamboat Co.*, 50 Me. 345; *Nibl. Ben. Soc. & Acc. Ins.* § 336.

We are of opinion that the burden assumed by the defendant, in its answer, of proving that the deceased came to his death with sui-

cidal intent, remained on the defendant, and that it did not devolve upon the plaintiff to prove, by a preponderance of evidence, that his death resulted from the accidental discharge of the gun.

It is further claimed on the part of the plaintiff in error that the court should have directed the jury to return a verdict for the defendant, on the ground that the death of the deceased should be treated as one "in violation or attempted violation of the criminal law." There are two answers to this point, either one of which is sufficient: First, the allegation of the answer is not that Beck's death resulted from the violation or attempted violation of any criminal law of the state of Montana, but only that at some indefinite time, "prior to said Beck taking his own life, said Beck was attempting and did violate the criminal law of the state of Montana." In the next place, while the evidence showed that, very shortly prior to the time that he was killed, he was engaged in unlawful acts, it did not show with sufficient clearness that he was so engaged at the time he met his death as to justify the court in taking the case from the jury. The judgment is affirmed.

HARVARD PUB. CO. v. SYNDICATE PUB. CO.

(Circuit Court of Appeals, Third Circuit. June 5, 1899.)

ACTION ON CONTRACT—EVIDENCE TO ESTABLISH—QUESTION FOR JURY.

Where letters introduced in evidence by a plaintiff in proof of the contract sued upon do not constitute in themselves a completed contract, but merely negotiations with a view to a contract, and they are supplemented by oral testimony, it is proper to submit to the jury the question whether the contract alleged was in fact completed.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Thomas Darlington, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

DALLAS, Circuit Judge. Eighteen errors have been assigned in this case, but it is not necessary to consider them in detail. The brief on behalf of the plaintiff in error presents its actual contention in four points. The first and second of these points rest upon the assertion that the court below erred in holding that certain letters which were adduced in evidence did not of themselves constitute a complete contract. If they did not, the learned judge was clearly right in submitting to the jury whether, upon the whole matter, the contract alleged and sued upon had in fact been completed. The Poconoket, 28 U. S. App. 600, 17 C. C. A. 309, 70 Fed. 640. We have carefully examined these letters, and find in them nothing but negotiations having a contract prospectively in view. From them alone it would be impossible to state any perfect agreement. They do not disclose a full and final meeting of the minds of the parties. If there was a contract, it was partly in writing and partly oral.

Consequently the court below committed no error in declining to hold, as by several of the plaintiff's points it was requested to do, that a contract exclusively in writing had been established. The plaintiff, indeed, was not willing to rest its proof of contract upon the letters merely; for it introduced supplementary testimony, which, if the letters had constituted a complete contract, would have been both superfluous and irrelevant.

The complaint made of the action of the trial judge in declining to instruct the jury that, in the absence of a plea of accord and satisfaction, "the alleged transaction of January 22d, as to a settlement on that day, cannot be considered by the jury in that light," is not well founded. The testimony relating to this transaction was received without objection, and there was some cross-examination with respect to it. In our opinion, the court would not have been justified in directing the jury as the plaintiff requested. What it did say was, we think, entirely proper and appropriate, viz.:

"I may say, however, respecting this, that I have been more inclined to regard the evidence heard on this subject as bearing on the question whether the plaintiff at that time believed it had such a claim as it now sets up,—in other words, whether the claim is an afterthought,—than as evidence of a settlement of the claim made here. The parties were at that time settling an old account, and they introduced into it the cost of putting in the electric light and preparing the office for this business. They made no such claim then as is now set up, so far as my memory of the testimony goes,—though I leave it to you,—nor until this suit was brought. You have heard the testimony of the witnesses respecting what was said upon that occasion. The defendant sets it up as evidence that this matter was called up, and that any claim the plaintiff had against the defendant on account of what had taken place was settled. I repeat to you that I have regarded it, not so much as evidence of such a settlement, as evidence bearing upon the question whether the plaintiff then at that time believed it had such a claim,—believed that the contract now set up existed,—or whether this claim was an afterthought. You have heard the defendant's testimony in answer to the plaintiff's on this subject, and must determine, from a fair consideration of it, and of all that is before you, what weight should be attached to it."

The fourth point submitted by the plaintiff in error, that "the verdict was against the evidence," presents no question which is properly for consideration by this court. The judgment is affirmed.

TOWN OF GREENBURG v. INTERNATIONAL TRUST CO.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 82.

1. HIGHWAYS—DETERMINATION OF NECESSITY BY COURTS—VALIDITY OF NEW YORK STATUTE.

Laws N. Y. 1892, c. 493, providing for the extending of highways in one town into or through other towns in the same county, was not in violation of the state constitution because it conferred on certain courts of the state the power to determine the necessity or expediency of such extensions, the highest court of the state having upheld the exercise of such powers by the courts in numerous analogous cases arising under the same constitution.

2. MUNICIPAL BONDS—IRREGULARITY IN ISSUANCE—BONA FIDE HOLDERS.

The fact that the municipal authorities gave a credit to the purchaser of the bonds of a town, instead of selling them for cash, as required by the statute, is not a defense to an action on such bonds by a subsequent bona fide purchaser.

In Error to the Circuit Court of the United States for the Southern District of New York.

J. Rider Cady, for plaintiff in error.

John Dillon, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The bonds in suit were created pursuant to the authority conferred by an act of the legislature of the state of New York entitled "An act to provide for the construction of highways and bridges upon highways running through two or more towns of the same county" (chapter 493, Laws 1892), and their validity is contested upon the proposition that the act violates the constitution of the state. The contention, if well founded, is of course fatal to the validity of the bonds, and no holder of them can invoke protection as a bona fide purchaser, as all purchasers take them with knowledge of the law, and presumed knowledge that they are void.

Section 1 of the act provides as follows:

"Any twelve or more freeholders, residing in any county of this state, may present a petition which must be duly verified by at least all of the said freeholders, to the supreme court at a special term to be held in the judicial district where such court is situated or to the county court of said county, stating that it is necessary for the public welfare and convenience that a highway in any one town in said county shall be continued along and through another town in the same county. Upon receipt of the said petition the said court shall carefully consider the facts therein alleged, and if it shall be satisfied that the said highway is necessary for the public welfare and convenience, and that its continuation and construction will afford a nearer road between two populous points in two towns than by any existing highway, then the said court may make an order directing that a notice shall be published in two newspapers of said county, for two successive weeks, of the time and place when an application for the commissioners shall be made, and at said time and place said court shall make an order appointing three commissioners for the purposes hereinafter described, all of which commissioners shall be freeholders residing within the said county."

By other sections of the act, the commissioners are directed to proceed with due diligence to continue, lay out, open, and construct the highway by as direct a route as they shall deem practicable between the terminal points named in the petition, and build any necessary bridges, are empowered to enter upon necessary lands and remove the fences, and are directed, upon a prescribed notice, to ascertain and determine the damages sustained by any person interested in the lands through which the highway may have been laid out. The act also provides for an appeal from the award of the commissioners by any person aggrieved to the court by which the commissioners were appointed; authorizes the court to confirm, or order the commissioners to alter or amend, the award; provides that the amount ascertained by the commissioners for the expenses and damages of

laying out and constructing the road shall be paid by the town through which it is constructed; directs the supervisor of each of the towns to issue the bonds or obligations of the town for the amount, payable in 20 years from date, and deliver them to the commissioners; and directs the commissioners to pay out the bonds at not less than par, in liquidation of the expenses and damages, or, at their option, to sell them at not less than par, and apply the proceeds for that purpose.

The constitution in force in 1892 (Const. 1846, and amendments) contained no provision in terms prohibiting the legislature from conferring upon the court the powers now in question. As to "officers whose offices may hereafter be created by law," it authorized their selection by appointment "as the legislature may direct" (article 10, § 2), and thereby enabled that body to lodge the appointment with any agency it might see fit to designate. *Sturgis v. Spofford*, 45 N. Y. 446. It authorized the legislature to ascertain the compensation to be made when private property was to be taken for public use "by not less than three commissioners to be appointed by a court of record as shall be prescribed by law" (article 1, § 7); and under this provision it was adjudged by the court of appeals to be no objection to the constitutionality of an act that it devolved upon the commissioners, thus to be appointed by the court, administrative duties in the management of the public undertaking. In *re Village of Middletown*, 82 N. Y. 196. Under the general powers confided by the constitution, it has been declared by the highest court of the state that the legislature could delegate to public officers the determination of the expediency of laying out highways and appropriating the property of individuals for the purpose; could direct the construction of highways by towns; could compel the creation of a town debt therefor by the issue of bonds; could impose a tax upon the property of the towns to pay the bonds; could do these things without the consent of the citizens or the town authorities; and that, when the legislative act has committed to public officers the duty of judging of the expediency of making an appropriation of property for a public use, it is no objection to its validity that it permits them to act upon their own views of propriety and duty without the aid of a forensic contest, or affording a hearing upon the question to parties interested. *People v. Smith*, 21 N. Y. 595; *People v. Flagg*, 46 N. Y. 401.

That the legislature can delegate to the courts the power of determining the question of the extent and necessity of an appropriation of property for public use is shown by the decisions under the general railroad act of 1850. In *Railroad Co. v. Davis*, 43 N. Y. 137, the court used this language:

"It is, we think, the clear construction of the statute that the court is to determine, upon the application by a railroad company to acquire additional lands for the purposes of the corporation, the question as to the necessity and extent of the appropriation. The plenary power of the legislature covering the subject would have authorized it to designate the particular premises which the respondent might take for its purpose. The general purpose being public, the legislature could have defined the extent of the appropriation necessary for the public use. But this the legislature has not attempted to do, nor has it

delegated to the railroad company the power to determine the necessity for the appropriation of private property for corporate purposes. It has constituted the court a tribunal to hear and determine on the premises."

In *Re New York Cent. R. Co.*, 66 N. Y. 407, the court said:

"This necessity is therefore made a judicial question, and when controverted it is obvious that the facts must, in some form, be laid before the court to enable it to decide."

We do not understand that the constitutionality of the present act is impugned upon any other contention than that it undertakes to devolve upon the court legislative or administrative, instead of judicial, functions. The separation of legislative, executive, and judicial powers is recognized throughout the constitution, as it is in the constitutions of all the other states; and, if the question of the necessity of opening public highways is not a judicial question, the legislature could not commit it to the courts, and the act is clearly void. This is the real inquiry, and, as it appears to us, the only one that requires discussion upon this branch of the cause:

If the legislature can devolve upon a court the decision of the necessity of an appropriation of property for the uses of a railway, it is difficult to understand why this may not be done when the public use is for the purpose of a common highway. No adjudication by the courts of this state, or by any other court, directly in point, is cited for the proposition that the legislature may not confer upon a judicial tribunal the power to determine as to the necessity of the construction of a highway. Inasmuch as such a question can be referred to a municipality, or to public officers, for determination, the objection to depositing the power with a judicial tribunal can only be found in the consideration that the question is not of a nature to involve the exercise of the judicial function. The objection is met by many decisions of the courts of this state in cases arising under statutes authorizing courts to review the action of commissioners in laying out, or refusing to lay out, highways. In *Lawton v. Commissioners*, 2 Caines, 179, the supreme court, in considering a statute which authorized the commissioners of highways to lay out a road, and, if they refused to lay it out, gave an appeal to the judges of the court of common pleas, assumed as unquestionable the authority of the judges to decide the appeal upon the merits,—“the fitness or unfitness of laying out the road.” In *People v. Champion*, 16 Johns. 61, the case arose under a later statute authorizing an appeal to three of the judges of the court of common pleas by any person aggrieved by the determination of the commissioners of highways in laying out, or refusing to lay out, any road, and the court declared that the power of the judges in appeals from a refusal authorized them “to lay it out themselves.” *Commissioners of Highways of Warwick v. Judges of Orange Co.*, 13 Wend. 433, was a case arising under a later statute containing substantially similar provisions, and the court said:

“The proceeding by appeal was not intended to be a review of legal questions, or of irregularities that might exist in the preliminary steps, or of a right of certiorari, but to be an examination of the necessity or propriety of the road, assuming all of the previous steps to have been regularly taken.”

In *People v. Judges of Dutchess Co.*, 23 Wend. 360, the court said:

"The commissioners had decided, in effect, that no road on any route between these points should be laid out. Upon that decision the judges were sitting in review, and it was a matter of no moment what particular route either the jury or the commissioners had examined."

In *People v. Commissioners of Highways of Cherry Valley*, 8 N. Y. 476, the syllabus is:

"Upon an appeal from the determination of the commissioners of highways refusing to lay out a highway, the referees have all the powers, and are charged with all the duties, formerly possessed by the three judges of the court of common pleas under the provisions of the Revised Statutes. To reverse the determination of the commissioners, they should make such an order in relation to laying out the highway as in their judgment the commissioners should have made."

In *People v. Commissioners of Highways of Town of Milton*, 37 N. Y. 360, the case was one where the commissioners had refused to open a highway, and, upon an appeal from their order, the referees had ordered it to be laid out and opened. The court affirmed the lower courts in ordering a peremptory mandamus compelling the commissioners to open the road. All of these cases necessarily sanction the proposition that the question of the propriety and necessity of opening, or refusing to open, a highway can be properly committed to the decision of a judicial tribunal.

We entertain no doubt that the present act was a constitutional exercise of power by the legislature, and, having reached this conclusion, do not feel it to be our duty to consider whether it was expedient or inexpedient legislation. It is proper to say, however, in answer to the suggestion that the act as framed precluded the officers or citizens from any voice in a matter entailing a large debt upon the town, that we do not so read the act. The commissioners were to be appointed after two weeks' public notice; and at any time before the appointment was made it was within the power of the court to reconsider its decision, and refuse to appoint commissioners, and it is to be presumed that the court would have given due weight to any remonstrances or representations had any been presented.

The bonds in suit were issued and negotiated conformably in all respects to the provisions of the act but one. They were negotiated at par, but not for cash, and under an agreement with the purchaser that, as to a portion of the price, payment might be deferred and collateral securities substituted meanwhile. Assuming this to have been a departure from the statutory requirement, as the plaintiff was a bona fide holder of the bonds, without notice of the deviation by the agents of the town from the terms of their authority, the facts did not afford any defense to his action. *Mercer Co. v. Hacket*, 1 Wall. 83; *Grand Chute v. Winegar*, 15 Wall. 355; *Provident Life & Trust Co. of Philadelphia v. Mercer Co.*, 170 U. S. 593, 18 Sup. Ct. 788. The court below properly directed a verdict for the plaintiff, and the judgment is affirmed, with costs.

DOREMUS v. ROOT et al.

(Circuit Court, D. Washington, S. D. May 22, 1899.)

1. MASTER AND SERVANT—ACTION FOR PERSONAL INJURY—JOINDER OF DEFENDANTS.

Although a master and his servant, through whose culpable negligence another is injured, may each be liable for such injury, their obligations rest upon different grounds, and they cannot be held jointly liable.

2. REMOVAL OF CAUSES—ACTION OF TORT AGAINST SEVERAL DEFENDANTS—SEVERABLE CONTROVERSIES.

An action to recover unliquidated damages for a personal injury caused by negligence, though the negligence complained of may constitute a breach of contract on the part of defendant, is an action *ex delicto*, governed by the law of torts; and the plaintiff may join several as defendants, and, if the evidence sustains his complaint against one only, may recover against that one and dismiss as against the others. In such case, defendants, though sued as though jointly liable, and although the complaint shows affirmatively that they are not jointly liable, cannot recast the issues tendered by the complaint, and divide the cause so as to present separate controversies as to each.¹

3. SAME—PLEADING.

When the right to remove a cause depends upon the nature of the controversy and the questions to be litigated, the complaint alone is to be considered for the purpose of ascertaining the nature of the controversy and the questions involved; and, although the defendants may by their pleadings introduce new matter and raise additional questions, they cannot so change the case as to make it cognizable in a federal court, if it was not so when commenced.

4. SAME—JOINDER OF DEFENDANTS TO PREVENT REMOVAL.

Where two defendants are sued together, and plaintiff demands judgment against both, the court cannot assume that either one of them is the real party against whom the plaintiff intends to prosecute his action, and that the other has been joined merely for the fraudulent purpose of depriving the real defendant of his right of removal. In order to sustain the jurisdiction of the federal court on that ground, it is necessary for the removing defendant to allege and prove such fraudulent purpose.

Action at law to recover damages for a personal injury, commenced in the superior court for the state of Washington, and removed to the United States circuit court by the defendant the Oregon Railroad & Navigation Company on the ground of a separable controversy. Heard on motion to remand.

M. O. Reed, for plaintiff.

W. W. Cotton, for defendant Oregon R. R. & Nav. Co.

HANFORD, District Judge. The plaintiff sues to recover damages for a personal injury suffered by him while employed in the operation of the Oregon Railroad & Navigation Company's railroad, through alleged negligence. The complaint charges the defendants jointly with negligence and wrongful conduct producing the injury, but it is apparent from the recital in the complaint that the two defendants could not have been joint actors, so as to become jointly liable, as in cases where several persons actively participate in the commission of a trespass. If the defendant Root is guilty of any wrong,

¹ For separable controversy as ground for removal, see note to Robbins v. Ellenbogen, 18 C. C. A. 86.

it is his personal, culpable neglect of a duty which, by reason of his position in the service of his co-defendant, he was obligated to perform personally. The employer is not guilty of any wrong, and cannot be held liable to the plaintiff, otherwise than by application of the principle that a servant in the transaction of the employer's business is to be regarded as the employer's instrument, and his torts and misfeasances which are connected with his employer's business are imputed to the employer. Although the employer and his negligent servant, whose culpable misconduct causes an injury, may each be liable to respond in damages, their obligations rest upon different grounds. Therefore they cannot be jointly liable.

The attempt of the Oregon Railroad & Navigation Company to remove this case from the state court in which it was commenced, into this court, is based upon the assumed ground that there is a separable controversy; and it is argued that because the complaint shows affirmatively that the defendants cannot be jointly liable to the plaintiff, and as each defendant may pursue an entirely separate and independent course in defense of the action, there is necessarily a separable controversy, and said defendant, being a citizen of another state and nonresident of this state, may claim the right of removal. This sounds plausible, but I think that the decision of the supreme court in the case of *Powers v. Railway Co.*, 169 U. S. 92-103, 18 Sup. Ct. 264, lays down a rule which constrains me to hold otherwise. See *Creagh v. Society*, 88 Fed. 1. As the identical question in this case has been presented to this court a number of times, and been argued with great persistence, and as this court has at different times made contrary rulings, I will endeavor in this opinion to state exactly the controlling propositions and rules which I understand to be now established by the decisions of the federal courts. They are as follows:

1. An action to recover unliquidated damages for a personal injury caused by negligence, although the negligence complained of amounts to a breach of contract on the part of the defendant, belongs to the class of cases denominated "actions ex delicto." The tort is the ground of action, and the law of torts must govern the case. In such a case the plaintiff may join several as defendants, and if upon the trial he fails to sustain his complaint against all, but does sustain it against one of them, he may dismiss as to the others, and recover against the one found to be liable. *Railway Co. v. Laird*, 164 U. S. 393-403, 17 Sup. Ct. 120.

2. In such an action against several defendants sued as if they were jointly liable to the plaintiff, they must all meet the plaintiff upon the ground chosen by him; and, even though the complaint shows affirmatively that they have not acted jointly in such a manner as to incur a joint liability, still they cannot divide the cause so as to present a separate controversy as to the separate acts of each. The defendants are not permitted to recast the issues tendered by the complaint, so as to make several lawsuits in place of the one case which the plaintiff has elected to prosecute against them all jointly. *Little v. Giles*, 118 U. S. 596-608, 7 Sup. Ct. 32.

3. When the right to remove a case from a state court into a United

States circuit court depends upon the nature of the controversy and the questions to be litigated, the complaint alone is to be considered for the purpose of ascertaining the nature of the controversy, and finding out what questions are involved. Although defendants by their pleadings may introduce new matter and raise additional questions, they cannot so change the case as to make it cognizable in a federal court, if it was not so at the outset. *Walker v. Collins*, 167 U. S. 57-60, 17 Sup. Ct. 738.

4. Where two defendants are sued together, and the plaintiff demands judgment against both, the court cannot assume that either one of them is the real party against whom the plaintiff intends to wage his action, and that the other has been joined as a co-defendant merely for the fraudulent purpose of depriving the real defendant of his right to remove the case into a United States circuit court. In order to sustain the jurisdiction of the federal court on that ground, it is necessary for the removing defendant to allege and prove such fraudulent purpose on the part of the plaintiff. *Warax v. Railway Co.*, 72 Fed. 637.

According to these principles, this case must be remanded. It is probable that the plaintiff will not obtain a verdict against both defendants in the state court, and that he may wish to dismiss as to one of them, and endeavor to obtain a judgment against the other. When that attempt is made, if the defendant Root shall be dismissed from the case on the plaintiff's motion, the bar to the right of removing the case into this court on the ground of diversity of citizenship will be eliminated, and the Oregon Railroad & Navigation Company will then have the right to file a new petition and bond for removal, if before taking any other step it elects to do so. *Powers v. Railway Co.*, 169 U. S. 92-103, 18 Sup. Ct. 264. In the present situation of the case, the court is without jurisdiction, and the motion to remand must be granted.

TIMES PUB. CO. v. CARLISLE. JOURNAL CO. v. SAME. WORLD PUB. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 8, 1899.)

Nos. 1,137-1,139.

1. LIBEL—ACTIONS—DAMAGES.

A good name is more estimable than tangible property, and as valuable, and the law gives corresponding redress for its injury.

2. SAME—EVIDENCE—PRESUMPTION FROM GOOD REPUTATION OF PLAINTIFF.

Every man is presumed to be innocent of crime until he is proved to be guilty; but there is a stronger presumption that a man of good reputation is not guilty of a criminal charge, and he who attacks the reputation of such a man cannot escape the effect of this presumption.

3. SAME—NECESSITY OF PROVING ACTUAL MALICE.

The unprivileged publication of matter that is false and libelous per se warrants the recovery of compensatory damages, without allegation or proof of malice in its ordinary acceptance; that is to say, ill will, bad motive, hatred, or intent to injure.

4. SAME—IMPLIED MALICE.

Malice, in its legal sense,—that is to say, “an act done wrongfully, without legal justification or excuse,”—is conclusively implied from such a publication.

5. SAME—UNPRIVILEGED PUBLICATION—JUSTIFICATION.

The fact that the information from which such a publication was made was derived from another, who made or repeated the charge it contained, and that the name of the informant was stated in the libel, is no justification for its publication.

6. SAME—EXEMPLARY DAMAGES.

Exemplary damages may be allowed by the jury, in an action of libel, when the publication was made with ill will, or a willful intent to injure the party libeled, and the matter published was false, libelous, and unprivileged.

7. SAME.

A violation of the rights and feelings of the victim of a libel, which is caused by a reckless disregard of them, is the legal equivalent of an intentional violation of them.

8. SAME.

Exemplary damages may be allowed by a jury, in an action of libel, when the publication has been made with a reckless disregard of the rights of the person libeled, although it was not inspired by ill will, spite, or intent to injure him.

9. SAME—QUESTIONS FOR JURY.

In an action of libel, it is ordinarily a question for the jury, in view of all the facts and circumstances of the case, whether or not exemplary damages should be allowed; and the amount of such damages is exclusively within their province.

10. FEDERAL COURTS—FOLLOWING STATE PRACTICE.

The federal courts in Missouri are not required to follow the statute of that state (Laws 1895, p. 169), which requires juries, in cases in which exemplary damages are allowed, to assess such damages separately.¹

11. LIBEL—LIABILITY OF CORPORATION.

A corporation is liable for exemplary damages for acts done in the course of its business, by its agents, while acting within the scope of their authority and duty, to the same extent as an individual; and a corporation publishing a newspaper may be liable for such damages for circulating a libel therein.

12. SAME—PLEADING—MATTER IN MITIGATION.

Under the Code matter in mitigation of damages for the publication of a libel must be pleaded before it can be proved.

In Error to the Circuit Court of the United States for the Western District of Missouri.

These were three actions for libel. The defendant in error, Harold Carlisle, was a merchant, living with his wife, in Kansas City, in the state of Missouri, where he had resided for more than two years, on February 20, 1897. He was 44 years old, and had a good reputation for honesty and integrity. He was engaged with one Peters, under the firm name of Carlisle & Peters, in trade in gents' furnishing goods, at 818 Main street, in Kansas City. He was born in England, and came to this country in 1879. He had been engaged for many years in the business of raising, buying, and selling cattle in New Mexico and Kansas. From 1884 until 1893 he was the manager of a cattle company, which had been incorporated in England, and which had a ranch, and sometimes as many as 20,000 head of cattle, in the southwestern corner of Utah and in the northwestern corner of New Mexico. In 1893 that company closed out its stock, and Carlisle and one Gordon, who then became his partner in this business,

¹ For conformity of practice in federal to that of state courts, see note to *O'Connell v. Reed*, 5 C. C. A. 594, note to *Griffin v. Wheel Co.*, 9 C. C. A. 548, and note to *Insurance Co. v. Hall*, 27 C. C. A. 392.

occupied the ranch, and conducted the business of buying young cattle, shipping them east, and selling them. Gordon occupied the ranch, and bought, cared for, and drove the cattle, while Carlisle lived in Kansas City, met the herds at Dallas, in the state of Colorado, shipped, and sold them. In June, 1896, Gordon drove about 700 of the cattle of this firm into Dallas, Colo., where Carlisle met him, and shipped them. At this time one Mostyn appeared at Dallas, and claimed that a part of a bunch of 50 cattle, which Gordon had bought from one White, had been stolen by White, and thereupon White was arrested. He was subsequently tried and convicted for the theft. When this claim was made, Gordon produced his bill of sale from White, and Carlisle remarked that, if there was anything in the bunch that had been stolen, he did not want it, and thereupon separated the cattle purchased from White from the other cattle owned by the firm, and turned them over to Mostyn and a proper inspector for the benefit of their owners. On February 20, 1897, John D. Reeder, the sheriff of Mesa county, Colo., appeared in Kansas City with an affidavit of one Chipman, an information signed by the district attorney of Mesa county, a warrant of arrest, an affidavit of the assistant district attorney of Mesa county for a requisition, a proper requisition on the governor of Missouri for Carlisle, and an order for his arrest and delivery to Reeder on the false charge, which was set forth in these requisition papers, of having in his possession, on June 4, 1896, eight head of cattle which he knew had been stolen by Ed. Young and E. Frank White, and which he intended to appropriate to his own use. On these papers Carlisle was arrested. He declared to all who asked him that he was innocent of the charge, accompanied the sheriff to Colorado, and the district attorney of Mesa county entered a nolle prosequi on the charge against him.

On the evening of the day of his arrest the plaintiff in error the World Publishing Company printed and circulated in the Kansas City World an article which gave an account of the arrest of Carlisle, and of the charge upon which he was arrested, and which contained, among other things, these words in addition: "Sheriff Reeder arrived here from Colorado Saturday morning. He said that for months he had been searching for evidence against Carlisle, who was formerly in the cattle business at Salt Lake City and who is alleged to have been operating with a gang of cattle thieves for money. * * * For a long time cattle thieves have been driving cattle off the lonely ranges in Northern Colorado. The authorities discovered that White drove cattle off the Utah Cattle Company's range in Mesa county and shipped eight head to Dallas, Colo., where they [—] received by Carlisle. Carlisle, in turn, shipped the cattle to Denver, where they were recovered by Sheriff Reeder before a sale was effected. This was last June. Before this the Mesa county sheriff had recovered two shipments of stolen cattle,—one of 20, and one of 40, head." On March 12, 1897, Carlisle sued the World Company for publishing the statements which we have quoted, and prayed for judgment for \$20,000 actual damages and \$5,000 punitive damages. In its answer to the petition of Carlisle the World Company set out the entire article which contained these quotations, the existence of the requisition papers, and the proceedings which they evidenced, and pleaded that White and Young stole 40 cattle, and delivered them to Gordon, who held them until they were identified as stolen cattle, and taken from the drove of Carlisle and Gordon by the sheriff, and that White and Young had been arrested, and White had been convicted of stealing the cattle. It also pleaded that Reeder, the sheriff, whom it believed, and from whose official position and appearance it was justified in believing, to be reliable and trustworthy, stated, in the presence of its reporter and others, substantially all that the article contained about the defendant in error before it made the publication, and that it published the statements in it without any malicious intent, and without any desire or intent to injure Carlisle.

On the morning of February 21, 1897, the plaintiff in error the Journal Company published in the Kansas City Journal an account of Carlisle's arrest, and of the charge upon which his arrest was made, and, among other things, these words in addition: "Sheriff Reeder arrived in Kansas City yesterday. He claims he has been searching for evidence against Carlisle for six months, and that Carlisle has been associated with a gang of cattle thieves, which has operated to some extent in Utah, stealing about 60 head of cattle. * * * For some time past cattle have been driven off the Utah Company's range in Mesa

county, Colo. Sheriff Reeder learned that Frank White had driven 18 head of cattle off the range, and shipped them to Dallas, Colo., where it is claimed Carlisle received them, and shipped them to Denver. Sheriff Reeder recovered the cattle before a sale had been effected, however. Sheriff Reeder claims to have recovered two shipments of stolen cattle before this,—one of 40 head, and one of 60 head. He claims Carlisle made both shipments." The defendant in error thereupon sued the Journal Company for publishing the statements we have quoted, and that company answered in the same way that the World Company did.

On the same morning, the plaintiff in error the Times Publishing Company printed and circulated in the Kansas City Times an account of the arrest of Carlisle, and of the charge upon which it was made, and, among other things, these words in addition: "The police of this city and John D. Reeder, sheriff of Mason county, Colo., allege that he has been at the head of an organized gang of cattle thieves, that have run off a great deal of stock from Colorado cattle ranges. * * * It is claimed by Sheriff Reeder that Carlisle, who, together with a man by the name of Gordon, is interested in a cattle ranch at Dallas, Colo., purchased 60 head of cattle 18 months ago, and 8 head of cattle last June, which were stolen from the Utah Cattle Company." Thereupon Carlisle brought an action against the Times Company for publishing the statements quoted, and that company answered in the same way that the Journal Company did.

On the motion of the plaintiffs in error, the three cases thus commenced were consolidated and tried together. Carlisle did not claim any damages in his petitions, or on the trial of these cases, for the publication of the fact that he was charged in the requisition papers with, and was arrested for, having eight head of stolen cattle in his possession, which he knew were stolen. His claim was for the publication of the charges contained in the statements we have quoted, and his allegation was that their publication was false and libelous. The gravamen of these charges, stated in different language, was that Carlisle had operated with, or been associated with, or was the head of, a gang of cattle thieves. There was no evidence at the trial that these charges were true. There was evidence that Reeder made the charges when he visited Kansas City for the purpose of making the arrest, and that he made them in the hearing of the reporters of the plaintiffs in error before their articles were published. The requisition papers were received in evidence, and the fact was proved that they were seen and examined by these reporters before the publications were made. The jury returned a verdict of \$2,500 against the World Company, of \$2,685 against the Journal Company, and of \$4,580 against the Times Company; and it is the judgments upon these verdicts which the writs of error have been sued out to reverse.

Frank Hagerman, D. B. Holmes, and Frank P. Sebree (Henry C. McDougal and L. C. Krauthoff, on the brief), for plaintiffs in error.

I. N. Watson and Shannon C. Douglas, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

"A good name is rather to be chosen than great riches, and loving favor rather than silver and gold." The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his later years. A man of affairs, a business man, who has been seen and known of his fellowmen in the active pursuits of life for many years, and who has developed a good character and an unblemished reputation, has secured a possession more useful and more valuable than lands, or houses, or silver, or gold. Taxation may confiscate his lands; fire may burn his houses; thieves may steal his money; but his good name,

his fair reputation, ought to go with him to the end,—a ready shield against the attacks of his enemies, and a powerful aid in the competition and strife of daily life. Every man is presumed to be innocent of wrong until he is proved to be guilty; but, when a heinous crime is charged upon a man whose character and reputation for honor and integrity have been unquestioned for years in the community in which he has lived, that character and that reputation stand sponsors for his innocence, and raise a still stronger presumption, which accompanies him in public and in private, in court and in council, and in every situation in life, and which is acted upon and recognized daily by all men,—a presumption that such a man would not be guilty of such a crime. *U. S. v. Shapleigh*, 12 U. S. App. 26, 42, 4 C. C. A. 237, 246, and 54 Fed. 126, 135. The law recognizes the value of such a reputation, and constantly strives to give redress for its injury. It imposes upon him who attacks it by slanderous words, or by a libelous publication, a liability to make full compensation for the damage to the reputation, for the shame and obloquy, and for the injury to the feelings of its owner, which are caused by the publication of the slander or libel. It goes further. If the words are spoken, or the publication is made, with the intent to injure the victim, or with a criminal indifference to civil obligations, it imposes such damages as a jury, in view of all the circumstances of the particular case, adjudge that the wrongdoer ought to pay, as an example to the public, to deter others from committing like offenses, and as a punishment for the infliction of the injury.

These general propositions are unquestioned. But the books are full of learning and confusion as to how far malice in the libeler is an essential prerequisite to the enforcement of these liabilities. Much of the discussion arises from, and a large part of the confusion is caused by, the different meanings which this word has grown to have. In the ordinary acceptance of the term, it signifies ill will, evil intent, or hatred; while its legal signification is defined to be "a wrongful act, done intentionally, without legal justification or excuse." *Darry v. People*, 10 N. Y. 120, 139; *Buckley v. Knapp*, 48 Mo. 152, 161; *Clements v. Maloney*, 55 Mo. 352, 359. When we come to read the text-books and the opinions of the courts on this subject, we find the writers and the judges using the word alternately with one and the other meaning, so that close attention to the sense in which it is used in each instance is requisite to a clear understanding of the statements of the writers and of the decisions of the courts. In many decisions it is laid down as a settled rule that malice is essential to a recovery in an action of libel, but that it is conclusively implied from the unprivileged publication of a false charge which is libelous in itself. *Buckley v. Knapp*, 48 Mo. 161; *Callahan v. Ingram*, 122 Mo. 355, 370, 26 S. W. 1020. This, indeed, is a settled rule of law, and it is obviously a correct statement where "malice" means, as it does in this declaration, that kind of malice which is always inferred from "a wrongful act, done intentionally, without justification or excuse"; for it is a truism to say that malice is the conclusive inference from such an act, and that, since the publication of a false charge that is libelous per se

is without justification or excuse, malice is implied therefrom. This declaration of the law has exactly the same practical effect as the more simple and more philosophic rule that malice, in the common acceptance of the term,—that is to say, ill will, evil intent, bad motive,—is not required to be either pleaded or proved to entitle the injured party to recover the actual damages he has sustained from the unprivileged publication of a false and libelous charge. The person libeled is as clearly entitled to full compensation for the loss he has sustained from a wrong inflicted with a laudable motive, or through mistake or inadvertence, as from one perpetrated from a bad motive, or with a diabolical intent. *Ullrich v. Press Co.* (Sup.) 50 N. Y. Supp. 790, 798; *Hamilton v. Eno*, 81 N. Y. 126; *King v. Root*, 4 Wend. 127. It is a corollary to these rules that it is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant. It is no defense to an action of trespass that another trespassed, and informed the defendant how to do it without expense or trouble; and it is no excuse or justification for an injury to a fair reputation that another has commenced to besmirch it, and has furnished the pigments to carry on the nefarious undertaking. *Sans v. Joeris*, 14 Wis. 666; *Newman v. Foster*, 8 Wend. 602; *Odgers, Libel & Sland.* p. 124.

But may exemplary or punitive damages be recovered for a libelous publication, without proof of ill will, hatred, or an intent on the part of the libeler to injure his victim? Punitive damages are given as an example to the public, to deter others from committing a like offense, and as a punishment to the wrongdoer. They are never allowable where the defendant, after due investigation, in good faith, with reasonable cause to believe the charge to be true, has published it from a proper motive, in the honest belief that it is true. Are there, however, no circumstances under which the jury may award exemplary damages, in the absence of proof of actual evil intent or bad motive on the part of the defendant? May the libeler shut his eyes, and blindly publish heinous charges against men and women of spotless character and unsullied reputation, and still escape liability for everything except the actual damages which they can prove, because he had no intention to injure them, no care about them, but simply sought to make money from the sale of the racy story? If he may not, where is the dividing line, and who shall determine in each case, the court or the jury, whether or not exemplary damages shall be allowed? It is not every degree of negligence, it is not a mere mistake or inadvertence occurring in the course of a reasonable investigation, that will lay the foundation for exemplary damages for the publication of a libel; and yet every man is bound to use his own property and pursue his own vocation in such a way that he may not unlawfully injure the property or violate the rights of his neighbors. Not only this, but when his property or his vocation borders upon or impinges upon the property or rights of his fellow men, he is bound to exercise ordinary care to ascertain the extent of that property and of those rights, and to abstain from unnecessarily injuring them.

In *Durant Min. Co. v. Percy Consol. Min. Co.*, 93 Fed. 166, an action of willful trespass, this court held that the plaintiff might recover more than his actual loss if the trespass was willful and intentional, and that the jury might "lawfully infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right, and to appropriate the property to his own use, from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them." It is difficult to perceive why a jury might not likewise infer an intent to violate the rights of a plaintiff, in a libel suit, from a stolid indifference to, or reckless disregard of, them.

In *Day v. Woodworth*, 13 How. 363, 371, the supreme court declared that exemplary damages might be allowed by the jury in "actions of trespass, where the injury had been wanton or malicious, or gross and outrageous."

In *Railroad Co. v. Quigley*, 21 How. 202, 214, an action of libel, that court held that:

"Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."

In *Railway Co. v. Arms*, 91 U. S. 489, 493, an action of negligence, Mr. Justice Davis, in delivering the opinion of the court, said:

"Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

In *Bennett v. Salisbury*, 45 U. S. App. 636, 639, 24 C. C. A. 329, 331, and 78 Fed. 769, 771, the circuit court of appeals of the Second circuit held that exemplary damages might be recovered in an action of libel, although the defendant had no ill will or intent to injure the plaintiff, if he was guilty of "such wanton disregard of, or such reckless indifference to, the rights of others as was equivalent to the intentional violation of such rights."

Through all these and many other authorities the thought runs that a reckless disregard of the rights and feelings of others may be equivalent to an intentional violation of them, and that, where such recklessness exists, punitive damages may be allowed, in the discretion of the jury. A moment's consideration will show, however, that wherever the violation of the rights of one who is slandered or libeled results from a reckless disregard of those rights by the libeler, that disregard is the equivalent of an intentional violation of them. Every man is presumed to intend the natural and probable effects of his acts and omissions. The natural and probable effect of the reckless

disregard by the publisher of a newspaper of the rights of his fellow men to their good names and fair reputations is the violation of those rights, and hence the reckless disregard of them becomes equivalent to an intentional violation of them. Moreover, every reason for the allowance of exemplary damages applies with as much cogency and force to a libel published with a reckless disregard of the rights of the libeled as to one published with an evil intent or a bad motive. Such damages are allowed as an example to the public, and as a punishment to the wrongdoer. The main purpose of their allowance is to protect the characters and reputations of those who have not been attacked, and to warn all men not to destroy or injure the names that are still good and the reputations that are yet fair. The interests of these citizens and of the public demand the protection of their reputations against assaults that would destroy them with a reckless disregard of the rights of their owners as forcibly as they do that they shall be protected against those inspired by hatred or ill will. The effect of libels published with recklessness is as deleterious as that of libels published with ill will. In truth, the demand for the protection against libelous publications made with stolid indifference to, and reckless disregard of, the rights of those injured, is far more urgent than the demand for protection against those published with hatred, because the former are usually inspired by avarice, and are as much more numerous and as much more dangerous to individuals and the public as avarice is more prevalent than spite.

Turn it as you will, the reason of the rule and the great weight of authority upon the subject lead alike to this conclusion: Exemplary damages may be allowed by the jury, in actions of libel, when, upon a consideration of all the facts and circumstances of the case, they find that the publication has been made with a reckless disregard of the rights and feelings of the person libeled, as well as where they find that it has been inspired by hatred or ill will towards, or an intent to injure, him. *Bennett v. Salisbury*, 45 U. S. App. 636, 639, 24 C. C. A. 329, 331, and 78 Fed. 769, 771; *Ullrich v. Press Co. (Sup.)* 50 N. Y. Supp. 788, 792; *Samuels v. Association*, 75 N. Y. 604; *Bergmann v. Jones*, 94 N. Y. 51, 62; *Holmes v. Jones*, 121 N. Y. 461, 467, 24 N. E. 701; *Warner v. Publishing Co.*, 132 N. Y. 181, 184, 31 N. E. 393; *Holmes v. Jones*, 147 N. Y. 59, 61, 41 N. E. 409; *Smith v. Mathews*, 152 N. Y. 152, 158, 46 N. E. 164; *Young v. Fox (Sup.)* 49 N. Y. Supp. 634; *Shanks v. Stumpf (Sup.)* 51 N. Y. Supp. 154; *Callahan v. Ingram*, 122 Mo. 355, 371, 372, 26 S. W. 1020; *Buckley v. Knapp*, 48 Mo. 161; *Clements v. Maloney*, 55 Mo. 352, 359.

It is ordinarily a question for the jury to determine, in view of the particular circumstances of each case, whether or not punitive damages should be allowed, and the amount of the allowance is exclusively within their province. *Day v. Woodworth*, 13 How. 370; *Scott v. Donald*, 165 U. S. 58, 89, 17 Sup. Ct. 265; *Holmes v. Jones*, 147 N. Y. 59, 67, 41 N. E. 409. The constitution of the state of Missouri, where these actions were tried (article 2, § 14), provides that:

"In all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

The questions which have now been discussed were presented in various forms in the trial of the cases before us, and have been properly saved for our consideration. It seemed conducive to a convenient and expeditious disposition of the cases to consider them before stating the details of the exceptions which raise them. We turn to a consideration of these exceptions. The main point of attack is the charge of the court. The plaintiffs in error did not plead or prove the truth of the charges for the publication of which these suits were brought, but they produced evidence to the effect that Sheriff Reeder originated the charges, and stated them to their reporters before their publication, and they prayed in their answers, and in four requests which they presented at the close of the trial, that they might prevail on account of this pleading and proof. The court carefully read to the jury the three libels, stated clearly the contents of the answers of the plaintiffs in error, and then addressed itself in their order to the questions of justification, mitigation of damages, compensatory damages, exemplary damages, and some special phases of the cases against the Times Company and the World Company. The trial judge properly charged the jury that the fact that the libelous matters published were told to the publishers by another was no justification for their publication, and that proposition of law is not challenged in this court, although, as we have said, the judge was asked to hold the counter proposition at the trial, and exceptions were taken because he refused. The complaint now is that there was error in the charge of the court on the question of damages, and we have called attention to the fact that this question of justification was presented and urged upon the court below because many of the statements of the judge that are now challenged as tending to induce error in the assessment of damages were not addressed to that subject at all, but to the question of justification alone. For example, he said:

"The repetition of slander uttered by publication in the newspaper makes the publisher of that scandal or libel as much responsible in law for the act of publication as if the newspaper were the originator of the slander; the information they received, as you will be advised by the court later on, going to the question only of damages."

This was a correct statement of the law. The court did not say that the publisher would be liable for as much damages as the originator, but that he would be as much liable, and he was speaking, not of the amount of damages, but upon the question of a justification of the publication.

It is assigned as error that the court instructed the jury that, if the defendant in error recovered, he would be entitled to compensatory damages, and then said that by "compensatory damages is meant simply such sum of money, such round sum in measurement, as in the judgment of the jury will compensate him for injury done to his feelings and his character and reputation."

He then told them that the action was not founded on special damages resulting from loss of business or trade, but on general damages for defamation of character, injustice, and indignity. This assignment is leveled at the adjective "round," and it is contended that its meaning is large, and that its use deprived the jury of the privilege of returning nominal damages. To our mind it has no such significance, and we are unable to persuade ourselves that it had any such meaning to the jury. In our opinion, it was used, and rightly used, to describe a lump sum, in contradistinction from one that is the result of calculation or of exact computation.

The statutes of the state of Missouri require that, in all actions where punitive damages are recoverable, the jury shall separately state the amount thereof in their verdict (Laws Mo. 1895, p. 168), and it is insisted that the court erred because it told the jury to assess such damages in these cases as they deemed just and right, and did not require them to separate the exemplary damages from the actual damages. We have searched this record in vain for any request on the part of the plaintiffs in error for such a separate assessment, nor do we find that this statute or this objection was in any way called to the attention of the court when the charge was delivered and the exception taken. The function of this court is to review the supposed errors of the court below. There is no error here for us to review, because this question was not presented to, or decided by, that court. Moreover, if it had been, there was no error in the instruction given or the practice adopted by the trial court. The federal courts are not required to follow subordinate provisions of state statutes which would incumber the administration of the law or tend to defeat the ends of justice in their tribunals. *O'Connell v. Reid*, 12 U. S. App. 369, 378, 5 C. C. A. 586, 592, and 56 Fed. 531, 537.

The next subject for our consideration is the charge of the court upon exemplary damages. While treating the subjects of justification and compensatory damages, the court defined "malice," in its legal sense, to be "a wrongful act, done intentionally, without legal justification or excuse," and used it in that sense throughout its instructions. It told the jury that no justification of the publication of the libels had been pleaded or proved, that malice was implied from their publication, and that the defendant in error was entitled to recover compensatory damages. This was a correct statement of the law, under all the authorities. *White v. Nichols*, 3 How. 266. When the court came to the subject of exemplary damages, it said to the jury:

"As I have already stated to you, gentlemen of the jury, the publication of libelous matter in a newspaper, that is false, and without justification or legal excuse, itself expresses malice, and entitles the parties to recover thereon. These publications can be made under circumstances which entitle the party to something more than what is called 'compensatory damages.'"

It then proceeded to give the portion of the charge on compensatory damages which has been considered, and continued in this way:

"It is also permissible for the jury to award, in libel cases, what is known as 'punitive' or 'exemplary' damages; that is, damages by way of punishment to

the party for doing recklessly and wrongfully an injury to another, or exemplary damage such as would be an example to the community to prevent such wrongs and injustice to society, to punish the party. Now, gentlemen of the jury, you are to determine for yourselves, from all the evidence in this case, as to whether or not you give the party punitive damages. Look at all the circumstances and facts in the case, to see whether this publication was made under circumstances such as to entitle the plaintiff to recover punitive damages."

This portion of the charge is vigorously assailed. It is contended that it is erroneous (1) because the charge on malice was not accompanied "with a further charge that, in the absence of express malice or its legal equivalent, there could be no recovery of exemplary damages"; (2) because "the proper legal definition as to what is sufficient to authorize exemplary damages was not given by the court, and the evidence did not warrant the charge on the subject"; and (3) because the court refused to give to the jury instructions 5, 7, and 8, which were requested by the plaintiffs in error, and which read in this way:

"(5) If you find, from all the circumstances, that there was no malice on the part of any one of the defendants towards the plaintiff inducing or actuating the publication complained of against that defendant, then you can give no damages against such defendant on account of such malice."

"(7) If a newspaper is advised by officers of the law, or other persons, that a given party has been guilty of an offense, and publishes that fact in good faith, and without any actual malice against such person, mentioning the source of its information in such publication, and having reasonable ground to believe that the facts stated are true, then such defendant cannot be charged with punitive damages by reason of such publication.

"(8) The jury are instructed that it is competent for a newspaper publisher to show, in mitigation of any punitive damages sought to be recovered from it for the publication of a libel, that it acted upon information received by it, and that it had reasonable cause to believe, and did believe, that the particular publication complained of was true at the time it was made, although it may have developed, by subsequent occurrences, that as a matter of fact such statements were not true."

The relation of malice to the action of libel, and to the recovery of exemplary damages, has been purposely discussed in the earlier part of this opinion, and it is only necessary here to compare the charge of the court with the conclusions there stated. In brief, they were that malice, in the legal sense in which the court below used it, is implied from the publication of an unprivileged libel; that malice, in the ordinary sense,—that is to say, ill will, hatred, or an intent to injure the person libeled,—is not essential to the recovery of compensatory damages in an action for libel; and that exemplary damages may be recovered either when the publication is inspired by ill will or an intent to injure the victim, or when it is made with a reckless disregard of his rights. A comparison of the charge of the court with these conclusions shows that it is in strict accord with them. The court spoke of malice in its legal sense. Taken in that sense, it was implied from the publication of the libels, and it remained implied throughout the entire trial, for the purposes of compensatory, as well as of exemplary, damages. In many cases this implied malice would be insufficient to warrant exemplary damages. But this implied malice, together with a conscious indifference to, or a wanton or reckless disregard of, the

rights of the defendant in error, was sufficient, even in the absence of ill will or an intent to injure, as we have already seen, to warrant an award of these damages. This was the effect of the court's charge. There was no direct evidence of ill will, or hatred, or intent to injure the defendant in error, on the part of the publishers of these libels; and their agents testified, truthfully, no doubt, that they had none. The real question was, not whether or not these agents were inspired by spite or ill will, but whether or not they had made the publications with a wanton or reckless disregard of the rights of Carlisle. The court very properly confined its charge on this subject of punitive damages to this question. It told the jury that they might allow exemplary damages for doing recklessly and wrongfully the injury which had been inflicted upon the defendant in error, and that they must look at all the circumstances and facts in the case, and decide for themselves whether the publications were made under such circumstances as would justify such an allowance. "Recklessly" signifies with a wanton disregard of all consequences, and hence of the violation of all rights, and its use presented to the jury the proper rule for their guidance upon the question under consideration. Cent. Dict. "Reckless"; *Plummer v. Kansas City*, 48 Mo. App. 484; *Railway Co. v. Adams*, 26 Ind. 78; *Cobb v. Bennett*, 75 Pa. St. 330. The result is that the objections that the court did not instruct the jury that there could be no recovery of punitive damages, in the absence of express malice or its legal equivalent, and that it did not give the proper definition of what was necessary to warrant the recovery of such damages, must fall, because it declared that the publishing of libels recklessly and wrongfully was the legal equivalent of express malice, and that such a publication would warrant the recovery of exemplary damages.

The objection that there was no evidence to warrant the consideration of exemplary damages by the jury must share the same fate. A merchant of unspotted character and unblemished reputation, residing and engaged in mercantile business in the city where these publications were made, was arrested on the affidavit of a stranger, who lived hundreds of miles away, for knowingly having in his possession eight stolen cattle. This affidavit was accompanied with the usual information, verified by the district attorney of a county in Utah, and by the necessary affidavit of the assistant district attorney of the same county for a requisition, with the usual requisition, and with an order for his arrest. When he was arrested, he and his attorney protested to all the agents of the plaintiffs in error who inquired of him that he was innocent of this charge. An account of his arrest, and of the charge against him, was published, and of this he made no complaint. The sheriff of Mesa county, who arrested him, and who, so far as this record discloses, was a stranger to the agents and employes of the plaintiffs in error, said in their hearing that the defendant in error had been operating with, and associated with, and had been the head of, a gang of cattle thieves. The publication of this charge is the foundation of these suits. The defendant in error was in Kansas

City. To many of the residents and citizens of that town he was not unknown. His character and reputation for honesty and integrity were easily ascertainable in the city where these publications were made. We have searched this record in vain for any evidence that, before this charge was published, any of the agents or employes of the plaintiffs in error made any effort, by inquiry of any of the acquaintances of the defendant in error, except of the sheriff of Mesa county and the police of Kansas City, who, they knew, were repeating these charges on his statement alone, to ascertain whether or not it was true, or that they ever even asked the defendant in error or his attorney whether or not he was the head of a gang of cattle thieves, or was associated or operating with them. The reputation of this man rested under the legal presumption that every man is presumed to be innocent until he is proved to be guilty, and under the still stronger presumption on which all men constantly act, in social and business transactions, that a man of 40 years of age, who has established a good reputation, would not be guilty of such a crime. The plaintiffs in error disregarded these presumptions, and published the story of the sheriff. A sworn charge of crime carries with it no presumption of truth; much less does the gossip of an officer. The trial judge thought that the publication of this story, under these circumstances, presented substantial evidence of the reckless disregard of the rights and feelings of the defendant in error, which he was not authorized to withdraw from the jury upon the question of the allowance of exemplary damages, and we are all of the same opinion.

Another contention of counsel for plaintiffs in error, under this exception, is that punitive damages cannot be recovered of their clients, because they are corporations. But the charges which they published were gathered and circulated in the course of their ordinary business by their agents who were acting within the scope of the authority and duty intrusted to them, and for "acts done by the agents of a corporation in the course of its business and of their employment a corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances." *Railway Co. v. Prentice*, 147 U. S. 101, 109, 13 Sup. Ct. 261; *Railroad Co. v. Quigley*, 21 How. 202, 210; *Bank v. Graham*, 100 U. S. 699, 702; *Salt Lake City v. Hollister*, 118 U. S. 256, 261, 6 Sup. Ct. 1055; *Railway Co. v. Harris*, 122 U. S. 597, 608, 7 Sup. Ct. 1286.

The conclusions already announced practically dispose of the refusal to give the three instructions requested. The fifth was a mere truism, from the failure to give which it is evident that no prejudice could possibly have arisen. It was a request to say to the jury, in effect, if you find no malice, you can give no damages on account of malice, or, in other words, you will give no effect to a nonexistent cause. No prejudice can arise from the refusal to give such an instruction. It may be further said that in these cases malice, in the legal sense, was implied from the publications, and the jury were not at liberty to find that it did not exist, while

malice, in the sense of ill will, was not essential to a recovery, so that the only effect of the instruction, if given, would have been to mislead or to puzzle the jury. The seventh instruction was properly refused, because it did not present the crucial question in the case,—whether or not the publications were made with a reckless disregard of the rights of the defendant in error,—while the charge of the court tersely and fairly presented it, because it was framed on the erroneous theory that there could be no recovery of exemplary damages unless the publication of the libel was inspired by actual malice or ill will, and because it assumed that the jury were at liberty to find that some of the plaintiffs in error had published the libels in good faith and with reasonable ground to believe that all the libelous matter which they published was true, when the facts proved were insufficient to warrant such findings. There was some of the libelous matter published by the World Company and some of that published by the Journal Company that there is no evidence that either of them had reasonable ground to believe; and, in the case of the Times Company, notice of the falsity of the charges was repeatedly given to its agents by Carlisle and his friends before they were published, and its city editor testified that all they knew about them from any other source was that the sheriff said he believed them. A publication under such circumstances could not have been made “in good faith.” *Lee v. Bowman*, 55 Mo. 400; *Coover v. Johnson*, 86 Mo. 533. The eighth request was properly refused because it assumed that the jury were at liberty to find that some of the plaintiffs in error believed all of the libelous matter which they published, while there is no evidence in the record that any of them, or any of their agents, ever had such a belief.

On the evening of the day of the arrest, a friend of the defendant in error and his partner went to the office of the Times Publishing Company, met the city editor, told him that the charges against Carlisle contained in the article which had been published on that day in the *Kansas City Star*, and which was then before him, were false, and that Carlisle was innocent, and, according to the testimony of the city editor, demanded that he should print nothing about it. The article subsequently published in the Times the next morning contained substantially the same charges made in the article in the *Star*. When the interview with Mr. Carlisle's friend and partner took place, the Times article had been written by the police reporter, and either at or after this interview the city editor inserted a statement to the effect that the defendant in error claimed that he was entirely innocent of the charge, and then published it. Before preparing the article the police reporter had talked with Carlisle, and the latter had told him that the charge against him of receiving the stolen cattle was trumped up, and his attorney, Watson, had informed him that Carlisle could prove his innocence of it. In answer to the question why he published the statements in the Times article of charges other than that for which the arrest was made, the city editor of the Times testified:

"Now, this man Reeder. The only thing, according to his statement,—the only specific charge they could get against this man,—was he had received eight head of cattle. But this man Reeder, who came from Colorado, believed that Mr. Carlisle was the head of an organized gang of cattle thieves. I say he believed it, and that was all we knew about it."

When the friend of Carlisle protested against the publication of the matter in the *Star*, the night before the Times Company published its article, this city editor replied that he intended to publish it anyway, and his assistant, or some other person in the office, added an injunction to read the Times and keep posted. It is assigned as error that the court below, in presenting this evidence to the jury, stated it incorrectly, and then instructed them, in effect, that when a newspaper is warned and notified that a charge is false, wrong, and trumped up, and then proceeds to publish it, it thereby affirms it, becomes sponsor for it, and answerable to the party injured, and that it was for them to say, under all the circumstances of the case, whether, if the Times Company published the libel, even with the addition to the effect that Carlisle claimed to be entirely innocent, it did or did not exhibit a wanton disregard of the rights of others. The testimony of the witnesses in the case of the Times Company has been carefully compared with this part of the charge of the court. There are verbal inaccuracies in the statement which the court made of this evidence. In some instances testimony attributed to one witness was given by another, but the substance and effect of the testimony relative to the action of the Times Company was clearly and fairly stated by the court, and the law was correctly declared. There was no just ground for exception to this part of the instructions to the jury.

It is assigned as error that the court below refused to permit the introduction of proof of the article in the *Star*, and its publication, in mitigation of damages, and that, while it admitted proof of the fact that this article was before the city editor of the Times and the friend and partner of Carlisle at the interview on the evening of February 20th, it restricted its effect to that fact. But the article in the *Star* was not evidence of the truth of the statements it contained, and it was not admissible in mitigation of damages in the action against the Times Company, because it was not pleaded in its answer in that case. For the same reason the offer to prove, by the testimony of the reporter of the *Star*, that he communicated what Reeder had told him to the reporters of the plaintiffs in error before they published their articles, was properly rejected. Neither of the answers pleaded or suggested the article in the *Star* or the story of its reporter as one of the sources which induced the plaintiffs in error to make such publications. In jurisdictions which have adopted the Code, matter in mitigation of damages must be pleaded before it can be proved. Rev. St. Mo. 1889, § 2081; *Northrup v. Insurance Co.*, 47 Mo. 435, 444; *Burt v. Newspaper Co.*, 154 Mass. 238, 244, 28 N. E. 1; *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178.

It is also assigned as error that the reporter of the *Star* was not permitted to testify in these actions to what Sheriff Reeder told him at the time of the arrest of Carlisle. As we have already seen, his testimony upon this subject was not competent in mitigation of

damages, but it is suggested that it was admissible for the purpose of contradicting and impeaching the testimony of Reeder. A perusal of Reeder's testimony, however, discloses the fact that no foundation was laid therein for his impeachment. No questions were asked him which would allow of his impeachment by the testimony of this reporter.

In connection with the rejection of this testimony, much complaint is made of the action of the court in the submission of the evidence upon the question of mitigation of damages to the jury. The record and the charge have been carefully examined upon this subject, with the result that it seems to us that this complaint is not warranted. The court expressly charged the jury that, while the answers did not plead justification, they set out the facts and circumstances out of which the publication of these articles grew, for their consideration on the question of the mitigation of damages and that they should look at all the circumstances and facts in the case to see whether the publications were made under such circumstances as to entitle the defendant in error to recover punitive damages. All the requisition papers had been received in evidence. The reporters of the plaintiffs in error had been permitted to testify fully to their examination of these papers, and to all that Sheriff Reeder had told them. With this evidence before them, these instructions gave to the jury all that the plaintiffs in error had pleaded, and all that they had proved, for their consideration upon the question of mitigation of damages, and they were too plain for mistake, misconstruction, or misunderstanding.

When the charge of receiving the eight head of stolen cattle was dismissed by the court in Colorado, the World Company published an article, purporting to be signed by Sheriff Reeder, to the effect that the charge had been dismissed by the entry of a nolle prosequi, and that the defendant in error was thoroughly vindicated in a lengthy opinion on the merits of the case submitted by the district attorney. The Journal Company and the Times Company made no publication of these facts, and did not publish the fact that the defendant in error brought these actions. In its charge the court called the attention of the jury to the publication of this article by the World Company, told them that if, when a publisher ascertains the fact that he has done an injustice, he makes the amende honorable, and says he has done a wrong, he has then acted the manly part; that public opinion and juries ought to appreciate such an act; and that the jury ought to consider this later publication by the World Company in mitigation of damages. It is assigned as error on the part of the Journal Company and of the Times Company that when the court gave this charge, and while speaking of a publisher, it added:

"But if, having slandered you and libeled you, he doggedly remains reticent from that day forth, leaving you to run down and to catch this swift-footed slander that goes through the world, that is another question for the jury."

But this statement of the court was certainly true in fact, and we are unable to discover why it is not true in law. A different question is surely presented, when a jury is to consider the damages to

be allowed for a publication of a false charge of crime which has been promptly retracted, from that which is presented when it is to assess the damages for one that has not been withdrawn. One of the crucial questions in this case was whether the publications were made with wanton indifference to, and reckless disregard of, the rights and feelings of the defendant in error. Silence after he was vindicated, and silence when he sued for the publication of the libels, presents this question in a far different light from that in which a prompt publication of the vindication places it. *Publishing Co. v. Hallam*, 16 U. S. App. 613, 645, 8 C. C. A. 201, 206, and 59 Fed. 530, 535.

Another portion of the charge to which objection is made reads in this way:

"One of the counsel in this case argues that Mr. Carlisle never went to the papers, and asked them to make these corrections. Gentlemen of the jury, it is not the duty—it is not required—of a citizen, when a newspaper libels him, if it does libel him, to go and hunt the libeler up, and entreat and implore him to rectify it. It is the duty of the publisher to look out for the facts, and to make corrections if the facts warrant it. It is not the duty of a man to go to them."

There is nothing questionable in this excerpt from the charge, except the last sentence but one, and that must be read and interpreted in the light of the subject under discussion when it was delivered. If the question of which the court was treating had been whether or not a person libeled could recover damages for the failure of the libeler to discover the truth and publish it after he had circulated the libel, and the court had charged that he might, such an instruction would undoubtedly have been error. But this was not the subject under consideration here, and this was neither the meaning nor the effect of the declaration of the court. The question under discussion was whether or not the fact that the defendant in error did not go to the publishers, and tell them the facts, and demand a retraction, after the libels were circulated, was any justification or excuse for their original publication. The court properly charged that it was not, and the remark that "it is the duty of the publisher to look after the facts, and to make corrections, if the facts warrant it. It is not the duty of a man to go to them,"—was used arguendo, only to support and enforce this rule, and not to announce another and an entirely different proposition of law, which was not in the mind of either court or jury. The connection in which these words were used made it impossible for the jury to misunderstand them, and in that connection their use was not erroneous.

Many assignments of error are made, and much complaint is indulged in, because the court below limited the effect of the requisition papers when they were received in evidence. An examination of these exceptions discloses the fact that the real objection to this limitation was that the court did not permit their use for the purpose of proving the truth of the facts which they recited. The proposition that the affidavit of the complaining witness, or the affidavits of the officers based upon it, constitute any evidence of the truth of the charges made therein, in these actions of libel, is unworthy of consideration. It is said, however, that great injustice was done

because the court failed to mention in its charge the affidavit of the assistant district attorney upon which the application for a requisition was granted. But the foundation of the requisition proceedings was the affidavit of the complaining witness, Chipman. No complaint is made that this was not mentioned to the jury. This affidavit was accompanied with the affidavit of the district attorney, or the information, and with the affidavit of the assistant district attorney, or the application for the requisition. But it is common knowledge that the affidavits of these officers are generally based upon the complaint of the witness who makes the charge. They do not purport to rest upon personal knowledge, but upon the information presented by the prosecuting witness; so that, when his affidavit is received, these formal affidavits of the officers are not of surpassing importance. Moreover, it was entirely in the discretion of the trial court to mention such affidavits, or to fail to mention them, in its charge, provided it fairly reviewed the evidence presented by the contesting parties. Our conclusion is that the failure to mention the affidavit of this assistant district attorney was the exercise of the discretion of the court in reviewing the testimony, with which we cannot interfere, and that the case presents no evidence of an abuse of that discretion, or of any injustice resulting from the manner of its exercise.

The entire charge of the court is challenged as partial and inflammatory. Careful and repeated readings of it, and of every objection made to it, have led us all to the conclusion that it was, on the whole, a just and fair presentation of the law and the facts of these cases. The truth undoubtedly is that the plaintiffs in error published the libels without special ill will or spite against Carlisle, on the theory that they were warranted in doing so because the sheriff of Mesa county made the charge they contained in the hearing of their reporters. This was a fatal mistake. Its commission left them without any defense against judgments for some amounts in these actions. The only question the cases really presented was what the amounts of the judgments should be. This was not all. The publication of the charge that Carlisle had been operating with, or associated with, or had been the head of, a gang of thieves, on the statement of this sheriff, without investigation or inquiry concerning its truth of any one but their informant and those who were repeating it on his information alone, in the face of the presumption of innocence, which the law throws around the upright man who has established a character for honesty and integrity, indicates so grave an indifference to and disregard of a right of the defendant in error deemed precious by every honorable man,—the right to the preservation of his good name unsullied,—that the court could not lawfully refrain from submitting to the jury the question of exemplary damages. We fear that counsel for the plaintiffs in error, in their criticisms of the trial court, have forgotten some of these facts. They have been instant in season and out of season in the defense of these cases. With rare skill and ability they have presented to the court below, and to this court, every consideration—every suggestion—favorable to their clients. But they were defending cases which the law forbade them

to completely win. It is hard to conduct a contest that must be lost. It is trying to receive with equanimity adverse rulings that are fatal to a defense, although expected and known to be right. We fear that the heat of the strife, the zeal of the advocate, and the unavoidable annoyance of inevitable defeat, have produced some obliquity of vision on the part of the counsel for the plaintiffs in error when they look at the charge of the court. Some of their criticisms of it seem to us to attribute strained and unnatural meanings to plain and correct declarations of law, and to apply other declarations to subjects to which they had no reference. In some of their criticism we fear they forgot for the moment that it was the duty of the court to declare the law applicable to the facts of these cases, to announce that the publications were not justified, and to submit the question of punitive damages to the jury, whatever the effect of this action might be upon the parties to the suit, while their duty was discharged when they considered the law and the facts solely with reference to their effect upon their clients. The facts in these cases were such that an impartial statement of them, and a clear and concise enunciation of the law which applied to them, could not be made welcome to counsel for the plaintiffs in error or to their clients. A hesitating, confused, and obscure presentation of the law and the facts might have been more favorable to them, but no just exception can be taken because correct declarations of law are plainly and forcibly given, or because apt and impartial references to the salient facts of a case are made. There were, as we have said, some inaccuracies in some of the court's statements of the facts. In a few instances testimony given or a statement made by one witness or person was attributed to another. But the court did not undertake to recite or refer to all the evidence, the mistakes in its references to it were insubstantial and ineffective, and the whole question of the existence and effect of the evidence was left to the jury, in whose province it fell.

The more carefully we have studied the record, the rulings upon the evidence, and the charge of the court in this case, the more firm our conviction has grown that the trial was, on the whole, fairly conducted; that the references to the evidence in the charge were just and impartial; that the instructions to the jury contained a terse, clear, and correct statement of the law of the cases; and that there was no substantial error in the proceedings. This conviction is confirmed as we review the entire case, and the arguments and briefs of counsel, by the fact that the counsel for the plaintiffs in error assign more than 75 errors in each of these cases, and specify in their briefs 74 upon which they rely. None of them have escaped our consideration. But none of them which have not already been considered demand extended notice or discussion. The 48th, 49th, 50th, 51st, and 52d assignments are that the court did not instruct the jury to return a verdict in favor of each of the plaintiffs in error; that it allowed the defendant in error more than three peremptory challenges (*Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909); that it refused to permit the plaintiffs in error to prove that Carlisle had not sued, or made any claim against, Chipman or his company for char-

ging him with receiving the eight stolen cattle; and that it refused to permit them to show that he had never made any claim against the Sheriff Reeder for the slander he had uttered. When counsel of the learning and ability of those who presented this case gravely announce to an appellate court that they rely upon 74 alleged errors for a reversal of judgments against their clients, and some of those specified turn out to be as frivolous as those we have just cited, it is at least difficult to resist a suspicion that they themselves were not certain there was any substantial error in the case. The judgments of the court below must be affirmed, and it is so ordered.

FELTON v. BULLARD.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1899.)

No. 617.

1. MASTER AND SERVANT—INJURY OF RAILROAD EMPLOYEE FROM DEFECTIVE CARS—OHIO STATUTE.

Section 2 of the Ohio act of April 2, 1890 (87 Ohio Laws, 149), which makes it unlawful for any railroad corporation to knowingly or negligently use or operate any car that is defective, or upon which any attachment is defective, makes no distinction between the cars owned by the corporation and foreign cars which it may operate, and the duty of proper inspection applies equally to both; and under the further provisions that, if any employé shall receive an injury by reason of any defective attachment, the company shall be deemed to have had knowledge of the defect, and proof of the defect and injury shall be prima facie evidence of its negligence, as construed by the supreme court of the state, to overcome the presumption of knowledge on the part of the company, raised by the statute on such proof, it is not sufficient to prove that the company furnished a sufficient and competent inspector, but actual and proper inspection, or its equivalent, must be shown.

2. SAME—DUTY OF RAILROAD COMPANY TO INSPECT FOREIGN CARS.

As a matter of general law, independently of statute, a railroad company owes to its servants engaged in handling or operating foreign cars on its road the legal duty of not exposing them to dangers arising from defects which might be discovered by reasonable inspection before they are admitted into its trains, and for the negligence of an inspector in that regard the master is responsible.

3. SAME—SUFFICIENCY OF INSPECTION.

A mere visual inspection of the grab irons constituting the ladders on cars, which brakemen are required to use more or less while the cars are in motion, cannot be held, as a matter of law, to be a sufficient inspection; and whether an inspection made was in fact a reasonable and sufficient one is a proper question for the jury.

4. SAME—ACTION FOR DEATH OF BRAKEMAN—TRIAL.

In an action against a railroad company to recover for the death of a brakeman, caused by the breaking from the car of a handhold forming part of the ladder upon which he was descending from a moving car, the testimony of an inspector that he inspected the car on the day before the accident by climbing up the ladder at one end and down that at the other is insufficient to warrant a peremptory instruction for the defendant, where the evidence disclosed that the iron was held to the car at one end only by a piece of a rusted screw half an inch long and imbedded in rotten wood.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Lawrence Maxwell, for plaintiff in error.

Harvey Scribner, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Edward McCarn, a brakeman in the service of the plaintiff in error, was killed, while descending from the top of a moving car, by reason of the defective character of a grab iron, which broke off and threw him beneath the wheels. This grab iron was attached to the end of a foreign car, which belonged to the Grand Trunk Railway Company, which had been received the day before from a connecting railway company. The grab iron was of the usual construction, and had been attached to the end of the car, in the usual way, by two screws, each of from three to four inches in length; one being at each end of the iron. An examination after the accident disclosed the fact that one of these screws was badly rusted, and had long been broken, so that it supported one end of the iron by a stub only one-half inch in length, which rested in wood much decayed. The screw at the other end appeared to have been freshly broken or wrenched in two; a part being pulled out with the grab iron when it came off the car. That this defective grab iron was the direct cause of the death of the intestate was not disputed. It constituted an attachment upon a car at the time being operated by the receiver upon a line of railway within the state of Ohio.

The Ohio act of April 2, 1890, so far as it bears upon the facts of this case, furnishes a rule of law which must govern its disposition. The second section of that act makes it unlawful for any railway corporation to knowingly or negligently use or operate any car that is defective or upon which any attachment thereto belonging is defective. It also provides that, if an employé of any such corporation shall receive any injury by reason of any defective attachment thereto belonging, the corporation "shall be deemed to have had knowledge of such defect before and at the time such injury was so sustained," and that, when the fact of such defect shall be made to appear by such employé or his legal representatives in an action against any such railroad corporation for damages on account of such injuries so received, the same shall be "prima facie evidence of negligence on the part of such corporation." 87 Ohio Laws, 149. This section of this statute recognizes no distinction between the liability of a railway company for injuries sustained by its employés through the operation of defective cars owned by such corporation and injuries sustained from defects in foreign cars. The statute applies to cars "owned and operated, or being run and operated, by such corporations." The liability is the same in either case. How, then, may this prima facie evidence of corporate negligence be rebutted? Prior to the passage of this act the decisions of the supreme court of Ohio were to the effect that a railroad company was not liable to a brakeman for the negligence of a car inspector, it being held that the brakeman and the inspector were fellow servants. *Railroad Co. v. Fitzpatrick*, 42 Ohio

St. 318; *Railroad Co. v. Webb*, 12 Ohio St. 475. The third section of this act changes the law of fellow servant in the cases to which it applies. That section provides that:

"In addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employé of such company, is not the fellow servant, but superior of such other employé, also that every person in the employ of such company having charge or control of employés in any separate branch or department, shall be held to be the superior and not fellow servant of employés in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

This section would seem to have no bearing upon the case now to be decided, inasmuch as the inspector employed by the receiver had no subordinates, and had no power "to direct or control any other employé" of the receiver. He was sole inspector, with no power of direction or control and no assistants. The situation is, therefore, unique. The inspector, under the decisions of the Ohio courts, which doubtless constituted a part of "the now-existing law" referred to in this section, was the fellow servant of the brakeman. This "now-existing law" is not changed by this section, except in so far as specifically provided by this enactment. Conceding, therefore, that the third section has no application to the peculiar facts of this case, we reach the inquiry as to the effect of the second section, which creates a statutory presumption of corporate knowledge of the defect from evidence of its existence and an injury sustained by an employé engaged in operation of such defective car. Is that *prima facie* case rebutted by evidence that the railroad corporation had furnished a sufficient and competent inspector? This question finds its answer in the case of *Railway Co. v. Erick*, 51 Ohio St. 146-162, 37 N. E. 128. One of the questions in that case arose upon the refusal of the trial court to instruct the jury that if the company had employed a competent inspector, whose duty it was to carefully inspect all cars and their appliances before they were permitted to go out, the company would not be liable if he neglected to make such inspection. This, in various forms, was refused. The supreme court held that the presumption of knowledge of the defective condition of the car in question, raised by the proof of the defect and injury, under the second section of the act of April 2, 1890, was not rebutted by proof of the employment of a competent and sufficient inspector. Upon this question the court said:

"The presumption of knowledge of the defect, before and at the time of the injury, is, by the statute, chargeable to the company; and this statutory presumption cannot be overcome by proof of facts which only raise a presumption that the company did not have such knowledge. Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the statutory presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defects. It will be noticed that this section of the statute also provides that, in the trial of a personal injury case against a railroad company, the fact of such defect in its cars or their attachments shall be *prima facie* evidence of negligence on the part of such corporation."

That this section of the statute constitutes a mere rule of evidence, as decided by the same court in *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 768, and *Hesse v. Railroad Co.*, 58 Ohio St. 167, 50 N. E. 354, is no answer. These cases in no way diminish the weight of the case of *Railway Co. v. Erick*, supra, as an authoritative construction of the statute, in which it is held that the statutory presumption of knowledge is not rebutted by anything less than evidence that there was "an actual and proper inspection."

Aside from the effect to be given to the second section of the act of 1890, we hold that the duty of inspecting foreign cars is a duty due from the master to his servant, and that the master is responsible to the servant for all defects which would be disclosed by a reasonably careful inspection. The well-known course of business pursued by carriers in this country involves so large a use of foreign cars as to make it inadmissible that any distinction should be recognized between the duty of caring for the safety and protection of employes engaged in operating such cars and that exacted in respect to cars owned or controlled by the carrier. Employes can no more be said to assume the responsibility for injuries due to the defective condition of foreign cars than they can be said to assume the risk arising from defects in domestic cars which might have been discovered by proper inspection. In the one case, as much as in the other, the inspector is discharging the duty of the master to his servants, and for his negligence in this particular the master is responsible. The question is one of general, and not local, law, unless controlled by statute. It is, therefore, a question for the courts of the United States to decide upon their own judgment as to the common law controlling the question. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

To support the contention that, in the matter of the inspection of foreign cars, the inspector is the fellow servant of the men operating such cars, the cases of *Mackin v. Railroad Co.*, 135 Mass. 201, and *Coffee v. Railroad Co.*, 155 Mass. 21, 28 N. E. 1128, have been cited. In *Mackin v. Railroad Co.*, the court, in discussing the duty of carriers to receive from other companies cars to be forwarded, said:

"The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is, not that of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakeman, as to such cars, while in transit, and until ready to be inspected for a new service."

In the later case of *Chandler v. Railroad Co.*, 159 Mass. 588, 589, 35 N. E. 89, the court declined to extend the exception made in the earlier cases to foreign cars employed in any way by the receiving company for its own uses during the process of forwarding them.

The rule which we deduce as having the support of the weight of authority and reason is that a railroad company owes to its servants engaged in handling or operating foreign cars the legal duty of not exposing them to dangers arising from defects which might be discovered by reasonable inspection before they are admitted into its trains. *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344; *Goodrich v. Railroad Co.*, 116 N. Y. 398-401, 22 N. E. 397. In the case last cited the New York court of appeals said:

"It was decided in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, that a railroad company is bound to inspect the cars of another company, used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that, when cars come in from another road which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employes for transportation. When so furnished, the employes whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer."

This rule, as thus stated, was approved and applied in *Railroad Co. v. Mackey*, 157 U. S. 72-91, 15 Sup. Ct. 491. In concluding a discussion of the question, the court, speaking by Justice Harlan, after quoting from *Goodrich v. Railroad Co.* the paragraph we have set out above, said:

"We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employes to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its trains."

In the later case of *Railway Co. v. Archibald*, 170 U. S. 665-669, 18 Sup. Ct. 777, the supreme court again had under consideration the duty of a railroad company to its servants in respect to foreign cars, and followed the doctrine announced in the case of *Railroad Co. v. Mackey*, cited above, saying:

"That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employes had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as 'foreign cars,' is also settled."

That this duty is not discharged by merely furnishing an inspector competent to discharge the duty is very clear, and that this was the holding in both the cases decided by the supreme court of the United States, and cited above, is most apparent from an examination of the facts of the cases, as well as from the language employed by the court in considering the duty as one identical in character with that resting upon the master in respect to the inspection of his own cars before admitting them into its trains. That the master is responsible for the negligence of such an inspector, and that the inspector is not the fellow servant of those operating

such foreign cars, is the necessary conclusion from the character of the duty.

In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, the court held that the inspector was not the fellow servant of a brakeman who was injured through the negligence of the inspector, who failed in his duty as inspector. Upon the same grounds he is not the fellow servant of a brakeman who sustains an injury through a defect in a foreign car, provided the defect was one which might have been discovered by the exercise of reasonable care in the proper inspection of the car by the inspector.

At the close of the charge, which included much upon the general subject of the exercise of care in making such an inspection as was possible and usual when foreign cars were received, and to which no exception was taken, the court was asked to charge as follows:

"If the defect was latent,—that is, one not visible,—the defendant is not liable, if the injury occurred by reason of such latent or invisible defects."

In response to this request the court instructed the jury as follows:

"I would not put it upon the ground of visibility alone. I will give it as I have already done,—if it was not discoverable by fair and reasonable and an ordinarily prudent inspection. It does not depend upon the mere question of visibility alone, but it depends upon that. Of course, it is an important circumstance. If it was visible, so that everybody could see it, why, it would be negligence not to see it. But if it was latent and concealed, in the sense that a reasonable and ordinarily prudent inspection would not discover it, then the railroad company is not liable."

The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grab iron was held to the wood of the car nor the decayed condition of the wood surrounding this broken screw was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grab iron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was no other inspection reasonable and possible, under the circumstances under which such cars are received and forwarded? Would a mere visual inspection of a car wheel be regarded as ordinary and reasonable? If the tapping of the wheel with a hammer would disclose by sound the presence or absence of a fracture which might not be disclosed to the eye, could it be said that so ready and accessible a test should not be applied? As much may be said touching the firmness and security with which this grab iron was fastened to the end of this car. This grab iron was one of the rounds in a ladder provided for the use of brakemen, whose duty called them more or less often to the top of such cars. The life of the brakeman may often depend upon the firmness with which such an iron is attached to the end or side of the car. Was there no other ready means of ascertaining whether it was properly and safely attached than a visual inspection? If the application of some force would disclose a dangerous weakness,

ought not such a test to be applied? The plaintiff in error did not regard a visual test as alone sufficient, for the inspector says that his habit was to go up such ladders at one end of a car and down the ladder at the other end. Did he do that in this instance? If he did, did he do so in such a way as to throw his weight upon this particular iron, or upon that end of the grab iron supported by the broken screw? If not, would such a test be feasible and calculated to disclose a broken screw or rotten wood? These were proper questions for the jury to consider, and it was not error to modify this request as was done.

Neither was it error to refuse the request for an instruction to find for the defendant. This request was based upon the insistence that there was no evidence upon which the jury could reasonably find that the railroad company had been guilty of negligence. The inspector testified that he did inspect this car upon the day it was received, being the day before the happening of the accident. He says he did so by going up one ladder and down the other. He also testified that neither the condition of the broken screw nor of the wood into which it had been driven could be discovered by the eye. The inspector also testified that he inspected all cars for his company, and that he frequently inspected as many as 50 in one day. It is true that he said he inspected this particular car and this particular grab iron in the manner stated; that is, by going up and down the ladder in which it was one of a series of four or five iron handholds, one above another. But it is manifest that his testimony was not based upon any memory of this particular car, but depended upon his habit and the record made of cars inspected. Did he in truth and fact test this particular grab iron by any means likely to disclose its weakness? It was held at one end only by a rusted stub of the screw one-half inch in length, and that embedded in decayed wood, though this fact did not show externally. Is it likely that this iron would not show its weakness if any weight had been thrown upon the broken screw? The grab iron was about two feet in length. If the weight of a man was thrown upon the end supported by the sound screw, it might hold. But, if that weight was thrown upon the other screw, was it likely to indicate any firmness? The facts were not voiceless. They speak for themselves. The condition of the screw supporting one end, and of the wood into which it was screwed, was such, as disclosed by examination after the accident, as to make it obvious that any strain thrown upon that end would disclose the weakness with which it was attached. Did the inspection made involve any strain upon the weak end of this grab iron? Did the inspector use this ladder at all? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless? The circumstances were such as that it was not error to take the opinion of the jury.

Let the judgment be affirmed.

HUBINGER v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1899.)

No. 1,099.

1. MORTGAGES—INJURY TO MORTGAGED PROPERTY—RIGHT OF ACTION OF MORTGAGEE.

A mortgagee may maintain an action at law for an injury wrongfully done to the mortgaged property, whereby its value is lessened, and his security impaired, provided he sustains an actual loss thereby, and the measure of his recovery is the amount of such loss.

2. FEDERAL COURTS—JURISDICTION—PENDENCY OF SUIT IN STATE COURT.

The pendency in a state court of a suit to foreclose a mortgage does not preclude a federal court from entertaining jurisdiction of an action at law by the mortgagee to recover damages for the conversion or destruction of the mortgaged property, which amounts to an abandonment by the plaintiff of any claim to the property itself.

3. MORTGAGES—REVERSAL OF ORDER CONFIRMING SALE—IOWA STATUTE.

The Iowa statute (McClain's Ann. Code, § 4429), providing that property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal, does not apply to a case where an order confirming a sale of property under a decree of foreclosure is alone appealed from and reversed, the purchaser being a party to the appeal, and on such reversal it is the duty of the purchaser to restore the property.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This is a suit wherein the Central Trust Company of New York, the defendant in error, hereafter termed the "Trust Company," sued John C. Hubinger, the plaintiff in error, in an action which is essentially an action at law to recover damages for the wrongful disposition and destruction of property which at one time constituted an electric street-railway plant in the city of Keokuk, Iowa, the same being the property of the Gate City Electric Street-Railway Company. A jury was waived, and the case was tried by consent before the court, which made a special finding of facts. From this finding we extract the following facts, in substance, which are all that are deemed essential to a proper understanding of the case: The Central Trust Company, as trustee, filed a bill to foreclose a deed of trust which was executed by the Gate City Electric Street-Railway Company of the city of Keokuk, to secure an issue of bonds amounting to \$85,000, which deed of trust covered all the property and franchises of said street-railway company. The suit was brought in the superior court of the city of Keokuk, Iowa, and a decree of foreclosure was entered therein on March 21, 1894. At a sale which was made under said decree by a master on April 28, 1894, the mortgaged property was purchased by John C. Hubinger for \$10,000, which sum was not sufficient to pay certain preferential claims that had been allowed in the foreclosure proceedings, and left nothing to be applied on the mortgage indebtedness. The sale was approved by the superior court, notwithstanding objections made thereto by the Trust Company, and the property so sold was delivered to Hubinger on May 10, 1894. From the order approving the sale the Trust Company took an appeal to the supreme court of Iowa, on June 27, 1894, without giving bond. In the latter court the order of the superior court confirming the sale was reversed, on January 23, 1896, and thereafter, on June 9, 1896, a writ of procedendo issued from said supreme court, directing further proceedings in the foreclosure case, not inconsistent with the opinion of the supreme court of the state. 96 Iowa, 646, 65 N. W. 982. Shortly after the property had been turned over to Hubinger, as heretofore stated, he surrendered the possession thereof to the J. C. Hubinger Company, a corporation then engaged in the operation of an electric light plant in said city of Keokuk, which was controlled by said J. C. Hubinger, and on April 10, 1896, after the supreme court of the state had reversed the order of the

superior court confirming the sale, said Hubinger made the transfer effectual by conveying said property, with full covenants of warranty, to the J. C. Hubinger Company for a consideration therein expressed of \$100,000. After Hubinger had acquired the property aforesaid at the sale aforesaid, he applied to the city of Keokuk for a franchise to operate an electric street railway on the streets of said city, and secured the passage of an ordinance known as "Special Ordinance No. 73," whereby there was granted to the said J. C. Hubinger Company, for a period of 25 years from said date, "the exclusive right to lay down, construct, and operate a street railway on all the streets of the city of Keokuk, with single or double track, standard railway tracks, with electric or other practicable motor power, other than animal or steam." This ordinance was duly accepted by the J. C. Hubinger Company, and by its terms operated as a repeal of a previous ordinance, No. 60, granted to the Gate City Electric Street-Railway Company, under which ordinance it had previously operated its railway in the streets of the city of Keokuk. The deed of trust in favor of the Trust Company, to which reference has been made, covered the franchises granted by said ordinance No. 60. After procuring the passage of ordinance No. 73, and the repeal of ordinance No. 60, important changes were made by the defendant in the location of the tracks of the Gate City Electric Street-Railway Company, as they existed when the deed of trust was executed. These changes consisted in extending the tracks at certain places, and in taking up portions of the track on some of the streets, and laying the same on other streets, so as to conform to the requirements of the new ordinance No. 73. All of the machinery originally used to operate said railway, such as engines, dynamos, and generators, with the exception of two boilers, were also removed from the power house of the railway company to a power house which was owned and used by the J. C. Hubinger Company. Before the commencement of this suit, and after the reversal of the order approving the foreclosure sale, the Trust Company tendered to the defendant the sum of \$10,000, which he had paid for the mortgaged property at the foreclosure sale, and demanded its return; but the defendant refused to restore it unless he was paid all further sums which he had expended in changing, altering, and repairing it, and sundry other sums which he had also expended. The trial court further found that by procuring the repeal of the old ordinance No. 60, and by the changes which the defendant had made in the mortgaged property while the same was in his possession, and by dismantling the old power house, the identity of the mortgaged property had been destroyed, so that it was no longer in existence in its entirety, and could not be restored to the Trust Company. It also found that the fair market value of said property, when the same was turned over to the defendant, was \$33,600. In pursuance of these findings, the trial court rendered a judgment in favor of the Trust Company, the plaintiff below, for the sum of \$25,271.18, which sum represents the market value of the mortgaged property as assessed by the court, less the price paid therefor at the foreclosure sale, interest having been computed on the balance at the rate of 6 per cent. per annum from and after June 10, 1896, until the rendition of the judgment. The writ of error brings this judgment before us for review.

James H. Anderson and John E. Craig, for plaintiff in error.

James C. Davis and William J. Roberts, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case having been tried before the circuit court without the intervention of a jury, and the facts having been found specially, the only question open for consideration in this court is whether the facts as found by the trial judge are adequate to sustain the judgment. The findings of the trial judge, as a matter of course, cannot be reviewed. The judgment is challenged by counsel for the plaintiff in error, as we understand, on two principal grounds:

First, because the Trust Company, as it is said, had no such title to the mortgaged property which was bought by the defendant Hubinger at the foreclosure sale as will enable it to maintain an action at law against the purchaser for the wrongful disposition or destruction of the property, or for his refusal to surrender it to the Trust Company upon demand; and, second, because the superior court of the city of Keokuk, in which the suit was brought, has, as it is claimed, exclusive jurisdiction of the controversy, and all matters connected therewith or incidental thereto.

Concerning the first of these contentions, it may be said that, while it is true that the Trust Company was not the absolute owner of the property in controversy, nevertheless the legal title was vested in it for the benefit and security of the mortgage bondholders, and we perceive no reason why it is not entitled to sue at law and recover the value thereof, from one who has wrongfully dealt with and dissipated it, so that it cannot be restored to the proper custody. The authorities are quite numerous that a mortgagee may maintain what would at one time have been termed "an action on the case" for an injury wrongfully done to the mortgaged property, whether it be realty or personalty, whereby its value is impaired and the security of the mortgagee lessened, provided that, as a result of the wrongful act, the mortgagee sustains an actual loss. The recovery in such cases is commensurate with the loss. *Yates v. Joyce*, 11 Johns. 136, 140; *Van Pelt v. McGraw*, 4 N. Y. 110; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57; *Sperry v. Ethridge*, 70 Iowa, 27, 30 N. W. 4; *Gooding v. Shea*, 103 Mass. 360; *Allison v. McCune*, 15 Ohio, 729; *Mitchell v. Mining Co. (Cal.)* 17 Pac. 246-257; *Heath v. Haile (S. C.)* 24 S. E. 300. The special finding shows that the mortgaged property had been dissipated by the wrongful acts of the defendant, and that he refused to restore it, and could not in fact restore it in its entirety, when, upon the reversal of the order confirming the foreclosure sale, it became his duty to restore it to the Trust Company. Inasmuch as the mortgagor company seems to have been utterly insolvent at that time, the mortgagee's security became impaired to the full extent of the value of the mortgaged property when it was purchased by the defendant, and we know of no reason why the defendant may not be compelled to respond for its value in an action at law.

We are also of opinion that the second ground on which the judgment below is contested is equally untenable. If the case at bar were one in which the Trust Company was seeking to recover the mortgaged property or any specific part thereof, or to enforce a lien against the same, it may be conceded that the action could not be maintained because of the pendency of the foreclosure suit in the state court. By the commencement of that suit, the court in which the bill was filed acquired an exclusive jurisdiction over the mortgaged property, and any attempt to enforce a claim against the property itself, or any specific part thereof, must be made in the state court. *Merritt v. Barge Co.*, 49 U. S. App. 85-93, 24 C. C. A. 530, and 79 Fed. 228; *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961; *Zimmerman v. Sorelle*, 49 U. S. App.

387, 25 C. C. A. 518, and 80 Fed. 417. As has already appeared, however, the case at bar is not one in which the Trust Company sought to recover the property, but it is essentially an action at law to recover damages for its waste and destruction. It is a suit strictly in personam, which contemplates no interference with the mortgaged property, and requires no reference thereto, further than to ascertain its value at a certain date, and what has since been done with it. The bringing of this suit by the Trust Company upon the theory that the mortgaged property had been destroyed by the wrongful conduct of the defendant, and was no longer available as a security, was a practical abandonment by the mortgagees of all claim to the property, and an election on their part to take a money judgment for its value. It is probably true that the state court would have had adequate power, by orders made in the foreclosure suit at the instance of the Trust Company, to have compelled Hubinger to account for its value; but we think that it was under no obligation to seek for such relief in that suit, but was entitled, upon the facts found by the trial court, to sue at law for the damages which it had sustained. *Buck v. Colbath*, 3 Wall. 334; *Stanton v. Embrey*, 93 U. S. 548; *Garabaldi v. Wright*, 52 Ark. 416, 12 S. W. 875.

It was suggested on the oral argument, and some stress seems to be laid on the point in the brief, that the defendant below was not obliged to restore the property which he purchased at the foreclosure sale because of a provision found in the Iowa Code (McClain's Ann. Code, § 4429) to the effect that "property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal." It is obvious, however, that Hubinger is not within the protection of this provision of the Code, as the trial court very properly held (87 Fed. 3-8), because the judgment under which he purchased was not reversed, but remains undisturbed to this day. The only proceeding which was challenged by the appeal to the supreme court was the order confirming the sale, and the defendant below was a litigant before the supreme court, endeavoring to maintain that the order was not erroneous. We fully agree with the trial court that the defendant was not a purchaser under "a judgment subsequently reversed," and for that reason was not protected by the aforesaid provision of the Code, and that he was bound to restore the mortgaged property when the order approving the sale was reversed. Some other points are discussed in the brief of counsel for the plaintiff in error, but they are not of sufficient moment to deserve special notice. The judgment below was for the right party, and it is hereby affirmed.

COOPER et al. v. NEWELL et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 511.

EVIDENCE—RECORD IN COLLATERAL SUIT.

In an action in a federal court in which it was sought to collaterally impeach a prior judgment of a state court, the admission in evidence of the record of a second suit in the state court, commenced by the person against whom the former judgment was rendered, to relieve himself therefrom, for the sole purpose of showing due diligence on his part, is not reversible error.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

F. Chas. Hume, for plaintiffs in error.

Henry W. Rhodes and Thos. H. Franklin, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The controlling question in this case, to wit:

"Was the judgment of the district court of Brazoria county, Texas (said court being a court of general jurisdiction), in the case of Peter McGreal v. Stuart Newell, subject to collateral attack in the United States circuit court for the Eastern district of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the state of New York and a citizen of the state of Texas, by evidence aliunde the record of the state court, showing that the defendant, Stuart Newell, in said suit in said state court, was not a resident of the state of Texas at the time the suit was brought, nor a citizen of said state, but a resident citizen of another state, and that he was not cited to appear in said suit, and that he did not have any knowledge of said suit, and that he did not in fact appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent?"

—was certified to the supreme court, and has been answered in the affirmative. (Opinion not yet officially reported) 19 Sup. Ct. 506. The trial court admitted in evidence the transcript of the proceedings and judgment of the district court of Brazoria county, Tex., in the suit numbered 3,542, filed August 20, 1876, by Stuart Newell against the heirs of Peter McGreal, not as a muniment of title, but for the sole purpose of showing diligence on the part of Stuart Newell in relieving himself of the aforesaid judgment of the Brazoria court in said case No. 1,527 (Peter McGreal v. Stuart Newell). This was not reversible error.

The other questions raised by the assignment of errors are not insisted upon, and the judgment of the circuit court is affirmed.

In re FRANCIS-VALENTINE CO.

(Circuit Court of Appeals, Ninth Circuit. May 16, 1899.)

No. 538.

1. BANKRUPTCY — DISSOLUTION OF LIENS — POSSESSION OF PROPERTY UNDER LEVY.

Where actions are begun in a state court, and writs issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in involuntary bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy, notwithstanding the pendency of an action of replevin in a state court against the sheriff by a stranger claiming ownership of the property; and the court of bankruptcy has jurisdiction to order the surrender of the property on summary petition by the trustee.

2. SAME—SHERIFF'S FEES.

A sheriff, holding property of an involuntary bankrupt under writs levied within four months before the commencement of the proceedings in bankruptcy, has no right, as against the trustee, to retain possession of the property until payment of his fees. Such fees are taxable in the court from which the writs issued, and, when there taxed and allowed, may be made the basis of a claim in the court of bankruptcy.

Petition for revision of an order of the district court of the United States for the Northern district of California, in bankruptcy. For opinion of the court below, see 93 Fed. 953.

Reddy, Campbell & Metson, for petitioner.

Gordon & Young, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The jurisdiction conferred upon this court by subdivision b of section 24 of the bankruptcy act of July 1, 1898, is invoked in behalf of Richard I. Whelan, formerly the sheriff of the city and county of San Francisco, in a petition which shows that, at the time when the Francis-Valentine Company was adjudged a bankrupt, certain of its property was in the possession of the said Whelan, as sheriff, having been levied upon by him under writs of attachment and executions issued out of the superior court of the state of California in and for the city and county of San Francisco in actions then pending, in which the bankrupt had been the defendant; that on April 10, 1899, the trustee of the estate of said bankrupt, under appointment of the district court of the United States for the Northern district of California, filed in said district court an affidavit setting forth the facts that the trustee had taken possession of said estate under the provisions of the bankruptcy law, and that the said Whelan claimed to be in possession of portions of said property, and was interfering with the trustee's possession of the same; that upon said affidavit an order was made requiring the said Whelan to show cause why an order should not be made commanding him not to interfere with or disturb the trustee's possession of the bankrupt's property; that upon the order to show cause the sheriff alleged his right to the possession of the property to consist in the fact that he held the same under writs of attachment and execution on behalf of certain creditors of the bankrupt, and so held

the same on the day when said corporation was adjudged a bankrupt, and that the said writs were not dissolved by the adjudication in bankruptcy, and that he still possessed the right to retain the possession of said property, and had been notified by the plaintiffs in said actions not to surrender the possession of the same. He further alleged that prior to the adjudication of the bankruptcy, and while he held said property under said writs, the American Type Founders' Company commenced against him an action of claim and delivery in the superior court of the city and county of San Francisco, state of California, to recover the possession of a portion of said attached property, consisting of a printing press, which said American Type Founders' Company claimed to own; that in said action, upon due proceedings had, and filing an undertaking therefor, the said printing press was taken from the possession of the said sheriff; that thereafter the said sheriff, as defendant in said action, pursuant to law, did file a bond in the sum of \$4,000 for the return of the said printing press to him, whereupon it was returned to his possession; that he would have sold the same upon said writ on October 12, 1898, but for a writ of injunction forbidding the sale, issued out of the said district court in proceedings against said bankrupt; that the action of claim and delivery commenced by the American Type Founders' Company is still pending and undetermined.

Upon the petition filed in this court it is contended: First, that the district court had no jurisdiction upon an order to show cause to take the property from the petitioner's possession while he was still holding the same under said writs; second, that the district court had no jurisdiction by such proceedings to summarily adjudicate the title to a portion of said property to be in the bankrupt's estate, while an action in replevin was pending against the petitioner in a court of competent jurisdiction under a claim of ownership in the plaintiff in said action, for the reason that, if judgment be rendered in said action against the petitioner, he will be required to answer for property which has been taken from him without due process of law.

In support of the first contention the petitioner cites and relies upon certain cases, of which the principal is *Marshall v. Knox*, 16 Wall. 551. In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the district court, sitting in bankruptcy, had no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: "The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee." These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt, nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt. Upon the adjudication of bankruptcy the sheriff's right to the possession terminated, for the

writs were dissolved, and upon the appointment of a trustee in bankruptcy the right to the immediate possession vested in the latter. There was no question of conflicting claims to be adjudicated by the district court. Nor had the sheriff the right to retain the possession of the property until his fees were paid. His claim for fees, and his lien therefor, if he has one, will be protected in the court of bankruptcy. No difficulty is presented from the fact, suggested by the petitioner, that the sheriff's costs had not been taxed, and that the district court had not the jurisdiction to tax the same. His fees were still taxable in the court in which the writs were issued, and, as allowed in that court, will be the basis of his claim in the bankruptcy court.

The pendency of the action of replevin against the sheriff on behalf of the American Type Founders' Company is not ground for holding that the portion of the property involved in that litigation shall not be delivered to the trustee. The possession which the sheriff had of that property was not for the benefit of the American Type Founders' Company, but was antagonistic to it. The intervention of bankruptcy divested the sheriff of his possession, just as it would have divested the possession of the bankrupt itself in case a like action had been commenced against the bankrupt by the same party plaintiff. The sheriff had no right to the possession of the printing press, except upon the theory that the title was in the bankrupt. The property having been once taken from his possession, upon a proper bond furnished by the American Type Founders' Company, in again securing the possession by a counterbond the sheriff asserted and relied upon the bankrupt's title. The American Type Founders' Company is not a party to the proceeding in the bankruptcy court, and its rights are in no way affected by the order upon the sheriff. It is not represented in the present proceeding. The question is purely one of the respective rights of the sheriff and of the trustee of the estate of the bankrupt. We find no error in the order of the district court, and the petition will be dismissed.

In re DAWLEY.

(District Court, D. Vermont. June 17, 1899.)

No. 47.

BANKRUPTCY—EXEMPTIONS—HOMESTEAD.

Where the bankrupt had a tenement house, in which he reserved a room for the storage of certain household and personal effects, but boarded at a restaurant, and lodged in furnished rooms elsewhere, and did not keep house, and had no family using, or for which he was keeping, any of the premises, *held*, that he was not entitled, under the laws of Vermont, to claim a homestead in the tenement house.

In Bankruptcy. On review of decision of referee in bankruptcy.

Butler & Moloney, for petitioner.

D. P. Peabody, pro se.

WHEELER, District Judge. The bankrupt appears to have had a tenement house, in which he reserved a room, where he stored some

household and personal effects, but he boarded at a restaurant, and had furnished rooms elsewhere, in which he lodged. The trustee and referee have refused to set out a homestead as exempt in the tenement house, and this is a review of that proceeding. The opinion of the referee seems to well show that no part of the house was used or kept as a homestead by him, within the meaning of the statutes of the state on that subject, as construed by the supreme court of the state. Moreover, homesteads are given in this state only to housekeepers, or heads of families. The bankrupt does not appear to be either. He is a boarder, and does not keep house, and is not a housekeeper. He has no family using, or for which he is keeping, any of the premises, and is not the head of a family. Not but that a single man or woman, without relatives even, might be a housekeeper, or a head of a family, as to a homestead; but the ability to be such is not enough; the condition must exist. It did not as to the bankrupt. Decision affirmed.

In re BINGHAM.

(District Court, D. Vermont. May 30, 1899.)

BANKRUPTCY—SET-OFF OF CLAIMS—SUBROGATION.

Where, at the time of the filing of a petition in bankruptcy, the bankrupt and a person indebted to him were jointly liable on a promissory note to a bank, and the bank proved its claim on the note, and thereafter the bankrupt's debtor took up the note, *held*, that the latter could not set off against his indebtedness to the estate the moiety of the note which the bankrupt should have paid, but that, on paying his debt to the trustee, he should be subrogated to the rights of the bank as to that moiety, and entitled to receive such dividends as should be declared thereon.

In Bankruptcy.

Henry C. Ide, for trustee in bankruptcy.

Wendell P. Stafford, for James E. Hartshorn.

WHEELER, District Judge. At the time of the filing of the petition the bankrupt owed James E. Hartshorn \$110.50, Hartshorn owed the bankrupt \$554.70, and both were holden on a note of \$1,200 to a savings bank, one-half of which each ought to pay. The bank has proved its claim, and Hartshorn has taken up the note. One-half of what he paid was his own debt, and he can have no claim against the bankrupt estate growing out of that. He insists that the balance of direct claims between him and the bankrupt should be set off against what he has paid that the bankrupt ought to have paid, and that the balance should stand as a valid claim in his favor against the estate. The bankrupt was impliedly bound to save him harmless from this part of that debt, and has not done so; but the detriment has occurred since the filing of the petition, and, till that occurrence, Hartshorn had no provable claim on that account. By this bankrupt act all claims turn upon their status at the time of the filing of the petition, and decisions upon statutes having different provisions in this respect will not afford safe guides for the construc-

tion of this. It affords relief for a surety when the creditor does not prove the claim by allowing the surety to prove it for subrogation, but nothing more. The relief is the same that the surety would have if the creditor should prove the claim, and get what could be had upon it voluntarily. The creditor has no right to anything more than payment, and the surety who has borne the burden is entitled to the benefit. These rights arise, not from the original contract of suretyship, but from the equities of the subsequent transactions. *Miller v. Sawyer*, 30 Vt. 412. Subrogation of the surety to the rights of the creditor does not enlarge them. They extend only to such dividends as the creditor can have. Here, Hartshorn should pay the balance due between him and the bankrupt to the trustee, now, for administration; and the trustee should pay the dividends on the bankrupt's half of the note, when declared, to Hartshorn. One-half of bank claim to stand for benefit of Hartshorn. Hartshorn's claim merged in balance of \$444.20 due the estate.

In re JACKSON et al.

(District Court, D. Vermont. May 12, 1899.)

BANKRUPTCY—COLLECTION OF ASSETS.

Where a debtor of the bankrupt gave him a promissory note made payable to the order of a certain bank, but the same had not been indorsed by the bank, and no notice of any assignment of it had been given to the maker, and the trustee in bankruptcy could not find the note, *held*, that the bank should be restrained from indorsing the note, and that the debtor should not be permitted to set up the note against payment to the trustee of his indebtedness to the estate.

In Bankruptcy. On report of referee in bankruptcy.

George N. Dale, for trustee in bankruptcy.

Elisha May and J. W. Erwin, for certain creditors.

Porter Dale, for Dyer and Island Pond Nat. Bank.

WHEELER, District Judge. The report of the referee on the petition of the trustee shows that creditors, undertaking to reach assets of the estate held in some alleged fiduciary capacity by trustee process in the state courts, have stipulated to discontinue their suits. Questions as to such liabilities of bankrupts relate to the discharge, and not to the assets, or the right of the trustee to the assets, which this court seems to have jurisdiction to protect. The stipulations, if carried out, will avoid the necessity of any injunction to restrain these suits. The report shows that Dyer gave Jackson a note dated October 27, 1898, payable to the order of the Island Pond National Bank three months or ninety days from date, on partnership account, which the trustee cannot find, the bank has not indorsed, and no notice of any assignment of which given to Dyer appears, and that Dyer owes the bankrupt firm \$87, if the note is disregarded. It would not become negotiable paper as to others without indorsement by the bank, nor could it be effectively assigned as a chose in action without notice to Dyer, and could not

be in existence anywhere before the bankruptcy proceedings as a valid claim against Dyer but in the hands of Jackson, nor since but in his hands, where it would belong to the trustee, or in the hands of the trustee as an asset of the estate. Dyer might be embarrassed if the bank should indorse it; therefore such indorsement should be restrained, and Dyer should not then be permitted to set up the note so unaccounted for against payment to the trustee of what is justly due from him to the estate. These proceedings may remain pending for carrying out these suggestions. Ordered accordingly.

GOODIER v. BARNES et al.

(Circuit Court, N. D. New York. June 19, 1899.)

1. **BANKRUPTCY—JURISDICTION OF CIRCUIT COURT—CITIZENSHIP.**

Under Bankruptcy Act 1898, § 23, a circuit court of the United States has no jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent conveyance of property by the bankrupt, when the bankrupt, the trustee, and the defendant are all citizens of the same state.

2. **SAME.**

Clause c of section 23, providing that "the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act," has no applicability to civil actions; the "offenses enumerated" meaning the crimes described in section 29.

In Equity. Motion to dismiss the bill on the ground that this court has no jurisdiction of the action, which is brought by a trustee in bankruptcy to set aside an alleged fraudulent transfer by the bankrupt of his property. All the parties are citizens of this state and reside in this district.

Fred. G. Fincke, for the motion.

Fred. H. Hazard, opposed.

COXE, District Judge. No papers have been submitted on this motion except the briefs. The court understands that no objection is made to the form of the motion and that the sole question which counsel desire the court to determine is whether or not the circuit court has jurisdiction of the action. The court has been unable to find an authority sustaining the jurisdiction; none is cited. A persuasive argument, sustained by several recent decisions, can be advanced in favor of the jurisdiction of the district court in these cases, but this conclusion, if affirmed, will not aid the complainant. Although the authorities are not in accord as to the proper construction of the present act, they all, apparently, agree that section 23 prohibits the circuit court from entertaining jurisdiction of actions of this character. *Burnett v. Mercantile Co.*, 91 Fed. 365; *Mitchell v. McClure*, Id. 621; *In re Sievers*, Id. 366; *Carter v. Hobbs*, 92 Fed. 594; *In re Abraham*, 93 Fed. 767; *Hicks v. Knost*, 1 Nat. Bankr. News, 336, 94 Fed. 625.

The proposition that paragraph c of section 23 of the act is applicable to a civil action cannot be maintained. It is limited by express words to "the offenses enumerated in this act," namely, the crimes described in section 29. The motion is granted.

CAMP v. ZELLARS.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1899.)

No. 836.

BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.

The district court, as a court of bankruptcy, has no jurisdiction of a petition by a trustee in bankruptcy for the cancellation of a conveyance of land previously made by the bankrupt to his wife, and alleged to have been fraudulent as to creditors, and for the recovery of the land for the benefit of the estate, nor to enjoin the bankrupt's wife from prosecuting a suit against the trustee to recover personal property claimed by her.

Petition for Revision of Decision of the District Court of the United States for the Northern District of Georgia.

H. A. & B. T. Camp were duly declared bankrupts as a partnership and as individuals. T. M. Zellars was appointed trustee of the estates of said bankrupts. After the passage of the bankruptcy act, and within four months of the time in which the petition in involuntary bankruptcy was filed in this cause, H. A. Camp conveyed certain real estate to his wife, Mrs. C. B. Camp, and placed her in possession of the same. T. M. Zellars, as trustee, filed a petition in said United States district court against Mrs. C. B. Camp, seeking to have said conveyance canceled, and to recover said lands for the benefit of the estate. The petition of said trustee is in the nature of a suit to cancel the said conveyance as fraudulent. The petition also alleges that Mrs. C. B. Camp has brought certain suits against the trustee to recover personal property claimed by her. The petitioner seeks to have these suits enjoined. Mrs. Camp filed a demurrer to this petition, upon the ground that the district court had no jurisdiction to hear and determine the question, and because the controversies referred to in said petition must be determined by a separate action at law or in equity, they being no part of the bankruptcy proceedings proper. This demurrer was overruled by the district court. The matter is brought to this court by a petition filed by Mrs. C. B. Camp, alleging that the district court erred in overruling the demurrer, and praying that this court superintend and revise the action of the district court.

H. A. Hall, for petitioner.

Alex. W. Smith, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. We are of the opinion that the district court erred in overruling the demurrer. The judgment of the district court is reversed. The district court is directed to sustain the demurrer of Mrs. C. B. Camp to the said petition filed by T. M. Zellars, trustee. *Bernheimer v. Bryan* (present term) 93 Fed. 767.

In re GRIMES et al.

(District Court, W. D. North Carolina. May 30, 1899.)

1. **BANKRUPTCY—EXEMPTIONS—PARTNERSHIP ASSETS.**

In North Carolina, in case of the bankruptcy of a partnership, each partner is entitled to receive, out of the partnership assets, the exemption allowed by the law of the state, provided the other partner consents thereto.

2. **SAME.**

A partner having an equal interest with his co-partner in the firm property is entitled to claim his statutory exemption therefrom in case of the bankruptcy of the firm, although the amount contributed by him to the capital of the firm was less than the amount of such exemption.

3. **SAME—DOMICILE—BURDEN OF PROOF.**

Where a creditor opposes the claim of a bankrupt partner to exemptions out of the firm assets, on the ground that he was not domiciled within the state at the time the firm's petition in bankruptcy was filed, and it is shown that he was at one time domiciled in such state, the burden of proof is on the creditor to show a change of domicile.

In Bankruptcy. On review of ruling of referee.

Glenn & Manley, for bankrupt.

L. M. Swink, for creditors.

EWART, District Judge. I concur with the referee in the conclusion that the partners constituting the firm of Grimes Bros. are entitled to their exemptions out of the partnership assets. In *Burns v. Harris*, 67 N. C. 140, Mr. Justice Reade says:

"One of two or more partners cannot have a portion of the partnership effects set apart to him, as his personal property exemption, without the consent of the other partner or partners, because the property is not his. But, if the other partner or partners consent, it may be done. The creditors of the firm cannot object, because they no more have a lien on the partnership effects for their debts than creditors of an individual have upon his effects."

In the case before the referee, the consent of both partners in their claim for exemption out of the partnership assets was filed.

It was further insisted before the referee that T. W. Grimes had no such interest in the partnership property which amounted to as much as his exemption. From the evidence taken in the case it appears that he contributed \$200 to the capital stock of the company, and that he was to receive a salary of \$900, as against his partner's capital. This made him an equal partner, and the finding of the referee that he was entitled to the exemption claimed, viz. \$500, was correct, and is hereby approved. It could make no difference to creditors from what fund the exemption was given. *Scott v. Kenan*, 94 N. C. 296. In this connection I am not unmindful of the decision of Judge Newman of the Northern district of Georgia (*In re Camp*, 1 Nat. Bankr. News, 142, 91 Fed. 745), which apparently sustains the contention of counsel representing creditors of Grimes Bros. But, in the case referred to (*In re Camp*), the evidence failed to show that B. T. Camp, one of the partners, and the son of the other partner, H. A. Camp, had such an interest in the partnership assets as would authorize the allowance to him

of an exemption. But in this case T. W. Grimes appears to have been an equal partner with E. E. Grimes, and hence entitled to the exemptions claimed. *Allen v. Grissom*, 90 N. C. 90; *McMillen v. Williams*, 109 N. C. 256, 13 S. E. 764; *Richardson v. Redd*, 118 N. C. 678, 24 S. E. 420. The finding of the referee as to this exception is approved.

It was further insisted that E. E. Grimes was not entitled to the exemption claimed, as he was not a resident of this state when the petition in bankruptcy was filed by Grimes Bros. The burden of showing a change of domicile, when it becomes material to do so, "unquestionably lies on the party who asserts the change." 5 Am. & Eng. Enc. Law, 865. It is presumed that the residence of a person continues to be in the place where it is proved to have been until the contrary is shown. 17 Am. & Eng. Enc. Law, 76; *Fulton v. Roberts*, 113 N. C. 428, 18 S. E. 510; *Chitty v. Chitty*, 118 N. C. 648, 24 S. E. 517. The term "domicile," used in the bankruptcy act of 1898, is a broader term than the term "residence." From the evidence it appears that E. E. Grimes was born and raised in this state; that he at one time lived and voted in Winston, and paid taxes there; that he has never voted in any other state, and is now a traveling salesman for a Winston tobacco house. There is certainly no evidence that he ever acquired a residence outside of North Carolina. The finding of the referee as to this exception is approved.

SELLERS et al. v. BELL.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 818.

1. **BANKRUPTCY—DISCHARGE—KEEPING BOOKS OF ACCOUNT.**

The bankrupt's omission to keep books of account cannot be made a ground of opposition to his discharge, when it appears that, since a time more than three years prior to the passage of the bankruptcy act, he has not been engaged in any business to which the keeping of books would be necessary or appropriate.

2. **SAME—SCHEDULES—JUDGMENT—DEBT.**

Where a judgment previously recovered against the bankrupt still appears on the records of the court, which rendered it as an unsatisfied obligation against him in favor of the judgment creditor, it is rightly included in the bankrupt's schedule as a debt due to that creditor, although it has actually been sold to another creditor, and the bankrupt is chargeable with knowledge of the sale.

3. **SAME—MONEY BORROWED FOR ATTORNEY'S FEE.**

Where a proposed voluntary bankrupt, who has no property except such as is exempt, borrows \$50, wherewith to pay the fees and costs of his attorney, just before filing his petition, he is not required to list the amount so borrowed in his schedule of assets, and his omission to do so is no ground of opposition to his discharge.

4. **SAME—EXEMPT PROPERTY—WEARING APPAREL.**

Under Code Ala. § 2037, exempting from execution personal property to the amount of \$1,000, and, in addition thereto, "all necessary and proper wearing apparel," a watch may be included in the term "wearing apparel"; and consequently, where the schedule of a voluntary bankrupt disclosed no assets except as appeared in the item "personal wearing apparel, \$100,"

which he claimed as exempt, he is not guilty of making a false oath to such schedule, so as to bar his discharge, although it is shown that he owned a gold watch worth \$50, which he habitually wore, and which he intended to include in the item mentioned.

5. **SAME—CLAIM AGAINST BANKRUPT'S WIFE.**

Where a husband, being at the time in business and enjoying good credit, advanced to his wife a sum of money to enable her to complete a purchase of realty for her own benefit, but took no note for the amount, and made no entry or memorandum of the loan, and never asked for repayment, and, being subsequently adjudged bankrupt, testified that his wife owed him the money, but that he did not exact it of her, *held*, that his omission to include this claim in his schedule of property would not bar his right to a discharge in bankruptcy, especially as the money, if repaid, would be claimable by the bankrupt as part of his statutory exemption, except as against a single creditor holding a note with waiver of exemption.

6. **SAME—FILING FEES.—POVERTY AFFIDAVIT.**

A voluntary bankrupt, whose petition is accompanied by an affidavit that he is without and cannot obtain the money necessary to pay the filing fees, cannot subsequently be required to pay such fees out of any property set apart to him as exempt, or out of money earned by him after the filing of the petition.

7. **SAME.**

A proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit gifts or loans from his friends for that purpose; and he is not guilty of a false oath in making affidavit that he "cannot obtain" the requisite sum, although it appears that friends would have advanced him the amount if requested.

Appeal from the District Court of the United States for the Middle District of Alabama.

Willis V. Bell, the appellee, resides in Montgomery county, Ala. Having caused to be prepared a petition to the court of bankruptcy praying for the benefit of the bankrupt act, to be adjudged a voluntary bankrupt, and to have a discharge from all his debts provable under the act, on September 8th he made affidavit before a notary public to this petition and to Schedules A and B attached thereto, and to a statement in writing "that he is a poor man; that he is not possessed of sufficient means and is not actually able to pay the deposit of twenty-five (\$25) dollars for court costs in the above-entitled cause." On the same day these papers were submitted to the clerk of the court of bankruptcy by the appellee's attorneys, Reese & Sternfeld. The clerk declined to receive and file them, because the affidavit did not state that he could not obtain the money. On being advised of this (at his home), he went to Montgomery, and, with his consent, there was added, to the affidavit, that he had made of inability to pay costs, the words, "And that he cannot obtain the money with which to pay said fees." Thereupon, on September 12th, the clerk filed the papers, and the cause duly proceeded. Schedule A showed the names of 21 creditors whose claims were in judgment, aggregating in amount \$41,341.42, and 15 creditors who had not sued their claims to judgment, whose claims aggregated in amount \$4,435.31. Schedule B, omitting the signature and affidavit thereto, was as follows:

"Schedule B.

"Statement of all real and personal estate and effects whatever of Willis V. Bell, with his claim of exemptions of personal property and effects excepted from the operation of said act by the provisions of section — thereof: Real estate, none; personal wearing apparel, \$100,—which said personal property is claimed as exempt from levy and sale under execution or other process for the collection of debts, under section 2037 of Code of Alabama 1896, and which is excepted from the operation of the act of July 1, 1898, by the provisions of section — thereof."

On the same day that these papers were filed the petitioner was adjudged to be a voluntary bankrupt.

At the first meeting of creditors, held October 5th, the appellants appeared before the referee by counsel. Only the appellants had then or have ever proved their debts against this bankrupt, and hence they alone, of the numerous creditors, appeared at that meeting or at any subsequent stage of these proceedings in bankruptcy. On October 5th the appellee also appeared before the referee, and was cross-examined by counsel for the appellants. The referee's report of that examination is as follows: "At Montgomery, October 5, 1898. Willis V. Bell, the bankrupt, being duly sworn, deposes and says: I stay at Ada. My wife and children are living at Ada. I am 46 years old. I am superintending a farm for N. J. Bell and a commissary store for him. We have never had a definite understanding about salary. I was to have a living. That understanding has been in vogue since December, 1894. Contract verbal, and not in writing. We have had no settlement. N. J. Bell looks over his books about twice a year. This understanding includes a living for my family as well as myself. Nothing said about spending money. I get money, besides my living and clothes, to pay tuition for the children and the doctor's bill. I have a pass on the Midland Railroad, and don't pay fare. I go to see my father once a year, and pay my fare on the Louisville & Nashville Railroad. My wife has some money, and I get it from her every time I want it, if she has it. I cannot tell always where I get the money from. Sometimes I sell an old suit of clothes, and get four or five dollars. My wife has some money,—a steady income. It don't amount to much this year. The rents amount to about 24 bales for the year. She had some of the property when we married,—about \$400 or \$500. She got a place that she bought in 1891. I think she paid about \$1,400 for it. I believe that was all she had. She had got one place she bought since then for \$2,000, paying \$1,000 cash and \$1,000 on time, secured by a mortgage which is now held by my brother N. J. Bell. She has two or three little places. She has 80 acres of land she paid \$100 for, and another 80 she paid \$300 for. She owns the following named places: The Webster place, that she paid \$1,400 for; the place called the Woodson place, for which she paid \$100; then she has another tract called the Giddins place. I think she paid \$300 for that. She has the Moseley place, for which she paid \$2,000, as stated above. She derives all her income from these places, except some houses and lots in Ramer and 40 acres of land near Ramer. She had a storehouse there, but I moved it away. She has three dwelling houses and lots there. I reckon they are worth about \$300 apiece. The store lot is worth about \$50. Two of them are not rented now. Two of them, when last rented, rented for \$4. The other rented for \$5 a month. One was rented up to August last. The other rented a while last spring. We got \$50 a year for the 40 acres of land near Ramer up to this year. This year we got \$40. I married in 1890. My wife has one place—the Webster place—that she has been getting \$250 to \$350 a year for. She accumulated the money, and I kept it for her mostly. We usually kept it about the house, sometimes in the wardrobe. She bought the Webster place in the summer of 1891. We did not get the rent that year. I bought it from — Webster, who lives at La Pine. I paid \$1,400 for it,—\$500 cash and the balance in the fall. My wife had \$500 or \$600, and I let her have some in the fall of 1890 or 1891,—at the time the purchase was made,—and some when the final payment was made. To the best of my recollection I let her have as much as \$500 at the time the last payment was made. She had the lots at Ramer when we were married. My wife bought the \$2,000 plantation about two years ago, since I failed. We bought from a man named Laird, of Colburg. My wife had the money. She got it from rents of her places. She has never paid me back the money I loaned her. I never loaned her any other money. I took no note for the money I loaned her, and made no entry on any book, and made no other memorandum of it, and I do not keep any books between my wife and myself. I never asked her to pay it back to me. You might say that she owes it. She really owes it; but I do not exact it of her. The arrangement I have with N. J. Bell includes my living and living for my family, and amounts to between \$600 and \$800. My brother limits me to an expense account of not over \$800. I get a little money on that account, and charge it to myself. The largest amount I recollect getting under this arrangement from the store was \$75 or \$100,—not over \$100. I have been in the mercantile and farming business

a long time. I failed and went out of business in 1894. The arrangement went into effect in January, 1895, and has been in effect ever since. When I failed, N. J. Bell took all the property on hand at that time, and none of my other creditors got anything. I put down in my schedule personal wearing apparel at \$100, comprising all my estate. I have a gold watch worth \$50, and had it at the time I made out the schedule. I had no other property. The most of my accounts on hand when I failed were secured by mortgage, and have been transferred to N. J. Bell. I know there are some accounts on my old books due and uncollected. They are all out of date and barred by statute of limitations. Q. You have stated these accounts are barred by statutes of limitations; do you know how long it takes for the statute of limitations to bar an account? A. I think it takes three years to bar an account stated. Q. How long does it take to bar an open account? A. About two years I think. I have kept no books since I suspended business in the fall of 1894. I had a diamond stud which could be worn as a ring. I gave it to my wife when we were married. I gave \$150 for it. I made the affidavit of inability to pay court fees [shown here, the same being the one now on file]. I think the affidavit was as it now is when I swore to it. There was some change made in the affidavit as originally prepared; but the changes were made with my knowledge, approval, and assent, and the affidavit, as it now stands, was sworn to by me. The only man I talked to about getting the money to pay for this bankruptcy proceeding was my brother, N. J. Bell, and he asked me, "What's it going to cost?" I told him I did not know, but would see a lawyer and find out. He told me, if it cost over \$50 or \$75, he advised me not to have anything to do with it. After I filed the pauper's oath, Mr. Bernard Frank came to me and said it was too bad; that he and several of my friends would have let me have money, if I had come to them. I did not say anything to N. J. Bell about letting me have this \$25 deposit fee after I had decided to go into bankruptcy. I did not ask my wife to let me have the \$25 to make this deposit fee. I never asked anybody to let me have it. I borrowed from Freeman Rushton fifty dollars just before I made the affidavit of inability to pay court costs, and had \$35 of it at the time I first made the oath. Between that time and the time the oath was changed I paid my attorneys \$25, and I think I paid to my attorneys the other \$10 for advertising or costs, or something of that kind. The balance of the fifty dollars, to wit, fifteen dollars, I might have bought goods for myself and family with. Still have two or three dollars at this time. [Signed] W. V. Bell."

On February 7, 1899, the bankrupt presented his petition for discharge, which is as follows: "W. V. Bell, of Ada, in the county of Montgomery and state of Alabama, in said district, respectfully represents that on the 12th day of September last past he was duly adjudged bankrupt under the acts of congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and orders of the court touching his bankruptcy. Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge."

On February 15th the judge of the court of bankruptcy made the following order: "For good and sufficient reasons shown, it is ordered that the affidavit of inability to pay filing fees of the petitioner filed herein, with the petition herein, be stricken from the file in this case, and that the petitioner be, and he is hereby, permitted to withdraw said affidavit."

On the 18th the appellants Sellers & Orum filed the following: "Sellers & Orum, of Montgomery, in the county of Montgomery and state of Alabama, parties interested in the estate of said W. V. Bell, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications: (1) That said W. V. Bell did knowingly, willfully, and fraudulently not attach a full, true, and correct schedule of all his property to his petition to be adjudged a bankrupt. (2) That the schedule of his property which W. V. Bell attached to his petition to be adjudged a bankrupt is willfully and knowingly false and untrue, in that it does not contain a debt of about \$600 which was due from the said Bell's wife to him. (3) That said schedule of his property attached by said Bell to his peti-

tion is willfully and knowingly false and untrue, in that the said Bell does not include in said schedule a gold watch worth about \$50, which his testimony shows he owned at the time said petition was filed. (4) That said schedule of his property attached by said Bell to his petition is willfully and knowingly false and untrue, in that said Bell had at the time of filing said petition a sum of money, to wit, \$50 or other sum, as shown by his testimony on his examination, which said Bell has never turned over to the trustee in this proceeding. (5) That said W. V. Bell willfully and knowingly swore falsely when he made the pauper's oath to the petition, swearing that he did not have, and could not obtain, money to deposit as costs and fees. (6) That the said W. V. Bell willfully and knowingly swore falsely when he made the pauper's oath to the petition, swearing that he did not have, and could not obtain, money to deposit as costs and fees, in that he had \$50 or other large sum when he made said affidavit. (7) Because said Bell willfully and fraudulently has not turned over any property to the trustee in this proceeding. (8) That the said Bell willfully and knowingly negligently failed to keep, for several years prior to filing said petition, any books of account or other books showing his assets and liabilities, so that the same might be ascertained in this bankruptcy proceeding. (9) That the laws of Alabama do not allow the said W. V. Bell any exemptions of personal property against the debt of this creditor, and that the said Bell has willfully and knowingly failed to turn over to the trustee the property set out in the schedule attached to his petition in this cause or the other property he owned, as shown by his own testimony in this case. (10) These creditors are informed and believe, and upon such information and belief state, that the list of creditors filed by said Bell is willfully and knowingly incorrect and false in this: that D. M. Snow & Co. appears as a creditor for the sum of eleven hundred one and $\frac{96}{100}$ dollars, when, at the time said petition was filed, said D. M. Snow & Co. was not a creditor of said Bell. (11) These creditors are informed and believe, and upon such information and belief state, that the said Bell paid D. M. Snow & Co. in full, or compromised their claim and settled it in full, before he filed his petition in this cause, and that D. M. Snow & Co. were not creditors, and the list of creditors returned by said Bell with his petition is willfully and knowingly untrue and incorrect."

After the filing of the foregoing, Sellers & Orum added to the specification of the grounds of their objection to the discharge that "the said Bell, before he filed his petition in bankruptcy in this court, and in contemplation of the filing of said petition, offered to petitioners (creditors), and stated to them, that he intended to file his petition in bankruptcy, but that he intended to pay them what he had paid other creditors, notwithstanding he got discharged from their debts." At the same time and by the same counsel the appellants W. B. Jones and Ray filed identically the same objections, except specification 9, not applicable to their case, as their judgment was not on a waive obligation.

At the instance of the appellants, a second examination of the bankrupt and an examination of other witnesses was had by and before the referee on the 1st and 2d days of March. From the report of that examination we make these excerpts: "Q. (by the appellants' counsel). I believe that you testified on your former examination that you had \$50 in your pocket. A. No, sir; I do not think I did. Q. Well, how much did you have on your person? A. I do not know how much I had at the time when the change was made in the paper. I did not have \$50. I might have had two or three dollars. I do not remember. Q. Did you have \$25? A. I did not have \$25. Q. When you first submitted the affidavit to the clerk, did you have any money in your pocket? A. I think I just had a little change. Q. When you submitted the affidavit to the clerk the second time, did you have any money in your pocket? A. I do not think I had." From the testimony of John A. Sellers: "Mr. Bell never offered me at any time anything not to oppose his discharge." From the testimony of W. B. Jones: "I have had no conversation with W. V. Bell since he went into bankruptcy. He never made me any offer, or offered me any inducement not to oppose his discharge." From the testimony of the clerk, questioned by the attorney for the appellee: "Q. Did any one pay the fees, what is known as the primary or original cost fees, for filing the petition in bankruptcy in the matter of W. V. Bell? A. I think, Mr. Wilkinson, you paid the fees yourself. Q. How was it done, by check or in money? A. My recol-

lection is that it was done by giving your check. Q. Was Mr. Reese or Mr. Sternfeld present when that was done? A. No, sir. Q. Did they have anything to do with it, or have any knowledge of it? A. I do not know anything about their knowledge. They certainly were not present. Q. Was W. V. Bell present? A. No, sir; he was not. Q. Was it done with his knowledge, so far as you know? A. I cannot say. I suppose it was done by you as his attorney. I suppose you were acting for him. He was not present. Q. You know nothing, then, except the mere fact that one Charles Wilkinson paid the fees of \$25? A. Yes, sir; that is all I know about it. Q. Was there what is known as the 'inability oath' made in this case? A. There was. Q. Do you know, as a matter of information connected with your office, that the judge of this district, as well as judges in other districts, have stated judicially that they would refuse to allow a discharge in bankruptcy to a man who has taken that oath? A. I do not understand clearly about this proposition. I have not looked into the question very closely. Once I heard some discussion about the question in a vague, hazy way. We have discharged one man who made that oath without paying his fees."

On March 25th the court of bankruptcy rendered the following judgment: "Whereas, Willis V. Bell has been duly adjudged bankrupt under the act of congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said Willis V. Bell be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 12th day of September, 1898, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

The creditors appealed, and present the following assignment of errors: "(1) That the court erred in rendering a judgment granting a discharge to said Willis V. Bell from all debts and claims which were provable against his estate, and which existed on the 12th day of September, 1898, excepting such debts as are by the act of bankruptcy excepted from the operation of a discharge in bankruptcy. (2) That the court erred in not sustaining the objections filed to the discharge of the said Willis V. Bell, as shown by the record. (3) That the court erred in refusing to grant said Willis V. Bell a discharge in bankruptcy from his debts provable under the act of congress approved July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' (4) That the court erred as shown by the record."

John D. Roquemore and Robert L. Harmon, for appellant.
Charles Wilkinson, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is to be observed that the petition in this case was presented before the general orders and forms in bankruptcy were prescribed by the supreme court. The general orders were adopted and established November 28, 1898, to take effect January 2, 1899. The forms in bankruptcy were not promulgated until December —, 1898. The attorneys who prepared the petition and schedules and their verification in this case had to use such forms as seemed to them to fit the provisions of the statute and the conditions of the estate. It is made the duty of referees to examine all schedules of property and lists of creditors filed by bankrupts, and to cause such as are incomplete or defective to be amended. Bankruptcy Act, § 39 (2). In this case the honorable referee has not on his own motion caused to be amended the schedules attached to the appellee's petition. The appellants, who were the only creditors that have appeared before the referee to

prove up their claims, have taken no action nor made any direct motion before the referee to have these schedules amended. On the day fixed by the referee for the first meeting of creditors, the appellee promptly appeared and submitted himself "to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate," so far as the referee or the counsel for the creditors who were present deemed necessary then to make inquiry. Five months thereafter, at the instance of the same creditors, he again appeared before the referee and submitted to such further examination as the counsel for the creditors chose to make. In the report made by the referee of the appellee's depositions on these two several occasions, there is nothing tending to show that he refused to answer or hesitated in answering any question propounded to him by the referee or by the counsel for the creditors. There is nothing in his testimony or in that of the other witnesses who deposed on the second occasion to show or indicate in the slightest degree that he did not answer fully and truly every question that was propounded to him. It is the duty of the judge of the court of bankruptcy to hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, and investigate the merits of the application and discharge the applicant, "unless he has (1) committed an offense punishable by imprisonment as herein prescribed; or (2) with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." Section 14b. The second of these statutory grounds for refusing to grant the discharge is not applicable to this case, because all the proof shows that the appellee has not, since the passage of the act of bankruptcy, nor within more than three years before the passage of the act, been engaged in business on his own account that required or made it appropriate for him "to keep books of account or records from which his true condition might be ascertained." As provided in the act of bankruptcy, the offenses punishable by imprisonment which the bankrupt may commit are:

"Having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of the bankrupt or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney." Section 29b.

The appellee in this case has not presented under oath or otherwise any claim, true or false, for proof against his estate. Hence this third subdivision under which a bankrupt may commit an offense, because he is allowed to bring certain claims against the bankrupt estate, cannot be applied here.

The first, third, and fourth errors assigned are too general to require or permit any special consideration of them. We therefore confine our attention to the second, which is:

"That the court erred in not sustaining the objections filed to the discharge of said Willis V. Bell, as shown by the record."

The character of these objections is such that it is more convenient to take them up without regard to the order in which they stand as they were presented. The last (which was filed subsequently to the others, and on what date it does not appear) we think is fully disposed of by a sentence or two in the testimony given before the referee by the appellants Sellers and Jones. Sellars says:

"Mr. Bell never offered me at any time anything not to oppose his discharge." Jones says: "I have had no conversation with W. V. Bell since he went into bankruptcy. He never made me any offer or offered any inducement not to oppose his discharge in bankruptcy."

The eleventh objection is not only not proved, but is clearly disproved by all the testimony in the case. It is to the effect that Bell had paid D. M. Snow & Co. in full, or compromised that claim and settled it in full before he filed his petition in this case. This is not only not sustained by the evidence, but is clearly disproved. The remaining part of this objection, as stated, is embraced in objection 10, which is to the effect that the firm of D. M. Snow & Co., which firm appears in Schedule A as a creditor, was not a creditor at the time the petition to be declared a bankrupt was filed. The proof on this subject abundantly shows, and the fact is not disputed by the appellants, that at the time of the failure of the appellee in business the firm of D. M. Snow & Co. was a creditor of his, and sued its debt against him to judgment, and it now appears (like the 20 others shown in the schedule) in the record books of the court rendering the judgment. The proof indicates that the part of Schedule A which gives the list of the judgment creditors was prepared from data obtained in the court house. It appears that the books and records of the courts were, and for some years had been, those from which this bankrupt's true condition might best be ascertained. It does appear from the testimony that, at some time subsequent to the rendition of this judgment, another one of the creditors of the bankrupt (his chief creditor) had purchased (not on the bankrupt's account) this judgment of D. M. Snow & Co. It further appears that the bankrupt had such information with regard to this purchase as gave him every reason to believe—in popular language, to know—that the purchase had been made. He had legal personal knowledge of the fact that that firm had extended credit to him, that he had not paid them, and that they had recovered judgment against him. His Schedule A showed that the residence of this firm was Montgomery, Ala.,—the place where the appellant firm resides and does business. The referee rightly refrained from causing to be made any amendment of the schedules to meet the suggestions of the proof on which this objection is based, and the judge of the court of bankruptcy did not err in refusing to sustain it.

The ninth objection had better be considered in connection with the first seven.

The eighth has been sufficiently noticed in what was said earlier in this opinion, showing that the second statutory ground for refusing a discharge in bankruptcy has no application to this case.

The other objections, redacted and put in different order and in working form, are: (1) That the bankrupt did not include in the schedule of his property the sum of \$50 which he borrowed from Freeman Rushton; (2) that the schedule did not make particular mention of a gold watch which he owned at the time his petition was filed; (3) that he did not include in the schedule of his property a debt of about \$600 which his wife owed him; (4) that when he made the affidavit stating that he "is without, and cannot obtain, the money with which to pay" the filing fees he made a false oath in relation to this proceeding in bankruptcy.

We appreciate the gracious forbearance which constrained the appellants to resist the temptation to accompany the first of the objections just above noted with the equally patent, and not less valid, one, "that the list of creditors filed by said Bell is willfully and knowingly incorrect and false in this: that it does not include the name of Freeman Rushton, of Montgomery, Alabama, from whom the said Bell borrowed \$50, just before presenting his petition, to be adjudged a voluntary bankrupt." It taxes judicial gravity to consider seriously this objection. The bankrupt law provides that the court shall order the trustee to pay all taxes, national, state, and municipal. These charges occupy a position above classification. It is provided:

"The debts to have priority except as herein provided, and to be paid in full out of bankrupt's estate, and the order of payment shall be (1) actual and necessary cost of preserving the estate subsequent to the filing of the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including * * * one reasonable attorney's fee, for the professional services actually rendered * * * to the bankrupt in voluntary cases, as the court may allow."

It is to be observed that in ordinary cases, whether in involuntary or in voluntary bankruptcy, the actual and necessary cost of preserving the estate subsequent to the filing of the petition and up to the qualification of the trustee will usually, and always should where he is exercising good faith, devolve upon the bankrupt himself, not at his charge and expense, but as a charge of the first rank against the estate which he is required or has volunteered to surrender. The charge of the second rank is the filing fees paid by creditors in involuntary cases. The reason for restricting this to fees paid by creditors in involuntary cases is obvious, because where such fees are paid in voluntary cases they may be paid by the bankrupt himself out of the estate which he has to surrender, and therefore no account need be taken of them. The charge next in rank and to be paid in full out of the bankrupt estate is the cost of administration, including a reasonable attorney's fee, such as the court may allow for services actually rendered to the bankrupt in voluntary cases. This clearly shows that, where there is no surrenderable estate in the bankrupt's hands out of which he could pay either in money or in property a reasonable attorney's fee, and therefore has to obtain credit therefor either from the attorney or from some other person, the reasonable value of the services actually rendered becomes a charge in favor of the bankrupt or of the attorney on all of the bankrupt estate equally with the other costs of administration. This view is in harmony with, and strongly supported by, the provision that a debtor may, in

contemplation of the filing of a petition to be adjudged a bankrupt, pay money or transfer property to an attorney to a reasonable amount, to be judged of by the court, for services to be rendered in the bankruptcy proceedings. In case the payment so made shall in the judgment of the court exceed a reasonable fee, the excess may be recovered by the trustee for the benefit of the estate. Section 60d. In the case we are considering the schedules and the testimony show that there is no estate in bankruptcy, unless the property which the law of the defendant's domicile exempts from levy and sale under judicial process from the payment of debts constitutes a part of the estate in bankruptcy. All of the evidence conduces to show and constrains us to conclude that, since the fall of 1894, the appellee has had no property which is not exempt from levy and sale under judicial process for the payment of debts by the terms of the constitution and statutes fixing such exemptions in the state of Alabama. What effect the waiver evidenced by the judgment in the case of *Sellers & Orum* may have will be discussed further on in this opinion. If the \$50 borrowed from Rushton at the time of preparing the petition and exhibits presented to the court to be declared a voluntary bankrupt became a part of the estate in bankruptcy as soon as it passed from Rushton's hand into the hand of the bankrupt on its way to the attorneys, the payment of it to the attorneys for their fee and to meet the cost of giving notice to the creditors, if the fee and cost charges were reasonable, was a valid disposition of that much of the estate. It is objected that the schedule did not make particular mention of a gold watch worth \$50, which the bankrupt owned at the time his petition was filed. In his examination before the referee on October 5th the appellee said that in the item "personal wearing apparel" in Schedule B he included the watch which he habitually wore; that, exclusive of the watch, his personal wearing apparel did not exceed in value \$25. He claims his personal wearing apparel, including the watch, as exempt property, under section 2037 of the Alabama Code, which provides that the personal property of a resident of that state to the amount of \$1,000 in value, to be selected by him, and, in addition thereto, all necessary and proper wearing apparel for himself and family, and all family portraits or pictures, and all books used in the family, shall also be exempt from levy and sale under execution or other process for the collection of debts contracted after the 23d day of April, 1873. The Code of Alabama provides:

"The words 'personal property' include money, goods, chattels, things in action and evidences of debt, deeds, and conveyances." Chapter 1, § 2.

It has been repeatedly and uniformly decided by the supreme court of Alabama that the exemption laws are founded in a spirit of humanity and benevolence, and are to be liberally construed, and that such a rule of construction requires them to attach to the phrase "personal property," as used in those laws, a signification so comprehensive as to embrace everything which is the subject of ownership, not being realty or an interest in realty. *Enzor v. Hurt*, 76 Ala. 595. In a general sense and within comprehensive signification attached to the phrase "personal property," as used in the Alabama exemption laws by the supreme court in the case just cited, that phrase includes

wearing apparel. It is clear, however, that section 2037 draws some distinction between personal property and the necessary wearing apparel, family portraits, or pictures and books used in the family. We have not found in the statutes of Alabama or in the decisions of the supreme court of that state a definition of the phrase "wearing apparel," as it is used in this section. The only limitation which the section puts upon the meaning of the words is that the apparel shall be necessary and proper for the wearer or his family. This includes what is merely proper, as well as what is necessary. And, subject to this qualification alone, there is no limitation put on the quantity, quality, or value of the property which the words used describe. The nature of the case, the reasonable average conditions of life, will sufficiently restrict the amount in quantity and value of articles kept by insolvent debtors to be worn on their persons. The homestead exemption is limited in Alabama both in value and in area. Personal property, as distinguished from wearing apparel, family portraits, or pictures and books used in the family, is exempt to the value of \$1,000. This is not restricted to designated articles. The right to select the property protected from seizure and sale for debt at any time before or after the levy of process and before actual sale is secured by the constitution beyond the power of the legislature to abridge it. It is fully recognized by the Code:

"Any person by an instrument in writing may waive his right to an exemption in any property exempt from levy and sale under execution or other process." Section 2104.

As to personal property, the waiver may be made by a separate instrument in writing, subscribed by the party making the same, or it may be included in any bond, bill of exchange, promissory note, or other written contract executed by him. Section 2105. That "a waiver of exemptions as to personal property" written in a promissory note will subject wearing apparel to levy and sale under execution is by no means clear. As was said in *Enzor v. Hurt*, *supra*, the exemption laws are founded in a spirit of humanity and benevolence, and should be, and uniformly have been, liberally construed. We have not found it said or suggested in the opinions of the supreme court of Alabama that the provision for waiving exemption as to personal property made by section 2105 should receive like liberal construction. It would seem to be the better view that, as the waiver operates as an exception to the general rule, as such exception it should be construed strictly,—not so strictly as to destroy or diminish the force of the exception, but so as not to extend "a waiver of exemption as to personal property" to wearing apparel. The question whether a watch of reasonable value, habitually worn by a debtor, is a part of his wearing apparel, within the meaning of those terms as used in exemption statutes, has been considered by the courts of several of the states, and answered affirmatively or negatively by them, according to the general scope of their respective exemption laws and the particular circumstances of the case in which the claim to the exemption was made. 29 Am. & Eng. Enc. Law, pp. 39, 40, notes. The phrase "wearing apparel," as used in exemption laws, has its popular sense, and includes all the articles of dress generally worn by per-

sons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance and to protection against exposure to the changes of weather, and also what is reasonably proper and customary in the way of ornament. A plain gold watch worth not more than \$50 is not usually worn habitually by farmers and country merchants as an ornament; but in this day, when everything moves on schedule time, a watch is an eminently useful, if not an absolutely necessary, article of dress. We conclude that where, as in Alabama, the exemption laws embrace the homestead of every citizen, and such personal property as he may have to the extent in value of \$1,000, "and, in addition thereto, all necessary and proper wearing apparel for himself and family," a fair construction of this last provision will include within the meaning thereof the watch worn by the appellee. Under different statutes in other states than Alabama, the decisions are conflicting.

It is further objected that the appellee did not include in the schedule of his property a debt of about \$600 which his wife owed him. For "a long time" the appellee was engaged in the mercantile and the planting business, carried on in connection with each other, in the country, in the manner that such associated business is conducted in the cotton-growing states. He had sons who sometimes wore the gold watch which he usually wore. In 1890 he married the wife referred to in this objection. At the time of their marriage she owned several lots in the town of Ramer, in Montgomery county, and a small farm near that town, from which property she has been getting an annual rent of about \$200. She seems to have had also \$400 or \$500 in money. The year after their marriage she bought a farm from Webster for the price of \$1,400, of which she paid \$500 in cash, and the balance in the fall of that year. The rent of this farm for that year was not included in her purchase. For the subsequent years this place brought her an annual income of from \$250 to \$350. Some time in the summer or early fall she got a small amount of money from her husband to pay on this purchase, and, at the time of making the last payment, in the fall of 1891, he let her have about \$500. The number and character of his creditors and the amount in face value of credits extended to him show that he had enjoyed good standing as a business man for some time previous to his failure, in the fall of 1894. It is matter of common knowledge that in 1891 cotton, the chief staple farm product grown in the state of Alabama, brought in the market a good price. It was at this time that the appellee let his wife have the money. From all that the record shows we must conclude that, if at that time he had given her this money outright, the appellants could not then have complained or now complain. After this transaction with his wife the appellee gave one of these appellants a note containing "a waiver of exemptions as to personal property." This waiver created no lien on any property. *Craft v. Stoutz*, 95 Ala. 245, 10 South. 647. The note was not put in judgment until March 3, 1898. On October 5th (if never before) the appellants obtained full knowledge of these transactions had between the appellee and his wife in 1891. The appellee took

no note for the money and made no entry on any book, and made no other memorandum of it. He says that he did not and does not keep any books between himself and his wife; that he never asked her to pay it back to him; that one might say she owes it; that she really owes it, but that he does not exact it of her. If, in fact, this transaction created the relation of debtor and creditor between the appellee and his wife, and the debt is still subsisting, though not renewed by any subsequent promise, and payment of it has never been demanded, and is not now exacted, and by the force of the waiver it is, under the laws of Alabama, subject to seizure by garnishment or other process to satisfy the appellants' judgment, there is nothing in the pending proceedings in bankruptcy to obstruct the use of such process from the state court. Giving the waiver the full effect claimed for it by the appellants, it would vest the right to this chose in action in the trustee, not as a part of the estate in bankruptcy for the benefit of creditors generally, but for the benefit of this one creditor to the exclusion of a great number of creditors whose debts aggregate nearly 100 times as much as his. Conceding that this alleged debt exists, it is a part of the personal property of the bankrupt, which has not been reduced to his possession, and he has no material part of it or evidence of it, or other thing in connection with it, which he can voluntarily surrender or be made to surrender by a summary rule against him. If the right to it has vested in the trustee, unless the wife voluntarily pays it or consents to submit herself to the jurisdiction of the court of bankruptcy, it can be recovered by the trustee, if at all, only by legal proceedings in the state court substantially identical with the proceeding which the appellants could have used had no adjudication in bankruptcy been had, and which, in our opinion, they still have the same right to use that they would have, if the bankruptcy proceedings were not pending. "All property of the wife held by her previous to the marriage, or to which she may become entitled after the marriage in any manner, is the separate property of the wife and is not subject to the liabilities of the husband." Section 2520. "The earnings of the wife are her separate property." Section 2521. "The wife has full legal capacity to contract as if she were sole, except as otherwise provided by law." Section 2526. "The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband." Code Ala. c. 60, § 2329. There was no proof offered tending to show that the wife had or claimed any other property than that disclosed by the bankrupt in his testimony before the referee, or that the property she owned had been acquired in any other manner than that shown by him. All of the items embraced in the foregoing objections amount in value to only \$700. Personal property, as distinguished from wearing apparel, family paintings or pictures, and books used in the family, and in addition thereto, is exempt under the law of Alabama, as we have seen, to an extent beyond the amount of these three items. The act of bankruptcy does not affect the allowance to bankrupts of the exemptions which are prescribed by the

state law. Bankruptcy Act, § 6. The courts of bankruptcy have jurisdiction to determine all claims of bankrupts to their exemptions. Section 2 (11). It is the duty of trustees to set apart the bankrupt's exemptions, and to report the items and estimated value thereof to the court as soon as practicable after their appointment. Section 47 (11). Exempt property is excepted from that the bankrupt's title to which is vested by operation of law in the trustee. Section 70a. On this subject Collier, in his work on Bankruptcy, says:

"A court of bankruptcy has no jurisdiction over exempt property other than to hear and determine the claims of the bankrupt, if disputed. It may restrain its own officials from interfering with it; but that is a jurisdiction over them, not over the property. It will not give any aid to the bankrupt in enforcing his rights as to the exempt property beyond preventing the trustee from interfering with it. To the state courts is left the decision of all questions that may arise between parties as to such property. The bankruptcy court cannot properly entertain a proceeding to enforce a lien upon such property." Coll. Bankr. pp. 74, 75.

There is lurking through all the record made in this case by the appellants from their first appearance before the referee an implied suggestion that much of the property now nominally owned and held by the appellee's wife and by the appellee's brother, N. J. Bell, is in fact the property of the appellee. It is now more than four years since the appellee's failure in business and the transfer of his assets real and personal to his brother, N. J. Bell. The bankrupt law does not open any door for inquiry into such transactions as occurred before the passage of the act, or into such transactions occurring after the passage of the act, but more than four months before the beginning of proceedings in bankruptcy. Moreover, it appears that these parties and the appellants reside in the same county; that the wife and the brother have real estate more than sufficient to satisfy the claims of the appellants; and, if the wife and the brother have been and continue to be parties to the fraudulent concealment of the appellee's property, there exists in the state of Alabama a court of chancery clothed with power to search the conscience of each of these parties and strip the veil from their simulated dealings, and make discovery of the property of the appellee, if he has any in the hands of these near kindred. Code Ala. §§ 819, 822.

The only objection remaining to be considered is that the appellee willfully and knowingly swore falsely when he stated in the affidavit which accompanied his petition that he was without, and could not obtain, the money with which to pay the fees of the clerk, referee, and trustee. Another statute of the United States provides that any citizen entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion the same without being required to prepay fees or give security therefor before or after bringing the suit or action, upon filing in the court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of the suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action; setting forth briefly the nature of his alleged cause of action. 27 Stat. 252. The bankruptcy act provides that any person who owes debts, except a

corporation, shall be entitled to the benefits of this act as a voluntary bankrupt. Section 4. In each of the sections referring to the fees of the referee, trustee, and clerk, required to be paid in bankruptcy proceedings at the time of the filing of the petition, there is a reservation made by the insertion of these words: "Except when a fee is not required from a voluntary bankrupt." Sections 40, 48, 52. It is made the duty of the clerk to collect the fee of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees. Section 51. The general orders in bankruptcy, which have the force of statutes, provide:

"In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has, or can obtain, the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed." Gen. Order 35, par. 4 (32 C. C. A. xxxiv., 89 Fed. xiv.).

"Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the costs of administering the same." Gen. Order 10 (32 C. C. A. xiii., 89 Fed. vi.).

The evident intent and spirit of the general law which secures all citizens entitled to bring any suit or action in the courts of the United States, the right to commence and prosecute the same, though they have not the means to pay or secure the costs, and the careful mention, four times repeated in the bankruptcy act, that the prepayment of fees is not required from a debtor who is without, and cannot obtain, the money with which to pay the same before filing his petition to be adjudicated a voluntary bankrupt, show that this class of litigants is not viewed with disfavor by the laws of this country. The last paragraph but one of the present law shows that petitions for voluntary bankruptcy are not disfavored. On the contrary, they might be filed after the expiration of one month from the passage of the act, while no petition for involuntary bankruptcy was permitted to be filed within four months of the passage thereof. In cases of voluntary bankruptcy, a schedule showing all of the property of the petitioner must accompany the petition. Upon the filing thereof, the right of the petitioner to sell or charge any part of the property embraced therein, and not excepted from that the title to which will be vested as of the date of the adjudication of bankruptcy in the trustee when appointed and qualified, immediately ceases. Although the courts may appoint receivers, or the marshal upon application of parties in interest, when absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or

the trustee is qualified, it is the duty of the bankrupt himself in involuntary cases, and much more in voluntary cases, to keep careful charge of and preserve all the property which, upon his being adjudged a bankrupt, will vest, by operation of law, in the trustee as soon as one shall be appointed and qualified. The actual and necessary cost, if any, of preserving this property subsequent to the filing of the petition, by whomsoever it is expended, is to be paid in full out of the estate first after the payment of taxes. There is no indication in the act that the petitioner in voluntary cases may not after filing his petition, and before obtaining his discharge, earn, according to his ability, a living for himself and family, or that he may not use all of his earnings as he may himself elect for that purpose, or that he shall in any manner account to the court for the same. Neither is there any indication in the law that any of the expenses of the bankruptcy proceedings are to be a charge on the property which, by the law of the bankrupt's domicile, is exempt from forced sale for the collection of debts, and on that account excepted from the bankruptcy estate by section 6 of the act. The whole purview of the act is opposed to the thought that the fees of the clerk, referee, and trustee are made, or in any event are to become, a charge upon the personal earnings of the bankrupt accruing after he is adjudged to be a bankrupt, or a charge on the exempt property, which is not in any case to be affected by the bankruptcy act. Its whole character is infinitely removed from that of our former laws, which used physical duress by incarceration as a means by which the debtor, or his friends through sympathy for him, were coerced into paying the debt, and he was punished for owing it. Though this evil spirit has been fully exorcised from the whole body of our national law and from the laws of Alabama, the idea or sentiment out of which it sprang and in accordance with which it was administered still lingers in the minds of some of our citizens. All such processes for collecting debts are forbidden by the constitution of Alabama. *Ex parte Hardy*, 68 Ala. 303.

The record in this case shows that the clerk of the court of bankruptcy where this proceeding is pending was examined before the referee, and was asked by the counsel for the appellee:

"Q. Was there what is known as the 'inability oath' made in this case? A. There was. Q. Do you know, as a matter of information connected with your office, that the judge of this district, as well as judges in other districts, have stated judicially that they would refuse to allow a discharge in bankruptcy to a man who has taken that oath? A. I do not understand clearly about this proposition. I have not looked into the question very closely. Once I heard some discussion about the question in a vague, hazy way. We have discharged one man who has made that oath without paying his fees."

We find in a text-book, from which we have received much assistance in our effort to construe the provisions of the bankruptcy act, this paragraph:

"In various districts, we are informed, rules have been promulgated which tend to expedite the cases in which the fees have been paid in preference to those which are prosecuted in forma pauperis. We believe it may be safely asserted that a bankrupt, by paying the small fees im-

posed by the law, not only will be paying a debt morally as well as legally due,—the payment of which any person, however insolvent he may be, can accomplish by borrowing from his friends,—but he will undoubtedly find that, by paying such fees, he will be advancing his own interests." Coll. Bankr. p. 570.

If these ideas are to find permanent lodgment in the minds of the judges of the courts of bankruptcy and become active, the carefully expressed provisions of the bankruptcy act granting the right to insolvent debtors to present their petition for relief in some cases in forma pauperis will not only be denied, but this humane and benevolent bounty from the government will be tortured into a most malignant snare. It is manifest that paragraph 4 of general order 35 relates only to cases in voluntary bankruptcy, and the language shows that there may be such cases in which the petitioning debtor is not required to pay the fees of the clerk, referee, and trustee before or at the time of filing his petition, although he presents a schedule of property in excess of the exemptions allowed by the law of the state of his domicile and surrenders an estate in bankruptcy. Otherwise, it would be futile to provide that "the judge at any time during the pendency of the proceedings in bankruptcy may order those fees to be paid out of the estate." The terms of the affidavit, as prescribed by section 52, are "that he is without, and cannot obtain, the money with which to pay such fees." This affidavit may well be made in cases in which there is an estate to be surrendered, consisting not in money or in property that has a market value or can be converted into money by the petitioning debtor without substantial sacrifice of its value, and from which, therefore, he could not obtain the money in the exercise of perfect good faith towards the court and his creditors. Upon the presentation of his petition and schedules, accompanied by the affidavit in the terms of the statute, the clerk has no option as to filing the petition and taking the action thereon prescribed by the law. The judge of the court of bankruptcy, on the motion of parties interested, or on his own motion, after notice to the bankrupt, may have satisfactory proof that the bankrupt has not made a full surrender of his assets, and that he then has, or can obtain, the money with which to pay those fees. There is nothing in this paragraph 4 in the nature of an amendment of the bankruptcy act or out of line with our construction of its provisions. It does not require the petitioning debtor to use, sell, or pledge his exempt property, for that would be repugnant to section 6, Bankruptcy Act. It does not require that he should apply to his kindred or friends to furnish him the money, at the peril of being charged with and convicted of making a false oath should he tender the statutory affidavit, and having his prayer for a discharge refused on that ground, or having it indefinitely delayed on that account, for this would be a refinement on our former laws prescribing imprisonment for debt. It does not impose any humiliation on a citizen to accept the bounty of the government in providing that he may obtain the benefit of the act without the prepayment of any fees; but it would inflict a humiliation on any citizen to require that he solicit or accept alms of his kindred or friends. The judgment of the court of bankruptcy granting the appellee his discharge is affirmed.

In re KERBY-DENIS CO.

(District Court, E. D. Wisconsin. May 13, 1899.)

1. BANKRUPTCY—PRIORITY OF CLAIMS—LIENS.

Where a statute of the state creates a lien in favor of employes performing certain kinds of labor, but provides that such lien shall not continue in force unless a statement thereof is filed within 30 days, and action begun within 3 months, holders of such liens, perfected according to the statute, against the bankrupt employer, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, although both classes of claims are equally within the description of claims for "wages," as to which the bankruptcy act declares that they shall "have priority, and be paid in full out of bankrupt estates." Section 64 (30 Stat. 563).

2. SAME—PREFERENCES—DISSOLUTION OF LIENS.

A lien for the wages of labor, created by such a statute and preserved in force according to its directions, is not a preference within the meaning of the bankruptcy act, nor is it among the classes of liens which are dissolved by an adjudication in bankruptcy under the provisions of section 67, subds. c and f, of the bankruptcy act (30 Stat. 564).

In Bankruptcy. On review of an order of the referee in bankruptcy directing the payment pro rata of certain labor claims against the estate of the bankrupt, and denying priority of payment to such of the said claims as were secured by a lien created and perfected according to the statutes of the state.

W. C. McLean, for lien creditors.

T. W. Spence, for trustee in bankruptcy.

SEAMAN, District Judge. The question certified by the referee is, in effect, whether the lien given by the state statute remains operative after the intervention of proceedings in bankruptcy. Its solution depends upon a sound construction of the existing bankruptcy enactment, without regard to any seeming hardship or inequality in the circumstances of the instant case. All the claims covered by the order of the referee are for labor performed within the time and for amounts entitled to priority as directed by section 64 of the act (30 Stat. 563), "and to be paid in full out of bankrupt estates." The aggregate amount is about \$15,000, of which about \$7,000 is represented in liens filed and adjudged, and the remaining \$8,000 were claims for which liens could have been obtained when the petition was filed in bankruptcy, but no liens were in fact filed or perfected. The property attached for the liens came to the hands of the trustee under a stipulation that the proceeds should be subject to an adjudication here of the rights of the parties, and such proceeds, with all realized from other property of the bankrupts are insufficient to pay in full both lien claimants and preferred claims, without reference to general indebtedness. The statutes of Michigan establish the liens in question as existing rights in favor of persons performing labor in manufacturing lumber, shingles, etc., to be paramount over all other claims or liens (3 How. Ann. St. §§ 8427a-8427p), but provide that the indebtedness shall not remain a lien on the products un-

less statement thereof is filed with the clerk of the county within 30 days after completion of the labor, and, further, that action must be commenced within 3 months. The lien is created by the statute, and not by the acts of filing the claim and bringing suit, which merely preserve or keep it in force. It is of a class uniformly regarded with favor, and so recognized by the bankruptcy act of 1867 and the decisions thereunder. A distinction is asserted under the present act that it makes no direct provision for such liens, but declares the invalidity of preferences obtained by various means in broad terms which include liens of this character. I am clearly of opinion that these statutory liens are not within the inhibited liens or preferences named in the act. The provisions which are cited to defeat them are subdivisions c and f of section 67, but the settled rules of construction, under the maxim, "*Noscitur a sociis*," exclude such application. The one relates exclusively to "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession," where the intention appears to give or obtain fraudulent preference; and the other to "levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent." In each the term "lien" is limited to such as are created through legal process, whereby a preference is obtained by the action or consent of the parties, and it cannot be extended to include the liens in question, which are expressly created by the state statute through the performance of the labor. The subsequent acts of notice and suit are mere matters of procedure to preserve and enforce the lien, and are in no sense the source of the preference. It is true that no provision is found in the act in express terms preserving liens of this character, but their recognition in that view is clearly apparent by the first clause of section 67, as follows: "Liens. (a) Claims which for want of record or for other reason would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against the estate." There being no provision to the contrary, I am of opinion that the liens afforded by the state statute are undisturbed by the present act, and that decisions as to their force under the act of 1867 are, generally speaking, applicable as well under the present act. The liens being valid, the claimants were at liberty to proceed for their enforcement in accordance with the state law up to the time possession of the property was taken in bankruptcy, and, unless the court of bankruptcy otherwise directed and provided for their ascertainment and enforcement, could proceed to judgment. The trustee in bankruptcy received the property to which the liens attached subject to their payment if found to be valid, and on the view stated the liens must be paid out of the proceeds derived from its sale, thus leaving the sum which then remains in his hands, including that derived from other property, to constitute the estate or assets for payment of "debts which have priority," as declared by section 64. The claims which are proved merely as labor claims, and not preserved as liens by filing the

requisite statement with the clerk of the county, cannot be recognized as liens within the state statute, for the reasons well stated in the opinion of Judge Dyer in this court, under the act of 1867, in *Re Brunguest*, 7 Biss. 208, Fed. Cas. No. 2,055. With the lien kept alive and identified as the statute directs, I have no doubt this court could furnish a remedy equivalent to the action in the state court; but, as the lien depends exclusively upon the statute, and is destroyed by the failure to file, no authority exists for its restoration, and certainly this court cannot revive it to the prejudice of claimants who have complied with the statute. The claims so presented can be paid only out of the estate of the bankrupt, namely, the assets which remain in the hands of the trustee, and they are payable therefrom in the order of priority prescribed by section 64. The order of the referee must be modified in accordance with this opinion. So ordered.

Appeal of SCHULTZ.

(Circuit Court, E. D. Pennsylvania. June 21, 1899.)

No. 54.

CUSTOMS DUTIES—ACIDS—COAL-TAR PREPARATION.

A coal-tar preparation, not a color or dye, from which crystal carbolic acid is made by "refining," and which is employed in the manufacture of disinfectants and some kinds of soap, is admissible free from duty, as an acid, within Act Oct. 1, 1890, par. 473, which relates to "acids used for medicinal, chemical, or manufacturing purposes," and not dutiable under paragraph 19, which relates to "all preparations of coal tar, not colors or dyes, not specially provided for."

Ingham & Newitt, for petitioners.
James M. Beck, for the United States.

DALLAS, Circuit Judge. The government claims that the merchandise in question is a coal-tar preparation, not color or dye, not specially provided for, and the appellant claims that it is an acid used for mechanical, chemical, or manufacturing purposes, not specially provided for. It has been charged with duty under this provision of the act of October 1, 1890: "19. All preparations of coal tar not colors or dyes, not specially provided for in this act, twenty per centum ad valorem." The importer contends that it falls within the provision of the free list, as follows: "473. Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this act." Unquestionably, this merchandise is a product of coal tar, not a color or dye; but it may nevertheless be an acid used for mechanical, chemical, or manufacturing purposes, and, if it be, it should have been classified as such. *Matheson v. U. S.*, 18 C. C. A. 143, 71 Fed. 394. Whatever it may be, there can be no doubt respecting its use. The evidence conclusively shows that crystal carbolic acid is made from it, and whether the method by which this is accomplished be called a chemical or a manufacturing one is, under

the terms of the provision, immaterial. It certainly is one or the other, and perhaps may be said to be both. In addition to this use, which is its principal one, it is also employed to a not insignificant extent in the manufacture of disinfectants and of some kinds of soap. But the more serious question is, is it an acid? The single witness examined on behalf of the government says that it is not; the three chemists produced by the appellant say that it is. The weight of the evidence does not, however, depend solely upon which side has produced the greater number of witnesses, and I have felt it to be incumbent upon me to carefully examine and consider all the testimony. It appears that the government's expert is of opinion (1) that, speaking broadly and of the substance as an integral whole, it is not an acid; and also (2) that it is a composite liquid, which, although it potentially embodies an acid, comprises certain other constituents, which must be eliminated before a true acid is brought into existence.

1. As to the first of these propositions, he agrees that down to a quite recent time, which he is unable to fix with any definiteness, the identical article now involved was held by all chemists to be an acid; but he says that it could not in October, 1890, have been so regarded, because a certain discovery had then been made which disclosed that its classification as an acid had been erroneous. I do not think this evidence can be given controlling effect in the interpretation of the statute. It is not supported in any way, and the witness' assertion that the discovery referred to by him was generally known to chemists, and that the consequence which he ascribes to it was generally recognized by them, must, I think, in view of all the evidence, be regarded as a mistaken one. All of the chemists called by the appellant still pronounce this substance to be an acid; the trade so designates it to this day, and the literature of the science, so far as it has been produced, continues to treat of it as such. The preponderance of the evidence, therefore, is plainly to the effect that this merchandise, which for a long time was admittedly regarded as an acid by those competent to determine its nature, is not differently regarded now.

2. The word "acids," as it is used in the act of congress, is inclusive of crude, as well as of refined, acids. The witnesses on both sides speak of the conversion of the substance in question into crystal carbolic acid as being accomplished by "refining," and of the product as a refined carbolic acid. That the crude material contains about 12½ per centum of foreign substances (some of which are themselves acids) is of no consequence. Before, as well as after, refinement, the stuff is substantially an acid. The removal of undesirable elements is probably incident to every refining process, but the thing refined is not thereby transformed; it is merely purified. The decision of the board of general appraisers is reversed.

ROESSLER & HASSLACHER CHEMICAL CO. v. UNITED STATES.

(Circuit Court, S. D. New York. June 1, 1899.)

No. 2,342.

1. CUSTOMS DUTIES—CLASSIFICATION—CRUDE ARTICLES.

An article may be crude for the purposes of classification under the tariff laws, by reason of the use to which it is applied, where it is crude in the sense that it is unrefined, although it may be the result of some manufacture.

2. SAME—ZINC DUST.

Zinc dust, which is partially oxidized atoms of zinc, unrefined, and is ordinarily obtained as a by-product in the refining of zinc, and used in dyeing, is entitled to free entry, under paragraph 386 of the tariff act of 1894, as an article in a crude state used in dyeing, not specially provided for, and is not dutiable, under section 3, as a nonenumerated manufactured article, nor under paragraph 174 and section 4, as assimilated to zinc in pigs and blocks.

This is an appeal by the importers from the decision of the board of general appraisers holding certain imported merchandise to be dutiable.

Comstock & Brown, for the importers.

D. Frank Lloyd, for the United States.

TOWNSEND, District Judge. The merchandise in question is zinc dust imported in 1894. The collector assessed it for duty at the rate of 20 per cent. ad valorem, under section 3, Act Aug. 27, 1894, as a nonenumerated manufactured article. The board of general appraisers, reversing the collector, held that it should have been assessed at one cent per pound, as assimilated to zinc in blocks or pigs, under paragraph 174 for zinc in blocks or pigs, and section 4, which is the similiter section of said act. The importer appeals, and claims that the merchandise is entitled to free entry, under the provisions of paragraph 386 of said act, as an "article in a crude state, used in dyeing, * * * not specially provided for."

In the treatment of zinc ore, it is first roasted in order to desulphurize it, and the product is then mixed with finely-divided carbon, and baked in a furnace, where the contents are raised to a heat sufficient to cause them to vaporize. The vapor then flows out into vessels, and as it cools becomes pig zinc. A certain portion of this vapor so comes in contact with the outer air that each atom of zinc unites with the oxygen therein, and becomes a core of zinc surrounded by oxide of zinc, and in this form it is received into other vessels, called "prolongs." Some of this material is preserved, and, after being sifted and protected from further exposure to the air, is put up and sold as zinc dust, the article in controversy in this case. In one factory, some of the furnaces make only zinc dust; in other factories, they consider it an accidental and objectionable by-product, the larger portion of which goes back into the retorts, to be ultimately converted into pig zinc.

The whole contest in this case turns on whether this is a manufactured article or an article in a crude state. The evidence sufficiently

proves the contention of the importer that it is an article used in dyeing not specifically provided for. It is known as indigo auxiliary, by reason of its use for dyeing purposes as a discharging agent in indigo vats. It is also used in the cyanide process of treating refractory ores, and for various other purposes, but the evidence for the United States is utterly insufficient to overcome the positive proof that its chief use is for dyeing. It is not similar to zinc, nor is it dutiable under the similiter clause, because, if it is not in a crude state, it is properly included under the head of articles manufactured wholly or in part, under section 3 of said act. *Mason v. Robertson*, 139 U. S. 624, 11 Sup. Ct. 668; *Tiffany v. U. S.*, 66 Fed. 737; *Robertson v. Edelhoff*, 132 U. S. 614, 10 Sup. Ct. 186; *U. S. v. Roessler & H. C. Co.*, 24 C. C. A. 604, 79 Fed. 313.

There is an irreconcilable conflict between the experts on behalf of the government and those on behalf of the importer as to whether this article is an accidental by-product, as to whether it is swept down or gathered up from the chimney flues and rafters where it is carried as a dust, and as to whether it is practically the same thing as zinc in a state of powder. But after a careful consideration of the opposing testimony, especially in view of the testimony of Dr. Baker, the government chemist, I have reached the following conclusions:

It would be impracticable to so pulverize zinc as to make a zinc powder. This has never been done commercially. It would not be identically the same thing, and it is not proved that it would accomplish the same purpose, as this zinc dust, which contains a considerable quantity of impurities, such as lead, iron, etc. As Dr. Baker states, it is crude as a metal, but not crude as a mineral. It is not "crude" in the common or dictionary sense of an article not manufactured, but it is "crude" in the sense of an article not refined. I think it is an article in a "crude" state, in the tariff sense of "crude."

It appears from an examination of said act that congress defines articles of this character as crude, not necessarily by inquiring whether they may or may not have been the result of some manufacture, but by reason of the use to which they are to be applied. Thus, in said act of 1894, the manufactured article glycerine is spoken of as crude, not purified; aluminum, as a manufactured article in crude form; and tartar, bladders, sounds, bones, camphor, coal tar, paper stock, and potash, as crude; while in section 21 provision is made for ores or metals in any crude form requiring smelting or refining to make them available, etc.

Inasmuch as all of said articles or substances have necessarily undergone some preliminary process of manufacture, and are considered crude only by referring to the purposes for which they are to be used, I think that this article may be "crude," under the tariff designation, although it is the result of a manufacture; and I am inclined to think, in opposition to the contention of the United States, inasmuch as this article is ordinarily only the accidental resultant product from the manufacture of zinc, that it is in its nature a crude by-product. That it is sifted without changing its character, and that care is taken not to expose it to the air, is not sufficient to make

it a manufacture. *U. S. v. Godwin*, 91 Fed. 753; *U. S. v. Merck*, 13 C. C. A. 432, 66 Fed. 251; *In re Hirzel*, 53 Fed. 1007; *Prentice v. Steamship Co.*, 58 Fed. 702. These conclusions are strengthened by the evident intention of congress, as gathered from an inspection of the various paragraphs of this act, to make raw materials for the dyeing industries free. The testimony of the government chemist, who is apparently the only disinterested witness in this case, strongly supports the proof that this article is not identical in composition or in its adaptation for use with powdered zinc; that it is "crude," in the sense that it is not refined; that it is crude so far as its use for dyeing is concerned; and that it is a by-product. For the foregoing reasons the decision of the board of general appraisers is reversed.

UNITED STATES v. PIN KWAN.

(District Court, N. D. New York. June 14, 1899.)

ALIENS—DEPORTATION OF CHINESE.

A Chinese person, not a laborer, who has come here with a certificate properly signed and viséd, and after examination, has been permitted to enter the United States and has engaged in business here as a merchant for 17 months cannot, in the absence of fraud, be deported, on the ground that the certificate is incomplete and defective in matters of nomenclature and description.

Appeal by defendant from an order of deportation entered by a United States commissioner.

Wesley C. Dudley, Asst. U. S. Atty.

Richard Crowley, for defendant.

COXE, District Judge. This case is devoid of trickery and fraud. The conduct of the defendant has been exemplary throughout. He has not entered the United States clandestinely; he has not deceived the officers of the government or withheld any information to which they are entitled. If there has been a failure to observe the strict letter of the law they, and not he, are responsible. He came to Buffalo October 27, 1897, with a certificate under section 6 of the act of July 5, 1884 (23 Stat. 115), signed by the registrar general and viséd by the United States consul at Hong Kong. This certificate states the defendant's former and present occupation as "assisted accountant." It also states that he is a Chinese person other than a laborer and that he is "going to Buffalo, N. Y., to join Quong Seng Lung & Co., 500 Michigan street, and attend to the business of the said company." On arrival at Buffalo he was examined by the collector and the inspector of immigration located at that port. His papers were found sufficient in every particular, his identification was complete and he was duly admitted into the United States, the collector certifying over his own signature to that effect. The United States inspector of immigration, Mr. De Barry, testifies as follows:

"I know Pin Kwan, the defendant; I admitted him in the United States on October 27, 1897, and have known him since that time. I have frequently

seen defendant at both of the stores (Nos. 494 and 500 Michigan street) selling goods and keeping accounts; I have never seen him doing anything else."

On the 17th of March, 1899, the defendant was arrested and brought before a United States commissioner. During the interval he has lived an industrious life, attending to the business of the firm at its stores on Michigan street, keeping its books and selling its goods. He has done nothing else. The business consists of general merchandise, such as wines, liquors, tobacco, medicine, clothing, shoes, soaps, etc. The defendant on coming here acquired an interest in the business and still holds it. All of these facts are undisputed.

Here, then, is the case of a man who, armed with a passport, signed by the duly authorized agents of the United States in China, has left his native land and journeyed 10,000 miles to engage in business in this country. Upon his arrival his credentials are carefully scrutinized by two agents of the United States and his right to enter this country is unhesitatingly confirmed. Upon the faith of this permit he invests his money here and devotes his entire time to mercantile pursuits. After nearly 18 months he is arrested, and it is proposed to send him back to China because of alleged defects in his entrance certificate, due not to any fault of his but to the carelessness of the agents of the United States. Before sanctioning this proceeding the court should be very sure of the rectitude of its position. The commissioner felt constrained to follow certain rulings of the executive officers of the government, placing a strict construction upon section 6 of the act of July 5, 1884, but, evidently, he reached this conclusion with reluctance and regret for he says:

"I am compelled to render a judgment against the defendant, but in fair dealing the decision in this case ought to be otherwise."

The court is in entire accord with the conclusion that good faith and fair dealing require that the defendant should be discharged. If it be possible for the United States to bind itself by the acts of its agents this controversy presents such a case. To repudiate this action now, after the defendant in reliance thereon has invested his money here, borders very closely upon bad faith. The entire volume of Chinese litigation is directed against Chinese laborers. No one can read the treaties, the debates in congress and the statutes which have, from time to time, been enacted upon this subject without being impressed with this fact. It was the object of the lawmakers to prevent the degraded and cheap labor of the East from coming in contact with the intelligent and high-class labor of this country. It was not their intention to exclude those who come here to invest their money in mercantile pursuits and thus add to the commerce and prosperity of the country. In dealing with these cases it has been the central aim of this court to ascertain the fundamental fact whether the defendant belongs to the prohibited class or not. If he does he should go back. If he does not he should, irrespective of technical considerations, be permitted to remain. When a Chinese person lands at one of our ports armed with the statutory certificate it would seem that

then is the time when the government should take advantage, if it desires to do so, of mere defects of form and description. After the certificate has been examined and declared sufficient and the person permitted to enter this country and, on the faith of such permission, has invested his money and engaged in business here, it would seem too late to order him back to China because of irregularities which, in legal effect, were waived by the collector. The law does not say that such certificate shall be the sole evidence to establish the right of the person to remain in this country, but that it shall be the sole evidence "to establish a right of entry into the United States." This is not a question whether the defendant should be permitted to enter this country. He was permitted to enter. He is here, and the question to be considered is this: Is there at this time a sufficient reason for deporting him? As this defendant came here with the permission of the agents, delegated by the government to grant or refuse that permission, it cannot be said that his entry into the United States was unlawful. His right to remain here must depend upon the question of fact whether or not he belongs to the prohibited class. Where a Chinese person produces a certificate, honestly obtained and free from jurisdictional defects, showing that he was allowed to enter the United States and supplements it by proof that he belongs to the class of Chinese persons who are permitted to come here, it is not easy to see upon what rule of right or theory of statutory interpretation he can be sent back to China. On the other hand, if in fact he belongs to the prohibited class and comes here intending to work as a laborer and does so work it seems clear that he should be sent back, even though his certificate conforms in every particular to the requirements of the law. To illustrate: Should it appear that a Chinese person admitted a year and a half ago is actually a student at Yale University, it would hardly be contended that he should be deported because his certificate states that he is "a reader of books" when it should have described him as a "student." On the contrary should it appear that a Chinese person, described as a student, on landing here begins to work as a common laborer and so continues to the present time there can be little doubt that he should be deported notwithstanding the fact that the certificate complies with all the minute requirements of the statute. It is thought that the defendant is and has been a merchant even within the strict definition of section 2 of the act of November 3, 1893 (28 Stat. 8). He is engaged in buying and selling merchandise at a fixed place of business, which business is, in legal effect, conducted in his name. It is not necessary that his name should appear in the firm designation. He has done no manual labor since he has been in this country. It is thought that these views are sustained by the following authorities: *Lee Kan v. U. S.*, 10 C. C. A. 669, 62 Fed. 914; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517; *Wan Shing v. U. S.*, 140 U. S. 424, 428, 11 Sup. Ct. 729; *U. S. v. Chu Chee*, 87 Fed. 312; *U. S. v. Gee Lee*, 1 C. C. A. 516, 50 Fed. 271; *U. S. v. Ng Park Tan*, 86 Fed. 605.

It is thought that nothing in the case of *U. S. v. Yong Yew*, 83 Fed. 832, is in conflict with these views. In that case the defendant by trickery and evasion secured entry into the United States as a merchant when in fact he was a laborer. He worked in a laundry continuously from the time of landing until he was arrested. As already stated the court is of the opinion that the plain purpose of the law cannot be evaded by such manifest artifice. The law should be construed to prevent fraud on the one hand and injustice on the other.

In order that there may be no misunderstanding the proposition decided by the court is restated as follows: A Chinese person, not a laborer, who has come here with a certificate properly signed and viséd and, after examination, has been permitted to enter the United States and has engaged in business here as a merchant for 17 months, cannot, in the absence of fraud, be deported, upon the ground that the certificate is incomplete and defective in matters of nomenclature and description. The order of the commissioner is reversed and the cause is remanded with instructions to discharge the defendant.

UNITED STATES v. LEE PON et al.

(District Court, D. Vermont. June 8, 1899.)

ALIENS—DEPORTATION OF CHINESE—EVIDENCE OF CITIZENSHIP.

In proceedings for the deportation of Chinese persons whose right to remain in this country rests solely on a claim that they were born in the United States, the testimony of their alleged father, shown by other Chinese witnesses to be inconsistent with previous statements made by him, which statements he denies having made, is not alone sufficient to establish such claim to citizenship.¹

These were appeals by the defendants from orders of a commissioner ordering their deportation.

Rufus E. Brown, for appellants.

James L. Martin, U. S. Atty.

WHEELER, District Judge. The appellants are said to be brothers, of the Chinese race, and their appeals from orders of deportation have been heard together. Lee Chick testifies that they are his only sons, born in Sacramento, Cal. If this is true, they have as much right to be here as any person can have; if not true, they have none. He is corroborated by one witness, who may, however, be mistaken. The case depends mainly upon the testimony of Lee Chick. Several witnesses of his race have testified circumstantially to his calling a young man of Germantown, Pa., at several times, his only son. He denies the conversations, and says that young man is a deceased brother's son, with whose history and whereabouts he seems well acquainted to within a short time. This person would be likely

¹ As to citizenship of Chinese, see note to *Gee Fook Sing v. U. S.*, 1 C. C. A. 212.

to have material knowledge. Government agents testify that they cannot find him, and he is not produced. The absolute denial of these conversations precludes any allowance for misunderstandings. They justly impeach Lee Chick, according to the credit of several witnesses to them. Other testimony more remote has been given, bearing more or less in various ways upon the claims made. Care has been taken, on account of the importance of the cases to the appellants as well as to the government, to give full opportunity for producing evidence, and adequate consideration of what has been produced. Upon the whole the appellants may have been born in the United States, but that they were is not satisfactorily proved; therefore, being of this alien race, by the laws of this country and treaties with theirs they do not appear to be lawfully entitled to remain in the United States. The decisions of the commissioner must, according to this view of the case, be affirmed. Deportation ordered. Orders stayed 10 days.

Motion for Rehearing.

June 28, 1899.

The additional evidence sought to be introduced, as it is made to appear, would not sufficiently meet the weakening of the testimony of Lee Chick by the government witnesses, and corroborate his testimony as to the birth of the appellants in the United States, to change the result. That they are his sons would more clearly appear, but that they were born in the United States would not. The motion must therefore be denied.

Motion denied.

UNITED STATES v. CHIN FEE.

(District Court, D. Vermont. May 11, 1899.)

1. PROCEEDINGS FOR DEPORTATION OF CHINESE — EFFECT OF DECISION OF IMMIGRATION OFFICERS.

The provision of the appropriation act of August 18, 1894 (28 Stat. 390), making the decision of the immigration or customs officers adverse to the right of a Chinese person to enter the United States final, unless reversed on appeal by the secretary of the treasury, conferred no new powers on such officers, and their powers under the existing laws as to Chinese persons not laborers are limited to determining the sufficiency of the certificate of such a person to entitle him to entry. The provision relates solely to proceedings on applications to enter, and does not render the decision in such proceedings denying an applicant the right of entry conclusive against his right to remain in the United States after he has entered, when challenged by proceedings for his deportation.

2. SAME.

The decision of a customs officer that a Chinese person is not entitled to enter the United States, made after such person has already entered, and without any application for entry, is not such an adjudication as is made conclusive by the statute.

3. SAME.

A Chinese physician, not a laborer, who resided in this country for several years, registered as permitted by the statute, and afterwards went to China temporarily, intending to return, is entitled to remain in the United States after his entry.

This is an appeal by the defendant from an order of deportation made by a commissioner.

James L. Martin, U. S. Dist. Atty.
David J. Foster, for appellant.

WHEELER, District Judge. The appellant is of the Chinese race; was born in China; is a physician; came to New York when 27, in 1874; went to Chicago in 1893; was registered there in 1894; went to China, because of sickness of his father, in 1896, intending to return to this country; came to Montreal, and appeared at Richford, in this district, in March, 1899; was taken before the deputy collector there, to whom he exhibited his certificate of registration, and by whom he was sworn, and asked as to his history and intentions. The deputy collector held that he was not entitled to come into the United States, informed him of that decision, and directed him to turn back to Canada. He remained in the United States, and was arrested and taken before the commissioner for being unlawfully within the United States, who ordered him deported to China. This appeal is from that order, and the question arising upon it is whether the appellant at the time of his arrest in this proceeding was unlawfully in the United States.

Those prohibited from coming into the United States, and from remaining here without certificates of residence, are laborers. The alien contract labor law used the same word in prescribing what persons should be excluded, and it was held not to include clergymen. *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511. The appellant, being a physician, would by parity of reasoning be without the prohibited class of Chinese laborers. Section 6 of the act of May 5, 1892, requiring Chinese laborers to procure certificates of residence from the collector of internal revenue, as evidence of their right to remain in the United States, as originally passed and as amended, contained a provision that "any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such a certificate as evidence of such right, may apply for and receive the same without charge." The appellant before going to China was domiciled here, and, under the law as it then and ever since has existed, had the right to remain here, and appears to have had the certificate provided for as evidence by the law of such right. Section 8 of the act of 1882 provided that the master of any vessel arriving in the United States should, before landing or permitting to land any Chinese passengers, deliver and report to the collector of customs a list of all Chinese passengers on board, sworn to by the master.

"Sec. 9. That before any Chinese passengers are landed from any such vessel, the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law."

"Sec. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel."

In *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, on habeas corpus against the collector and master detaining the person of a Chinese merchant from landing, the supreme court held that section 6 of the act of 1882, as amended by the act of 1884, requiring Chinese persons other than laborers about to come to this country to obtain certificates of permission and identity from their government, viséed by a diplomatic or consular representative of the United States there, as the sole evidence permissible to establish a right of entry into the United States, did not apply to Chinese merchants domiciled in the United States, "in China only for temporary purposes, *animo revertendi*," on their return to the United States, and he was discharged. This left him free to remain in the United States, according to his right. After this decision, provision was made in the appropriation act of August 18, 1894, that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing, or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury." 28 Stat. 390.

After that, *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 937, arose on habeas corpus in favor of a Chinese merchant domiciled in the United States, and returning thereto from a temporary absence, against the collector and the manager of the transportation company, for relief from detention to prevent landing on the refusal of the collector to admit him. The case was essentially like *Lau Ow Bew v. U. S.*, which was relied upon for the relator, except that the detention was after the act of 1894. The court said:

"Now, the difference between that case and the present one is that, by the statutes in force when the former was decided, the action of executive officers charged with the duty of enforcing the Chinese exclusion act of 1882, as amended in 1884, could be reached by the courts when necessary for the protection of rights given or secured by some statute or treaty relating to Chinese. But by the act of 1894 the decision of the appropriate immigration or customs officers excluding an alien from admission into the United States under any law or treaty is made final in every case unless on appeal to the secretary of the treasury, it be reversed." To avoid misapprehension, it is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of habeas corpus, *Lem Moon Sing* was entitled of right, under some law or treaty, to re-enter the United States. We mean only to decide that that question has been constitutionally committed by congress to named officers of the executive department of the government for final determination."

In *re Lee Yee Sing*, 85 Fed. 635, decided later, and relied upon for the government here, was also upon petition for habeas corpus against the collector for detention on refusal to permit entry. The court said:

"His right to enter having been passed upon by the only officer clothed with authority to decide the question, the petition must be denied."

The act of 1894 gave no new or additional power to the immigration or customs officers, but what they had authority to pass upon before was made final, which was, as to Chinese persons not laborers, the sufficiency of their certificates as evidence, under the

provisions of the laws quoted, of their right to come then and there into the United States. That was a different question from the determination of the right of Chinese persons, not laborers, being in the United States, to remain here. Not those who have come irregularly, but those who, however they have come, have not any right to be and to remain here, are to be deported. These cases upon the effect of the act of 1894 involved only the right of the customs officers to prevent the persons in question from landing, and not what the right of those persons to remain longer would have been after landing and commencing to remain. These officers could decide what they would do, and could carry out their decision without review, except on appeal to the secretary of the treasury. The status of such persons as commorant or inhabitant in this country does not appear to have been committed to them. The reservation of the supreme court in its opinion in *Lem Moon Sing's Case* shows that there might be rights remaining after the decision of the officials which would not be cut off. Their decision would cover conclusively the control of persons seeking admission while in their custody for exclusion, but not their rights as to other matters, then or afterwards. In *re Monaco*, 86 Fed. 117; In *re Kornmehl*, 87 Fed. 314. The statutes quoted seem to imply that an application is to be made by Chinese persons to the customs officials for admission by land as well as by sea, upon which they are to act. In this case no such application was made by the appellant. He was in the United States when they accosted him, and took their proceedings, and ordered him to return to Canada. That was not an adjudication upon an application to come in, for there was none; and, if there had been one, the adjudication should have been such as would give opportunity of appeal, which does not appear to have been had. In *re Gin Fung*, 89 Fed. 153; *U. S. v. Wong Chung*, 92 Fed. 141. The order made was a requirement of departure without retaining custody, rather than an exclusion with it. Nothing stands in the way of the right of the appellant to remain in the United States but these proceedings, as was shown by the decision in *Lau Ow Bew's Case*, and as was left remaining in *Lem Moon Sing's*, before cited. He came at about the same time as *Lau Ow Bew*, and appears to have the same right to his domicile here, evidenced by his certificate, that *Lau Ow Bew* had when discharged from the custody of the customs officials in his case. Appellant discharged.

UNITED STATES v. WONG AH GAH.

(District Court, D. Vermont. May 29, 1899.)

CHINESE DEPORTATION ACT—MERCHANT—BUSINESS CONDUCTED IN FIRM NAME.

A mercantile business conducted in the name of a partnership is conducted in the name of a partner in the firm, within the meaning of section 2 of the Chinese deportation act of 1893, although his name does not appear in the firm name.

This was an appeal by defendant from an order of deportation made by a commissioner.

Fuller C. Smith, for appellant.
James L. Martin, U. S. Atty.

WHEELER, District Judge. This appeal is from an order of deportation to China of the appellant as a laborer. He is now shown by the stock book of Quong Wah Lung & Co., of 24 Harrison avenue, Boston, to have been a share owner and partner engaged in buying and selling merchandise, since 1896, in that firm of 32 members, which had existed long before by that name. Section 2 of the act of 1893 declares that "a merchant is a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name." The principal question is whether the conducting of that business in that name includes the appellant and his name within the meaning of the statute. That it does appears to be well settled by the circuit court of appeals of the Ninth circuit in *Lee Kan v. U. S.*, 10 C. C. A. 669, 62 Fed. 914. The opinion there by then Judge, now Mr. Justice, McKenna, is exhaustive of the subject, and nothing appears to be necessary or proper here but to refer to and follow it.

Appellant discharged.

UNITED STATES v. WONG QUONG WONG.

SAME v. WONG CHIN SHUEN.

(District Court, D. Vermont. June 1, 1899.)

1. CONSTITUTIONAL LAW—ALIENS—USE IN EVIDENCE OF PRIVATE PAPERS UNLAWFULLY SEIZED.

The fourth and fifth constitutional amendments, which protect persons against unreasonable searches and seizures, and against being compelled to be witnesses against themselves in criminal cases, may be invoked in behalf of aliens residing in the United States, and they protect persons, not only from the unreasonable seizure of their private papers, but from the use of such papers, when unlawfully seized, as evidence against them in cases involving a forfeiture of their property or personal rights.

2. SAME—DEPORTATION OF CHINESE—LETTERS UNLAWFULLY SEIZED.

In proceedings for the deportation of a Chinese person, where the issue is the citizenship of such person in the United States, the government cannot use as evidence against him private letters, written by him, which its officers obtained by opening envelopes and taking the letters therefrom, in violation of the constitutional provisions against unreasonable seizures.

These were appeals by defendants from orders of deportation made by a commissioner.

Fuller C. Smith, for appellants.
James L. Martin, U. S. Atty.

WHEELER, District Judge. The appellants are brothers, of the Chinese race. Their appeals from orders of deportation stand upon the same evidence, and have been heard together, by consent. The testimony of the elder and that of their father shows, with somewhat convincing detail, that they were born in San Francisco. It is attacked by showing discrepancies of statements at different hearings, which would be formidable if the language in which they were made could be always clearly understood; but the obvious difficulties in

that respect require large allowances for many natural, and, with the best of faith, unavoidable, misunderstandings. In view of these circumstances, the discrepancies do not appear to justly overcome the direct and apparently well-understood assertion of the fact of birth in this country.

But the government produces letters, written in Chinese, said to have been handed by the appellants to an employé of the government, who passed them to customs officials, who opened, kept, and have offered them in evidence, and which, being interpreted, are said to show bad faith in the claim made by the appellants, and to go far towards overthrowing it. They are objected to as having been procured by unreasonable seizure, if the mode of acquiring them as attempted to be shown is true, and as not being shown to have come from the appellants if it is not true. The fourth amendment to the constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"; and the fifth, among other things, that no person "shall be compelled in any criminal case to be a witness against himself."

In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, goods had been forfeited under the revenue laws on evidence furnished by papers required to be produced on order of court. The question of the admissibility of such evidence, so procured, was much discussed in an elaborate opinion by Mr. Justice Bradley, in the course of which he quoted largely and approvingly from the judgment of Lord Camden in *Entick v. Carrington*, 19 Howell, St. Tr. 1029, and added, among other things:

"Breaking into a house, and opening boxes and drawers, are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers, to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. * * * And any compulsory discovery, by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman. It is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. * * * And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself."

The judgment of forfeiture was reversed for the admission of this evidence.

In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, a judgment of conviction of bribing an alderman was reversed because proof of what he had testified to before a senate investigating committee was admitted in evidence upon the trial.

The opening of the envelopes, and taking these letters from them, was a seizure of papers of the appellants that was unreasonable and contrary to the spirit of these amendments; and such papers, procured in that way, cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendments to all persons in this country. It has been said that

the manner of obtaining such evidence, whether by force or fraud, does not affect its admissibility; but these constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use. The cases cited show that they cover the use of papers or testimony when it would be a carrying out of their violation.

That the government can, by executive or judicial officers, exclude or expel aliens, is not in any manner to be questioned; but aliens, while here, are entitled to the benefit of these guaranties, which are not confined to citizens, as affecting liberties and property. These appellants claim to be citizens by birth, and whether they are such or not is the only question here, and that should not be determined upon what would be in violation of their rights as citizens, even if not extending to aliens. If citizens, they cannot be lawfully deported; and the question whether they are or not should be carefully tried, with due regard to their constitutional rights. The letters seized must be excluded.

Appellants discharged.

LEE SING FAR v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 488.

1. CHINESE EXCLUSION ACT—PERSONS BORN IN UNITED STATES.

A person born in this country of Chinese parents, who are permanently domiciled here, though aliens, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry.¹

2. SAME—HABEAS CORPUS PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In habeas corpus proceedings brought by a Chinese person claiming the right to enter the United States from China, on the ground of being a citizen of this country by birth, the court is not bound to accept the testimony of the petitioner's witnesses as conclusive, though uncontradicted, and where in such a case it appeared that petitioner, a girl 20 years old, had resided in China for 17 years, and the testimony as to her identity with the person claimed to have been born here was inconclusive or improbable, the finding of the court and its referee, who heard the witnesses, will not be disturbed on appeal.

Appeal from the District Court of the United States for the Northern District of California.

S. C. Denson and A. H. Yordi, for appellant.

E. J. Banning, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Appellant claims to be a native-born citizen of the United States. She arrived in San Francisco on June 25, 1898, on the Pacific mail steamship Peru from China, and was by

¹As to citizenship of Chinese, see note to Gee Fook Sing v. U. S., 1 C. C. A. 212.

the collector of the port denied the right to land. Thereafter a writ of habeas corpus was sued out in her behalf in the United States district court. The case, in accordance with the usual custom, was referred to Hon. E. A. Heacock, a special referee and commissioner of said court. In due time he heard the testimony, and made his report thereon to the district court, recommending that judgment of remand be entered. The report of the referee was adopted by the court, and judgment entered accordingly. The appeal is taken from said judgment.

Did the court err in holding that appellant was not born in the United States, and that she was not entitled to enter and remain in the United States? Are the order and judgment of remand contrary to law, and unsupported by any evidence? These are the only important questions presented for our consideration. Preliminary to any decision upon the merits, there arises the question whether the case is properly before us for review. There was no exception taken by appellant's counsel to the report of the referee. Ordinarily the court, in such cases, is not called upon to examine the testimony taken before the referee. The judgment is entered as of course. It is only in cases where petitioner or the United States takes an exception to the report that the district court is called upon to examine the evidence. Why should not the applicants in this class of cases be held to have waived or lost their rights, if no exception to the report of the referee is taken, the same as litigants in civil or other cases? The practice is not uncommon in the Chinese cases for counsel not to take any exception, and then, after the district court has entered judgment of remand, to have a substitution of attorneys, who come into the case and claim, as in the present case, that the former attorney, by inadvertence, oversight, or neglect, failed to note any exception to the report "until after the time allowed by law for taking such exceptions had passed," and for that and other reasons ask for a rehearing, which, if granted, often enables the applicant, after finding out the reasons given by the referee for the remand of the applicant, to supply the "missing link" in the evidence from willing witnesses near at hand, although it is always claimed in the petition that their presence or knowledge of facts was before unknown. Such procedure, on the part of the petitioners, for a writ of habeas corpus, does not commend itself to our favor. As no objection to the consideration of this case upon such grounds has been urged on behalf of the United States, we proceed to a discussion of the case upon its merits; first stating that the district court properly refused to grant a rehearing herein. At the hearing before the referee, four witnesses were examined: Lee Cum Duck, Low Jew, Leong Lai, and Lee Sing Far, each of whom testified that appellant was born in the United States. Lee Cum Duck, on behalf of petitioner, testified that he had lived in California 23 years; that Lee Sing Far was his daughter; that she was born at 815 Washington street, in March, 1879; that he took his family, consisting of his wife, the petitioner, and two other girls (sisters of Lee Sing Far), to China, on the ship Gaelic, in 1882, and left her there with her mother; that he remained in China about two years, and then returned to California; that he had never

written any letter to his daughter, but sent letters every year to his wife; that he sent money to his wife in China, and told her to send the daughter Lee Sing Far here, and she sent me a photograph "on the same boat that the girl came"; that he only identified her because of that fact; and that he had not seen her since he left her in China. Low Jew testified that he had been in California 21 years; that he knew Lee Sing Far ever since she was born; that she was born at 815 Washington street, San Francisco; that she, with her father, mother, and two sisters, went to China in 1882; that witness went to China in 1890, and returned in 1891; that, when he arrived in China, he called on Lee Cum Duck's wife, and called again when he was about to return to California; that he had no talk with the petitioner on either visit; that he did not hear her talk; that she was in a room, sewing; that at his first visit he remained there "just long enough to deliver the letter, and immediately came away"; that "the second time I went there, and asked if they had a letter for me to bring back; I got the letter and left"; that Lee Sing Far's face was towards him, but he did not know whether she saw him or not; that on both occasions he saw her well enough to identify her; and that petitioner is the same person he then saw in China. Leong Lai testified that he lived in California 21 years; that he knew Lee Sing Far, and had known her from the time she was born; that she was born on Washington street, third floor, 815, Chum Di Ho's building; that she went to China, in 1882, with her father and mother and two sisters; that the other two girls were twins, and were born at the same place; that he went to China in 1896, and returned to California in 1897; that, while in China, he saw Lee Sing Far twice at Dock Sing Lee street in Canton, China; that he called at the house to deliver some money sent to Lee Sing Far's mother by her father from California; that he delivered a letter and the money to this girl's mother; that he remained but five or six minutes, "and gave the money and the letter, and that is all"; that at the second time he stayed "a few minutes, just long enough to get a letter"; that he did not at either time talk to petitioner; that he saw her face "kind of sideways"; and that she was sewing and sitting down in the next room. If appellant was born in the United States, of parents of Chinese descent, who, at the time of her birth, were subjects of the emperor of China, but had a permanent domicile and residence in the United States, and were here carrying on business, and were not employed in any diplomatic or official capacity under the emperor of China, she would become at the time of her birth a citizen of the United States, and be entitled to all the rights, privileges, and immunities, as such, including her right to land and remain in the United States. *U. S. v. Wong Kim Ark*, 169 U. S. 649, 705, 18 Sup. Ct. 456, and authorities there cited.

The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant

is of Chinese parentage. She has been in China, with her mother, for 17 years. In such a case it cannot be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would, as a general rule, be impossible to do so. The only protection to the government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the "crucial test" of his credibility may be applied. It may or may not always be successful; but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth.

In *The Ottawa*, 3 Wall. 268, 271, the court said:

"Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, manner, impartiality, truthfulness, and integrity of the witness." 1 Greenl. Ev. § 426.

If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence offered is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States. Take the present case: Is there any satisfactory evidence as to the identity of Lee Sing Far as the daughter of Lee Cum Duck? The testimony is to the effect that she left California when she was between 2 and 3 years of age. The father had not seen her for 15 years before she arrived in the United States, in 1898. Admitting that there may be in many cases certain recognized family characteristics and resemblances that might enable the parents to recognize one of their own children after such a period of time, yet that lapse of time and change from childhood to maturity is liable to bring many changes in the features and general characteristics of the individual. It is not impossible, but very improbable, that her father, under the circumstances of this case, would have recognized or been able to identify his child by her features and general appearance. But the testimony is clear that he did not so identify her. He sent money to China to her mother to enable the daughter to come to America, and the mother sent a photograph of the daughter to Lee Cum Duck, and it was by means of this photograph that he recognized her. He testified "that he only identified her because of that fact." Is this such a clear identification as would enable this court to say that the court erred in holding that it was not satisfactory? Would it not open the door to imposition and

fraud in the identity of Chinese persons claiming the right to land in the United States? Is the identity of appellant strengthened by the testimony of Low Jew and Leong Lai? These witnesses state that they identified her; that they had seen her twice in China before she came to America; and that they were at her mother's house at two different times, not exceeding five minutes at each time, and saw her in an adjoining room, but did not know whether she saw them or not. Is this such positive or clear evidence as to carry conviction to the mind of the court? Does it not bear the earmarks of suspicion as to its truth? Is the court compelled to accept such testimony as being satisfactory?

In *U. S. v. Chung Fung Sun*, 63 Fed. 262, Coxe, District Judge, said:

"The contention in the case of *Chung Fung Sun* is that he was born in California twenty years ago; that his father, when he was five or six years old, returned to China with his wife and child, remained there a year and a half, and then came back to this country, leaving his wife and the appellant in China, where his wife has lived ever since, and where the appellant lived until the present year. This is sworn to by the alleged father; but the inherent improbability of the story must be apparent to all."

See, also, *Gee Fook Sing v. U. S.*, 1 C. C. A. 211, 49 Fed. 147; *Lem Hing Dun v. Same*, 1 C. C. A. 209, 49 Fed. 148.

Upon the point as to the identity of a Chinese person, the case of *U. S. v. Tom Mun*, 47 Fed. 722, decided by Judge Hoffman, may be examined with profit. The law is well settled that a witness may very seriously impair his credibility by swearing positively and minutely to occurrences which were not of such a nature as to impress themselves forcibly upon his memory. *Willett v. Fister*, 18 Wall. 91, 97. It was for the referee, in the first instance, to determine the credibility of the respective witnesses and the sufficiency of the testimony. The witnesses were brought before him. He had the opportunity, of which we were deprived, of seeing them, and noticing their manner and appearance,—their freedom or hesitation in answering questions. These and other circumstances of like character are often as safe a guide as the mere language used by the witness in enabling the court to determine the truth or falsity of the testimony. It is true that a witness is presumed to speak the truth; but this presumption may be overcome and repelled by the manner in which he testifies, by his demeanor on the witness stand, by the character of his testimony, by the circumstances and surroundings under which he testified, whether his statements are reasonable or unreasonable, the probable or improbable nature of the story he tells, his opportunities of seeing and knowing the matters concerning which he testifies, and his interest, if any, in the proceedings; and if, from these and other circumstances, the court is of opinion that his statements are false, incredible, or unsatisfactory, it has the right to reject them. Of course this power is not an arbitrary one, and should in all cases be exercised with legal discretion and sound judgment. These methods furnish a safe landmark by which courts and juries are usually enabled to determine the credibility of any witness who testifies in their presence. *U. S. v. Ybanez*, 53 Fed. 536, 541; *Same v. O'Brien*, 75 Fed. 900, 911; *Shelp v. U. S.*, 26 C. C. A. 570, 81 Fed.

694, 698, 699; 29 Am. & Eng. Enc. Law, 768, and authorities there cited.

In *Elwood v. Telegraph Co.*, 45 N. Y. 549, 553, the court said:

"It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited, and have the effect of overcoming a mere presumption. *Newton v. Pope*, 1 Cow. 110; *Lomer v. Meeker*, 25 N. Y. 361. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility, * * * and, furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." *Wait v. McNeil*, 7 Mass. 261; *Koehler v. Adler*, 78 N. Y. 287, 291.

In *Quock Ting v. U. S.*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, the court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

This court, in *Gee Fook Sing v. U. S.*, *supra*, where the testimony as to the point that petitioners were born in the United States was as positive as in the present case, said:

"The evidence is not sufficient to make a case in favor of the appellant so clear as to warrant this court in reversing the judgment of the district court upon the facts. As to each of the cases, we consider that the evidence, as a whole, does not make as good a case for the appellant as it might be reasonably expected a man would make out in his native city, after time for ample preparation; and the case is such as any impostor could easily make. We hold that when, upon a candid consideration of all the evidence in a case, there appears to be room for a difference of opinion as to the material facts in issue, this court ought not to reverse the judgment on a question of fact alone."

We are still of the same opinion.

From the views herein expressed it is unnecessary to notice the other question argued by appellant's counsel. The judgment of the district court is affirmed.

D'OLE v. KANSAS CITY STAR CO.

(Circuit Court, W. D. Missouri, W. D. June 12, 1899.)

1. COPYRIGHT—SUIT FOR INFRINGEMENT—DAMAGES.

In an action for damages for infringement of a copyright by the publication in a newspaper article of matter taken from a pamphlet copyrighted by plaintiff, the chief purpose of which was to advertise his business as a photographer, and of which a large number of copies had been distributed free, but none had ever been sold or offered for sale, and where the evidence leaves it doubtful whether the pamphlet has any commercial value, the court cannot determine plaintiff's loss on account of the publication with sufficient certainty to warrant a judgment for substantial damages.

2. SAME—PRIOR PUBLICATION.

Giving away copies of a pamphlet by the author, or leaving copies in a public hotel office, constitutes a publication which renders a subsequent copyright ineffectual.

Action at Law for Damages for Infringement of a Copyright.

Teasdale, Ingraham & Cowherd and C. M. Ingraham, for plaintiff.

Wash Adams, for defendant.

PHILIPS, District Judge. This is an action for damages for the invasion of a copyright, and grows out of substantially the following state of facts: The plaintiff is a photographer at Kansas City, and in 1896 he got up a pamphlet under the title of "The Answer," followed by the words, "How to Sit—When to Sit—What to Wear—When Having a Photo Taken." This pamphlet is about 4 by 6 inches in size, and contains about 10 or 12 pages of printed matter, including pictures of various persons. As the preface shows, its principal purpose seemed to be to advertise and exploit the plaintiff's profession, and his attainment in the art of photography. The rest of the matter contains simply directions about how to dress and pose, and the like, in having a photograph taken, with additional precautionary suggestions along this line. On the 15th day of March, 1897, the plaintiff obtained a certificate from the librarian of congress of the pamphlet being copyrighted. In November, 1897, the defendant published in its newspaper, the Kansas City Star, an article taken from the Philadelphia Ledger, a newspaper published in Philadelphia, Pa., which contained several of the paragraphs found in said pamphlet. It is sufficient to say that this article contained enough of the printed matter of the pamphlet to constitute an infringement of plaintiff's work. At the time of this publication by defendant, it was not aware of the existence of plaintiff's pamphlet, and of course was not aware that it had been copyrighted. For this publication plaintiff has brought suit for \$5,000 damages. The cause has been submitted to the court without the intervention of a jury.

On the evidence in this case, if the court were to meet the question of the ascertainment of damages, it would be exceedingly difficult to find any substantial predicate for the assessment. The evidence shows that the plaintiff in the spring of 1897, and perhaps earlier, in part, had freely distributed and scattered about

10,000 or more copies of this pamphlet over the city, on the streets, and in business houses and private residences, showing that he regarded it in the nature of an advertising "dodger." He never sold a single copy of the pamphlet, nor even offered it for sale. He had never, prior to this publication in the Star, had any estimation made by any publishing house or merchant, or other person, as to any terms upon which they would undertake its sale. And the only evidence offered at this trial in respect of its commercial value is his statement and that of one other witness to the effect that they thought it could be sold by some business house to persons who might desire to have their photographs taken, or to other photographers, while other witnesses in the case—experienced photographers—testified that they had seen other pamphlets of a not very dissimilar character, and that the information contained therein was quite common to the profession, and that they did not regard the pamphlet as possessing any commercial value. From which it is quite apparent that any estimation the court could place upon its value would be highly speculative. Furthermore, how could the court, with any degree of required certainty, justifying the assessment of damages against the defendant, determine what damage resulted to the plaintiff from such publication in this newspaper? The plaintiff did not distribute, or attempt to distribute, or sell, a single copy of this pamphlet after the publication in the newspaper, to enable the court by comparison to determine in the remotest degree how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of his pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be a very unsafe criterion for the court to recognize in assessing such damages.

In the view, however, taken by the court of another branch of this case, it is not necessary that the court should further discuss the question of damages. It is conceded that if the fact should be found, on the weight of evidence, that prior to securing the copyright the plaintiff published his pamphlet, he is not entitled to the protection of the statute giving him the exclusive right to publish its contents, and this action would fail. The certificate of the librarian of congress shows, as already stated, that the copyright was granted on the 15th day of March, 1897. Beyond cavil, the evidence shows that an edition of this book was printed in Kansas City, paid for by and delivered to the plaintiff, about the middle of December, 1896. This edition amounted to 5,000 copies. Although not authorized by law to do so, this edition, on the reverse side of the title page, contained the following, "Copyrighted 1896 by W. T. D'Ole, Kansas City, Mo." The evidence further shows that the plaintiff then stated that he wished to get out these pamphlets for distribution for the holidays,—evidently re-

ferring to the approaching Christmas, 1896,—and that he then knew the print showed that the book purported to have been copyrighted in 1896; and he stated that this made no difference, as nobody would know or pay any attention to it. The inference is therefore persuasive that he obtained these pamphlets for circulation before or during said holidays; and it is an afterthought when he states that he would not distribute the books prior to obtaining the copyright, as he stated that the absence of such certificate of copyright made no difference with him. This evidence is supplemented by the further testimony of a credible witness, sustained by the circumstance of a contemporaneous event well calculated to fix the date in his mind, that he saw copies of this book at a hotel in this city on or before the 20th day of February, 1897. This is followed up by the testimony of one of the ladies whose picture appears in this pamphlet, that her father on or about the 1st day of March, 1897, brought her one or more copies of this pamphlet. In its ordinary acceptation, the word "publication" means "the act of publishing a thing or making it public; offering to public notice; or rendering it accessible to public scrutiny." In copyright law, it is "the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies." Without undertaking to state the qualifications of this definition, as applied to certain incidents, by which the book might be exhibited by the author, prior to copyrighting it, without amounting to a publication, within the spirit of the statute, it is safe to say that the appearance of a pamphlet, after its delivery to plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly was a "rendering it accessible to public scrutiny," and was likewise a "communicating it to the public by distribution of copies." When copies of it were furnished to the father of said witness, and put in her hands for her scrutiny, or any person to whom she might show it, it was a sending out of the book. More than this, the evidence of the plaintiff shows that in March, 1897, just after he obtained his certificate from Washington, he ordered and had published 5,000 more copies of this pamphlet, a copy of which last edition is in evidence. The first sentence in the preface to this edition is as follows: "Since we issued the last edition of this pamphlet, we have enlarged our premises, added more light, more accessories, and fitted up a studio second to none," etc. This is the direct statement of the plaintiff himself, put into the edition of March, 1897, that he had issued a previous edition. In its ordinary acceptation, "to issue" is to "send out; to put into circulation." And, as applied to the matter of the publication of an edition of the book, its natural meaning would be "to put into circulation." The construction of the pamphlet itself, which the plaintiff, with evident pride, exhibited on the witness stand, shows that he is a man of education; and it must be presumed that when he wrote himself a preface for this last edition, stating, "Since we issued the last edition," he understood its meaning and purport, as any other author would be presumed to have employed the

term. He undertook on the witness stand to explain away the obvious import of the term he had employed by stating that the year before he had gotten up a pamphlet somewhat similar in character, but very defective, called "Pointers," which he never distributed, and that he had reference to that print when he spoke of the former edition, and that he employed the word "issued" not in the sense of having published. But what is fatal to this contention is, first, the fact that the statement is, "Since we issued the last edition of this pamphlet." The evidence incontestably shows that the last edition was simply copied from, and was a reproduction of, this pamphlet printed in December, 1896. And, second, the statement of plaintiff on the witness stand that the first paper, called "Pointers," was never published or circulated by him, and was thrown into the furnace and burned. It is therefore absolutely incredible that when he used the language, "Since we issued the last edition of this pamphlet," he had in mind "Pointers," which had never been issued, and which had never been distributed, and the existence of which was unknown to the public; and there could therefore have been no occasion for, or sense in, referring to it in the preface of the pamphlet in question.

Again, according to plaintiff's present contention, if he had not circulated any of the 5,000 copies printed and delivered to him in December, 1896, why should he in March, 1897, have 5,000 copies more printed, when he then had on hand 5,000 copies? The 5,000 copies already on hand were certainly sufficient for scattering over the town as an experiment, to see whether or not they brought him any return of business or patronage. Such a course of conduct is so unusual and extraordinary in a business man as to challenge one's credulity respecting the statement that he made no distribution of these pamphlets prior to March 15, 1897. In his deposition given in this case, the plaintiff stated that he did not get out the copy of December, 1896, in time to distribute it in 1896, when the evidence, beyond contradiction, establishes the fact that the pamphlets were delivered to him as early as the 18th day of December, 1896; and this question was propounded to him: "When you got out this edition in the fall of 1896, did you give out any of the pamphlets or books in '96? Ans. I presume we did." And this presumption of his was a most natural one, because it is inconceivable that he would have printing done, and pay therefor, and take the pamphlets away on the 18th day of December, without distributing any of them, when, as the preface shows, its object was to advertise his business and to draw customers; and this is emphasized by the testimony of the witness that he said he wanted them for use in his holiday business. Without trenching too far upon the domain of metaphysics, and without even the appearance of offense, the court may be pardoned for advertng to another fact in this connection. The most striking, and possibly, in the estimation of the plaintiff, the most catching, thing about this pamphlet, is the false presentment of the face and artistic pose of the plaintiff on the front side thereof. The faces of the "modest beauties" and "little ones" presented in the pamphlet are

hidden away somewhat in the inner leaves of the book; and it will be readily recalled, from plaintiff's testimony and manner on the witness stand, how greatly inflamed was he with admiration of this offspring of his original conception and severe mental par-turition. Is it then to be presumed that he could patiently have such a child of his genius, with his own face stamped upon it, concealed for three months in his art gallery? A little matter like the absence of the copyright certificate could hardly have stood so long between his caution and his consuming pride of a wider fame, and ambition for more customers. It became painfully ap-parent on the hearing of this case that the plaintiff and his wit-nesses, since the taking of his deposition herein, and from the contest at the trial, recognized the necessity of placing the dis-tribution of the pamphlets after the 15th day of March, 1897; but, without impugning the integrity of the witnesses, the other facts and circumstances in evidence are of such persuasive force that the court feels constrained to say that the weight of evidence tends to show that at least some of the pamphlets printed in 1896 were prior to March 15, 1897, distributed in such manner as to constitute a publication, within the letter and spirit of the law. It is there-fore unnecessary for the court to discuss other questions of law raised by counsel in this case,—among which is that raised on the fact that after the plaintiff obtained his copyright he never cor-rected the statement on the page following the title page, that it was copyrighted in 1896. On this question of law the court ex-presses no opinion. Verdict and judgment for the defendant.

HOERTEL v. RAPHAEL TUCK SONS & CO.

(Circuit Court, S. D. New York. June 8, 1899.)

COPYRIGHTS—FALSE NOTICES.

A false copyright notice, impressed on a book or other publication, to subject the person so impressing it to the penalty imposed by Rev. St. § 4963, must contain all the essentials of a valid notice, as prescribed by sec-tion 4962, and a notice which omits the date of the alleged copyright will not sustain an action for the penalty.

On Demurrer to Complaint.

Harry E. Knight, for complainant.

Wm. A. Jenner, for defendant.

LACOMBE, Circuit Judge. The defendant in this case is not liable for the penalties sued for, since he has kept carefully outside of the express language defining the offense charged. The notices which are found impressed on the fancy cards which it has imported and sold do not contain any date of alleged copyright,—an essential element of the copyright notice required by section 4962, Rev. St. The phrases used in section 4963, viz. "such notice of copyright or words of the same purport" and "a notice of United States copyright," refer most clearly to the notice specified in section 4962; and, while

the courts have been liberal in holding any form of notice sufficient which contains the essentials of "name," "claim of exclusive right," and "date when obtained" (*Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279; *Bolles v. Outing Co.*, 23 C. C. A. 594, 77 Fed. 966), they have not yet sustained the sufficiency of a notice which wholly omits some one of these three essentials. The demurrer is sustained.

FRUIT-CLEANING CO. V. FRESNO HOME-PACKING CO. et al.

(Circuit Court, N. D. California. May 22, 1899.)

No. 12,529.

1. JURISDICTION OF COURT—PARTNERSHIP NAMED AS PLAINTIFF.

The introductory part of a bill was as follows: "The Fruit-Cleaning Company, a co-partnership consisting of [three persons, named in full], doing business at the city of Brooklyn, in the state of New York, complainant, brings this, its bill of complaint," etc. The bill further alleged that, "at all the times hereinafter mentioned, the said [naming such three persons] were and are co-partners in trade under the firm name and style of the Fruit-Cleaning Company, having its principal place of business at the City of Brooklyn, in the state of New York." *Held* that, while the co-partnership was named as the complainant, the bill sufficiently disclosed the real parties in interest, and therefore should not be dismissed, after answer, on the ground that there was no legal party plaintiff sufficient to give the court jurisdiction.

2. PATENTS—PARTNERSHIP AS PATENTEE—VALIDITY.

A co-partnership, to which an invention has been assigned, possesses legal capacity to take the legal title to a patent when issued; and hence a patent issued to the co-partnership, as patentee, is valid, and confers the exclusive right to the invention.

3. SAME—INVENTION—COMMERCIAL SUCCESS.

Though one follows the general ideas of a patent issued many years before, yet if, by adding thereto other devices, he produces the first machine, which, in a commercial sense, successfully performs the work sought to be done, he is entitled to a place among inventors.

4. SAME—CONSTRUCTION OF CLAIMS—REFERENCE TO SPECIFICATIONS.

If a claim contain the phrase, "substantially as described" or its equivalent, the entire specification is entitled to be considered in connection with the claim.

5. SAME—INFRINGEMENT—MECHANICAL EQUIVALENTS.

In a raisin-seeding machine, a laminated rubber roll employed to force the fruit upon the teeth of a carrier is the mere mechanical equivalent of a brush roll, used for the same purpose, and its substitution therefor does not avoid infringement.

6. SAME—FRUIT OR RAISIN SEEDERS.

The *La Due* patent, No. 543,834, for a fruit-seeding machine, adapted especially to the seeding of raisins, construed, and *held* not anticipated, valid, and infringed, as to claims 1, 2, 3, 4, and 5, by the *Cox* patent, No. 608,108, and not infringed as to claims 6, 7, and 8.

John H. Miller and Tracy, Boardman & Platt (T. D. Merwin, of counsel), for complainant.

Wheaton & Kalloch and Bigelow & Titus, for defendants.

MORROW, Circuit Judge. This is a suit in equity for infringement of letters patent on mechanism for seeding fruit. The bill of com-

plaint describes the complainant as "the Fruit-Cleaning Company, a co-partnership consisting of Alfred Nicholls, George E. Lewis, and Charles F. Allen, doing business at the city of Brooklyn, in the state of New York." It is alleged that one George C. La Due, a citizen of the United States, residing at the city of Brooklyn, N. Y., was the inventor of mechanism for seeding fruit, and on the 23d day of May, 1895, applied for letters patent of the United States on the same; that, prior to the issuance of any patent therefor, the said La Due, by an instrument in writing executed as required by law, sold, assigned, and transferred to the Fruit-Cleaning Company all his right, title, and interest in and to the invention; that said assignment was filed in the patent office, and on July 30, 1895, letters patent of the United States No. 543,834 were granted to the Fruit-Cleaning Company for said invention, since which time the said company has been the sole owner and holder thereof, has made large numbers of machines containing the said invention, and upon each one has caused to be marked the word "Patented," with date and number of patent. The respondents are alleged to be the Fresno Home-Packing Company (a California corporation), L. L. Gray, Thomas H. Lynch, L. R. Payne, E. J. Gray, and John D. Gray, and to have infringed upon the rights of complainant by the making and using, within the two years last past, in the Southern district of California, machines containing and embracing the invention patented in and by said letters patent No. 543,834. Complainant alleges great and irreparable damage by reason of the infringement, and prays for a writ of injunction restraining respondents from making, using, and selling any machines containing said invention, for an accounting, and for costs of suit. Respondents, in their answer filed February 17, 1898, deny that George C. La Due was the original or first inventor of the said mechanism for seeding fruit, and aver that the alleged invention was described and patented in United States letters patent No. 56,721, granted to J. B. Crosby, of Boston, Mass., on July 31, 1866, for an improved raisin seeder or mechanism for seeding fruit. They admit the filing of an application for patent by said La Due; the assignment by him of his right, title, and interest in the same to the Fruit-Cleaning Company; and the granting of letters patent No. 543,834 to said the Fruit-Cleaning Company; but allege that the patent so granted was and is invalid by reason of the prior invention and patent of said mechanism by said J. B. Crosby, and there is therefore no infringement. A replication was filed to this answer on February 28, 1898, and the parties thereupon proceeded to take testimony. Respondents, on October 13, 1898, asked leave to file an amended answer, setting up as a defense the alleged defect in the character of complainant. The application was denied, and the case was set for argument on final hearing. Thereafter, on October 26, 1898, a motion was made by respondents to dismiss the bill of complaint, upon the grounds that no person, either natural or artificial, having capacity, power, or right to maintain a suit in this court, is named as complainant in said bill, the Fruit-Cleaning Company being neither a corporation nor a natural person, but only the fictitious name of a co-partnership, not a party constituting any actual

or legal entity, and therefore incapable in law of being a complainant in this suit; also, that no person or entity, either natural or artificial, is named as complainant over whom this court can exercise any jurisdiction. It is admitted by the respondents that it is too late to raise the objection of a mere defect of parties by demurrer, but it is contended that the motion to dismiss is proper at this time, for the reason that there is an entire absence of a party plaintiff; that, without such a party, the court has no jurisdiction to try any of the issues of fact tendered by the bill of complaint; and that this objection can be raised in any form and at any stage of the proceedings. It is not a question of federal jurisdiction based upon allegations of diverse citizenship of the parties to the action. The federal jurisdiction is invoked in this case on the ground that it is a suit in equity arising under the patent laws of the United States. Nor is it a question of misjoinder or nonjoinder of parties plaintiff, but it is the legal question whether there is an actual party plaintiff in the case. If there is no such party capable of maintaining this action, then the case should be dismissed.

The introductory part of the bill now under consideration is as follows: "The Fruit-Cleaning Company, a co-partnership consisting of Alfred Nicholls, George E. Lewis, and Charles F. Allen, doing business at the city of Brooklyn, in the state of New York, complainant, brings this its bill of complaint," etc. This is in form, at least, a substantial compliance with equity rule No. 20, which requires that every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties plaintiff. But it is objected that the Fruit-Cleaning Company, which is here set forth as the plaintiff, is the name of a co-partnership that does not contain the names of the partners, and no federal or state statute authorizes an action to be brought by plaintiff in a co-partnership or firm name. The answer to this objection is that, while the co-partnership name does not itself disclose the names of the co-partners, they are given in the title to the bill of complaint, and these names so declared constitute as much a part of the introduction to the bill as the name of the co-partnership. But the bill goes further, and alleges "that, at all the times hereinafter mentioned, the said Alfred Nicholls, George E. Lewis, and Charles F. Allen were and are co-partners in trade under the firm name and style of the Fruit-Cleaning Company, having its principal place of business at the city of Brooklyn, in the state of New York." This specific averment as to the parties composing the firm or partnership named as plaintiff discloses the real parties in interest, and informs the respondents of the names of their adversaries. These are the parties to whom the court will resort, if necessary, to compel obedience of orders, and to enforce the payment of any costs awarded in favor of the respondents. *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204; 1 Daniell, Ch. Prac. (6th Am. Ed.) 357. The objection that there is no party plaintiff to the action cannot, therefore, be sustained.

It is next objected that the plaintiff has no title to the invention patented. This objection was not taken in the pleadings, but, on the contrary, respondents in their answer "admit that on the 23d day of

May, 1895, the said George C. La Due filed in the patent office of the United States an application praying for the granting and issuing of letters patent of the United States for the same; that, prior to the granting and issuing of any patent therefor, the said La Due did, by an instrument in writing, under his hand and seal, executed as required by law, assign and transfer to said complainant, the Fruit-Cleaning Company, all his right, title, and interest in and to said invention, and did by said assignment request the commissioner of patents to issue such patents to said complainant, the said Fruit-Cleaning Company, and that said assignment was in writing, and was filed in the patent office of the United States prior to the granting and issuing of any patent for said invention." Respondents further admit "that, after proceedings had and taken in the matter of said application, and on the 30th day of July, 1895, letters patent of the United States thereunder, dated on that day, and numbered 543,834, were granted, issued, and delivered by the government of the United States to said complainant, the Fruit-Cleaning Company." The respondents further admit "that said letters patent were issued in due form of law, under the seal of the patent office of the United States, and were signed by the secretary of the interior, and countersigned by the commissioner of patents of the United States, and that prior to the issuance thereof all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions." These admissions on the part of the respondents constitute all the facts necessary in this case to establish the complainant's title to the patent, and enable it to maintain this action for its infringement.

It is contended, however, that it appears from the complaint that the patent to the invention was issued to a co-partnership; that a co-partnership has no legal capacity to take the legal title to a grant; and therefore the patent is void. But a patent right is an incorporeal kind of personal property (*Shaw Relief-Valve Co. v. City of New Bedford*, 19 Fed. 753; *Bradley v. Dull*, Id. 913; *Vose v. Singer*, 4 Allen, 230; *Machine Co. v. Featherstone*, 147 U. S. 209, 222, 13 Sup. Ct. 283), and, in a certain sense, analogous to property in a share of stock (*Hall, Pat. Est.* § 14). The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by securing a patent from the government in the manner provided by law. This right the inventor may, under the law, assign before the patent is issued, and request that the patent be issued to the assignee. When the patent is issued, an exclusive right to the invention for the statutory period has been created and vested in the assignee. *Gayler v. Wilder*, 10 How. 477.

In *Bloomer v. McQuewan*, 14 How. 539, the supreme court, by Chief Justice Taney, said:

"The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented. This is all that he obtains by the patent."

In *Jordan v. Overseers*, 4 Ohio, 309, the supreme court of Ohio said:

"This leads us to consider the nature and extent of such rights as accrue from letters patent for useful discoveries. Although the inventor had, at

all times, the right to enjoy the fruits of his own ingenuity in every lawful form of which its use was susceptible, yet before the enactment of the statute he had not the power of preventing others from participating in that enjoyment to the same extent with himself; so that, however the world might derive benefit from his labors, no profits ensued to himself. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using it is not enlarged or affected."

The court of appeals of Kentucky, in *Patterson v. Com.*, 11 Bush, 315, said:

"The right of the appellant to sell oil is not derived from the patent laws of congress. If no patent had been issued, the right to sell this character of property would exist, and the only benefit to be derived from the patent is that it excludes others from selling the same kind of oil for a limited period, unless authorized to do so by the patentee, with the additional right on the part of the latter to sell and transfer his patent right in the mode prescribed by the patent laws."

Section 4898 of the Revised Statutes of the United States provides that:

"Every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States."

An oral agreement for the sale or assignment of the right to obtain a patent is not invalid; if sufficiently proved, it can be specifically enforced in equity. *Somerby v. Buntin*, 118 Mass. 279; *Dalzell v. Manufacturing Co.*, 149 U. S. 315, 320, 13 Sup. Ct. 886.

The technical rules that would render void a grant of real property are manifestly inapplicable to the right of property in an invention confirmed by a patent. It is common knowledge that a partnership may acquire the title to an invention in the name of the partnership after the patent has been issued, in the same manner as it would acquire the title to any other personal property, and there does not appear to be any good reason why it may not do so before the patent has been issued. The grant in the patent of an exclusive right does not change the character of the property. A conveyance of personal property to a partnership in its firm name conveys the title, and the property becomes partnership property. But, conceding that resort should be had to the law relating to grants of real estate for the purpose of defining and construing rights secured under letters patent for an invention, we do not find that under that law the patent is void because the grant of an exclusive right has been made to a co-partnership.

In *Kelley v. Bourne*, 15 Or. 476, 484, 16 Pac. 40, it was held that a deed conveying real estate to a partnership by its firm name, if ineffectual to transfer the legal title, was valid and binding as a contract, and created an equitable estate in the land described.

In *Dunlap v. Green*, 8 C. C. A. 600, 60 Fed. 242, the action was trespass to try title. In plaintiff's chain of title was a deed to a partnership by the firm name of Darcy & Wheeler. It was held that:

"A deed is void which does not in some way point out the grantor and grantee. The usual method of describing a person is by giving his name in full. But this is not the only method. Any other description would suffice which would distinguish him from others; as, for example, where one is

described by his office or by his relation to other persons. 5 Am. & Eng. Enc. Law, 432, and cases there cited. * * * The office of a name at common law is merely to identify, and for that purpose the description in the deed objected to seems to be sufficient. If evidence should develop that there was more than one Wheeler in the city of New Orleans, state of Louisiana, or more than one firm of Darcy & Wheeler in said city, it would merely be a case of latent ambiguity, arising from extraneous evidence, capable of being removed, and in every such case of doubt the true party may be shown by parol."

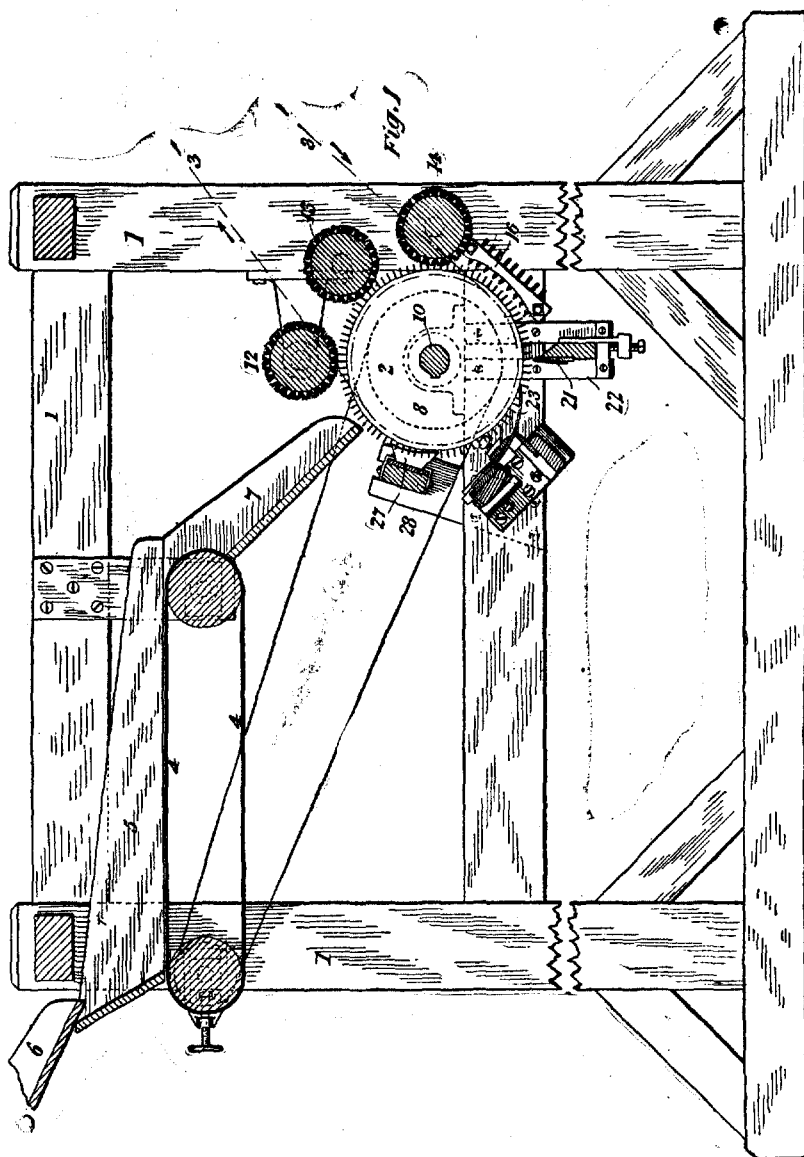
The doctrine of these two cases, applied to the grant in the present case, would alone be sufficient to dispose of the respondents' objection to the complainant's title to the patent in suit.

The subject-matter in controversy is a mechanism for removing the seed of fruit from the pulp or body thereof, especially dried fruit, such as raisins, currants, etc., consisting mainly of a cylinder built up of a series of toothed disks, spaced with smaller plain disks, and clamped upon a shaft or mandrel, the space between the toothed disks and between the several teeth of each disk being less than the diameter of a raisin seed; three cylinders, having elastic surfaces formed of bristles, arranged adjacent to the toothed cylinder, and progressively closer to it; suitable devices for the feeding of the fruit between the first of these rolls and the toothed cylinder, and for the carrying of the fruit thence around and under the other bristle-covered rolls, which rolls, in turn, impale the fruit upon the surface points or teeth, and press the fruit until the skin is ruptured and the seeds thrust out; a series of stripping wires, arranged tangentially in the grooves between the disks of the toothed cylinder, which serve to push the fruit off from the teeth; and cleaning blades, arranged in these grooves, for the purpose of wiping off from the teeth the free pulp exuding from the fruit and adhering to the teeth. The accompanying drawings illustrate the details of construction, and are explained as follows:

"Fig. 1 is a central vertical longitudinal section of a machine embodying my improvements. Fig. 2 is an enlarged detailed cross section of the fruit-carrying or impaling roll, taken between the circular plates composing the same. Fig. 3 is a lengthwise detail section of said roll, looking from the left hand of Fig. 2. Fig. 4 is an enlarged detailed view of the fruit-stripping devices, as viewed in the direction of the upper arrow of Fig. 2. Fig. 5 is a similar detail view of the carrier roll cleaning blades. Fig. 6 is an enlarged detailed section, similar to Fig. 1, of the carrying roll, showing certain modifications, to be hereinafter more fully described.

"Referring to the views in detail, 1 represents the general framework of the machine; 2 represents, as a whole, the fruit-carrying roll or the surface upon which the fruit is impaled for the purpose of removing the seed therefrom. This roll is driven by belt, 3, and it in turn drives the endless feeding belt, 4, which runs along the bottom of trough, 5, into which the fruit is fed, as from the spout, 6; 7 being a long spout inclined from the vertical, which delivers the fruit upon the carrier roll. The belt, 4, acts to agitate and separate the raisins, and to deliver the same singly, or in a single layer, to the delivery trough, 7, down which they fall upon the carrier roll, and are thereby separated, and the movement of the roll keeps them in motion, so that they will not stick together, but will be carried forward singly or in a single layer.

"The carrier roll, 2, is composed of toothed plates, 8, alternating with spacing plates, 9, which are properly bound together and fixed to the shaft of the roll, 10, the roll being supported in suitable journals on the frame of the machine. The teeth, 11, of the alternate plates of this roll, are perfectly



square in cross section, and the length thereof is such as conforms to the thickness of the fruit to be operated upon, while the space between any two adjacent teeth is less than, or at least does not exceed, the average smaller diameter of the seed of the fruit.

"12 is a removable brush roll, journaled in brackets or other like supports fixed to the machine, and which roll is the impaling roll, or the one which forces the fruit upon the teeth of the carrier, the roll being so adjusted relatively to the fruit-carrier surface, and the character of its surface of fiber, bristles, or other yielding substance being such, that the fruit is impaled

upon the teeth without being at least to any essential extent ruptured by the action of the roll. 13 is a similar roll, similarly mounted, but adjusted somewhat nearer to the carrier surface, and the bristles or operative surface of this roll may be stiffer or less yielding than that of the roll 12. The function of this roll is to perforate the skin of the fruit lying over the seeds of the impaled fruit, preliminary to the unimpaled portion of the fruit being pushed from off the seeds. 14 is a similar roll, similarly supported on the frame, the brush or yielding surface of which is adapted to engage the perforated skin of the fruit, and press the same down upon the main body of the fruit; thus leaving the seeds upon points of the carrier surface, but stripped of the skin and pulp of the fruit. These rolls are driven by contact with the surface of the carrier roll, or they may be driven by belting,—such, for example, as is seen at 15, in Fig. 6. Their peripheral speed, however, should be the same as that of the surface of the carrier roll.

"16 indicates a frame, and a series of longitudinal wires carried thereby, under tension, and located at different distances, or at distances whereby the first wire 17 (Fig. 2) is at a distance from the carrier surface somewhat less than the average thickness of the fruit seed, while the intermediate wires

Fig. 3

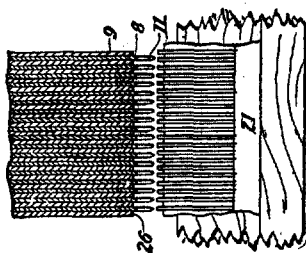


Fig. 5



Fig. 2

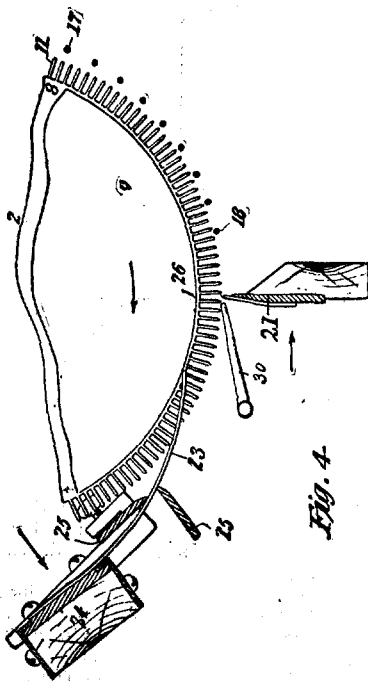


Fig. 4

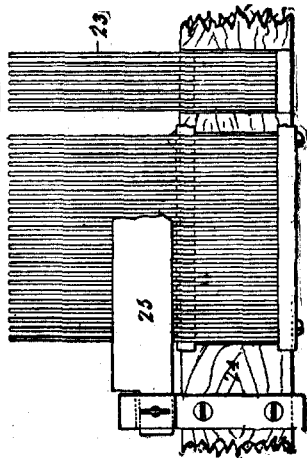
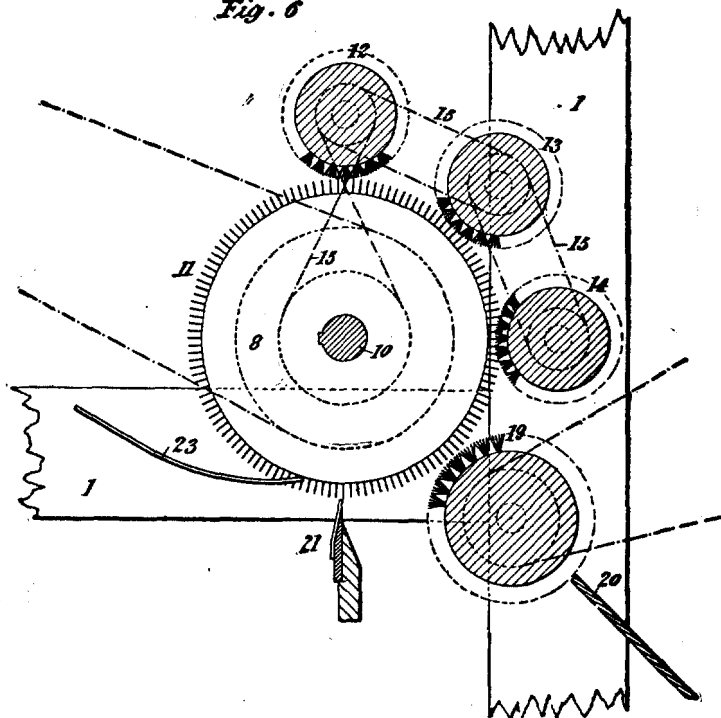


Fig. 6



set successively slightly closer to the surface of the carrier roll, the last wire, 18, just escaping the points of the carrier teeth. The purpose of these wires is to remove the seeds which have been excluded from the fruit impaled upon the carrier surface. As the seeds roll under and out from or are brushed off by these wires, the wires are caused to vibrate, and thereby further assist in moving the seeds by their vibrating or flicking action, and at the same time prevent undesirable accumulation of gum upon the same. In lieu of the use of such wires, a rapidly revolving roll, such as the brush roll, 19, of Fig. 6, may be employed, and which has a peripheral speed considerably greater than that of the speed of the carrier roll. Other like or similar acting devices may be used for removing the excluded seed from the impaling points, the desirable action of such device being that of a flicking or whisking nature. In the use of such a roll or like device, a guard or cleaner, 20, may be employed, the purpose of which is to restrain and confine the flying seed as well as to remove the same from contact with the seed-removing roll. To insure the removing of the seed from the carrier surface that may pass the last wire, 18, a comb, 21, is provided, the teeth of which just clear the points of the teeth of the carrier surface.

"If it be desired, the wires, 17 and 18, may be omitted, and the comb alone used, but preferably with an air-blast nozzle, 20, which is located to direct a jet of air, under pressure, to between the points of the comb and the impaling surface, whereby the seeds will be blown off. In the case of the use of an air-jet, the comb may be omitted, or it may be employed with one or more of the wires, 17, 18, or the wires alone be used; the comb or the wires, or both, acting to loosen the seed, and the jet acting to remove them. This comb is mounted in removable supports, 22, so that it can be taken from the machine and cleaned at any time when needed, and another put in its place.

"23 indicates a series of fruit-stripping wires, which are secured to the

crossbeam, 24, removably mounted in the frame. Adjustable bearing blades, 25, are provided, whereby the wires are brought to a common plane, and the desired pressure of the same upon the carrier roll is effected. Preferably, these wires are slightly curved, as shown, but in substantial effect they are arranged tangentially to the carrier. The points of the wires rest in grooves, 26, between the toothed plates, 8, of the carrier roll, and upon the edges of the spacing plates, 9, the spacing plates being of smaller diameter than is the circle of the bottom of the spaces between the teeth of the toothed plates, and preferably the thickness of the points of these wires is not in excess of the depth of the grooves so formed, whereby it is insured that the points of the fingers will be beneath the fruit when the same reach the fingers, as the carrier rotates. The function of these wires is to strip the seeded fruit from the carrier teeth. It is essential to this stripping action that the fingers bear stiffly on the carrier, so as not to have any vibratory or relative movement, and be composed of long slender wires, in contradistinction to blades or plates.

"27 indicates a series of scraping or cleaning blades mounted on the bar, 28, removably supported on the frame of the machine. These plates are of the general segmental form shown in Fig. 5, and their curved or working edges, 29, lie in the grooves, 26, and in contact, or very nearly so, with the edges of the spacing plates, 9, of the carrier roll, the thickness of these scrapers being practically that of the said spacing plates. The function of these plates is to scrape off any gum that may collect in the grooves, 26, or on the grooved sides of the teeth of the carrier."

In regard to the commercial requirements of a suitable mechanism for seeding raisins, the inventor says in his specifications:

"In seeding raisins mechanically in practical quantities, and by impaling the same on a surface of points or teeth, and with the purpose of not destroying the natural form of the fruit and of not wasting the pulp of the fruit, the following conditions have to be considered: If the impaling points are sufficiently slender to not unduly rupture or tear the raisins, nor force therefrom the pulp thereof, then, by reason of the toughness of the skin, it is not practicable to force the raisins upon the impaling points by a single action, so as to at the same time drive the seeds from the fruit without injuring the impaling teeth. If the impaling teeth be sufficiently strong to sustain a single impaling and seed-removing action, then they would be so large as to undesirably rupture and force out much of the pulp of the fruit, and the force of such action would have to be in excess of the resistance of the seeds, and would crush them, which would spoil the fruit for commercial and consumption purposes."

And, particularizing the improvements contained in his invention, he states:

"The essential features of operation of my mechanism consist in first partially impaling the raisins upon the pointed or toothed surface, or so that the teeth will only perforate one side or through the skin on one side of the fruit, and engage and force the seeds to contact with the skin on the opposite side of the fruit, and in then puncturing or rupturing the skin over the seed, and pressing the same and the underlying pulp farther upon the impaling teeth; the actions of impaling the fruit, opening the same, and forcing the seed therefrom being separately effected, in contradistinction to the action of a roll which forces the fruit upon the teeth, and expresses the seed by a single pressure."

The difficulties previously experienced in seeding raisins, by reason of the gummy pulp of the fruit adhering to the working parts of the machine, and clogging its action, is remarked, and the inventor's method of disposing of this annoyance is thus explained:

"This clogging takes place particularly on the impaling teeth, and on the devices which strip or remove the fruit from the impaling teeth, which latter, as heretofore employed, act to increase this difficulty, in that they have consisted

of blades or devices of extended or plane surfaces, adapted to collect the gum, and bind the stripped raisins together into clogging masses; whereas, it is desirable that the raisins be singly stripped, and fall away from the impaling surface without adhering together. My improvement in this regard relates to the use of stripping wires in contradistinction to blades or fingers, and in supporting said wires in such manner that they may be readily removed and substituted by other like wires while one set of stripping wires is being cleansed. It is essential that the raisins be delivered singly, or not in masses, to the impaling surface, in order that they shall not overlaid one another when submitted to the impaling action, and to this end I provide means whereby the raisins are dropped upon such surface, and kept agitated or in motion, so as to be separated, if clinging together, and caused to feed singly to the impaling device. It is also highly essential that the impaling teeth be kept clean of collections of gum or pulp, and to this end I provide cleaning blades that lie in the grooves or between the teeth of the impaling surface, and collect whatever gum may pass the strippers, which cleaning blades are mounted upon movable supports, so that one set thereof may be substituted by another while the former is being cleansed."

The patent contains 11 claims. Complainant claims infringement of the first eight claims, and contends that, even admitting the respondents' utmost claim as to the technical use of the words "puncture" and "perforate," claims 2, 3, 4, 5, 6, and 7 would be clearly infringed. The claims read as follows:

"(1) In combination in a machine for seeding fruit, a carrier for conveying the fruit, which is provided with a series of points or teeth spaced to engage the seed of the fruit, a pressure mechanism, the surface of which moves to and from the carrier and acts to partially impale the fruit upon the carrier, and a puncturing mechanism, the surface of which moves to and from said impaling surface, and acts, subsequently to the action of said impaling mechanism, to perforate the skin over the seeds of the impaled fruit, for the purpose of uncovering the seed of the fruit.

"(2) In combination in a machine for seeding fruit, a carrier for conveying the fruit, which is provided with a series of points or teeth spaced to engage the seed of the fruit, pressure mechanism, having motion angularly with relation to the carrier, and acting to partially impale the fruit upon the carrier, and by further action to puncture or rupture the skin over the seeds of the impaled fruit, to free the seed preliminarily to removing the same from the body of the fruit.

"(3) In combination in a machine for seeding fruit, a roll for receiving and conveying the fruit, the surface of which is provided with a series of points or teeth spaced to exclude the seeds of fruit impaled thereon, a pressure roll acting to partially impale the fruit on the carrier teeth so that they engage the seed preliminarily to removing the same from the pulp, and a brush roll, acting to rupture the skin of the fruit lying on, and to force the same off, the seed, substantially as set forth.

"(4) In combination in a machine for seeding fruit, a carrier roll provided with a series of points or teeth spaced to exclude the seed of the fruit, a roll acting to partially impale the fruit on the carrier so that its teeth engage the seed, a roll acting to puncture or rupture the skin of the fruit lying on the seed, and a roll acting to force the punctured skin and pulp of the fruit from around the exposed seed, substantially as set forth.

"(5) In combination in a machine for seeding fruit, a carrier roll provided with a series of teeth spaced to engage and exclude the seeds of fruit impaled thereon, and a series of two or more rolls adjusted at different distances from said carrier, and successively acting to partially impale the fruit on the carrier teeth, and rupture and displace the skin of the fruit lying over the seed, preparatory to removing the seed, substantially as set forth.

"(6) In combination in a machine for seeding fruit, a carrier provided with teeth spaced to engage the seed of the fruit when impaled upon said teeth, a roll acting to partially impale the fruit upon the said carrier, a roll acting to

perforate the skin of the fruit over the seeds thereof, and a series of stripping wires, 23, located between the teeth, and acting to lift from the teeth the fruit impaled thereon.

"(7) In combination in a machine for seeding fruit, a carrier for conveying the fruit, composed of a series of spaced teeth, a series of two or more rolls acting to impale the fruit upon the teeth and exclude the seeds therefrom, and a series of cleaning blades, located in the circumferential spaces between the teeth, and acting to remove therefrom collections of pulp or gum, substantially as set forth.

"(8) In combination in a machine for seeding fruit, a carrier for conveying the fruit, composed of a series of spaced projections, pressure mechanism, acting to press the fruit upon the carrier, puncturing mechanism, acting independently of the pressure mechanism, to open the fruit and expose the seeds thereof, and seed-removing mechanism, operating to detach the seed from the said carrier."

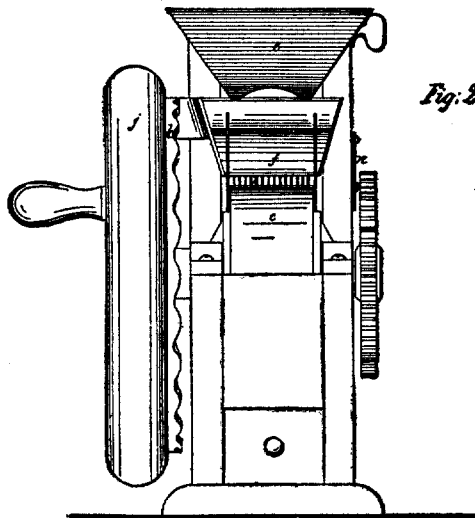
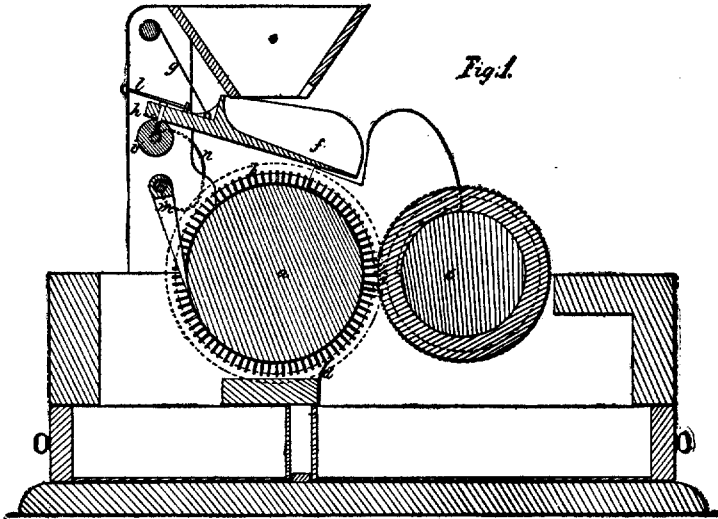
The letters patent No. 56,721, issued to J. B. Crosby, set up by respondents as anticipatory of the La Due machine, were granted on July 31, 1866, and are as follows:

"Be it known that I, J. B. Crosby, of Boston, in the county of Suffolk and state of Massachusetts, have invented a machine for removing the seeds from raisins and other similar dried fruit; and I do hereby declare that the following, taken in connection with the drawings which accompany and form part of this specification, is a description of my invention sufficient to enable those skilled in the art to practice it:

"This machine or apparatus operates by impaling the fruit by or upon a number of wires placed so closely together that, while the pulp of the fruit is forced upon the wires, the seeds, being hard and of too great size to enter the spaces between the wires, remain at the projecting ends or points thereof, and are thus thrust through the skin of the fruit, which breaks to allow their exit. The seeds then remaining at the wire ends, and beyond the body of the impaled fruit, are removed, after which the impaled pulp is taken off from the wires. Fig. 1 of the drawings shows, in vertical longitudinal central section, a machine embodying this invention, and Fig. 2 shows an end view of the same. In the cylinder or roll, a, are set the impaling wires, b, the ends thereof, in the rotation of a, impinging upon and slightly embedding in the surface of the cylinder or roll, c, covered or composed of elastic material, preferably vulcanized rubber, the roll, c, being provided with means by which it can be adjusted towards and from the cylinder, a, so that the ends of the wires may, by proper adjustment of the cylinder, c, just puncture through the skin of the fruit. In the operation of the machine, the rolls, a and c, turn towards each other at the same surface velocity, by the impact of the wires with the surface of roll, c. To guard against tearing the fruit by failure of the two cylinders to revolve at about the same surface speed, the rolls are geared together, as shown most clearly in Fig. 2. The machine being operated so as to cause the rolls, a and c, to turn towards each other, and raisins being presented to the action of the two rolls, they are seized in the bite thereof, and are forced by the bed or soft-surfaced roll, c, upon the wires, b; but the seeds remain at the ends of the wires, and embed into the soft surface of the roll, c. In the continued rotation of the rolls, the seeds remain at the wire ends till removed by contact with the scraper, d, which extends across the cylinder, a, just clearing the ends of its wires, b. The raisins may be supplied by hand, or a suitable hopper may be arranged to supply, from a quantity placed therein, the regular and proper number of raisins suited to the capacity of the machine. The hopper is marked e, and its shaking discharging bottom and spout, f. The angle at which the bottom, f, is set, and by which the discharge of the fruit is regulated, can be varied by means of the adjusting cord, g, the bottom, f, being pivoted at h to a rock shaft, i. The hand wheel, j, by which the machine is operated, is provided with a cam, k, acting on a projection from f, so that, in connection with the counter-acting spring, l, a sufficient side shake or vibration is given the bottom, f, to supply raisins to the action of the machine dropping them into the bite of the rolls. The wires are arranged at uniform distances apart, and in regular rows, around the cylinder, a, and between these rows are set a series of strippers, m,

which, as the cylinder, a, revolves, wedge off and remove the impaled pulp from the wires, the pulp falling into a suitable receptacle placed to receive it. The series of strippers is kept in place with the points thereof close in contact with the body of the cylinder by the spring, u, the series turning with the shaft on which they are mounted, and it is advisable to have slight grooves turned in the surface of the cylinder, a, to receive and steady the points of the strippers.

"I claim: (1) The employment of closely-set wires, in combination with a bed or presser, for the purpose of forcing out of raisins or similar dried fruit the seeds or stones thereof by the impalement of the pulp of the fruit on the wires, as specified. (2) The combination, with the above, of a seed remover or a pulp remover, or both, arranged to operate substantially as set forth."



The essential features of this patent are a toothed cylinder, the spaces between the teeth being narrower than the thickness of a raisin seed, a single rubber roll adjacent to the toothed cylinder, by means of which the raisins are impaled upon the teeth and the seeds excluded therefrom, suitable feeding devices, and means for stripping from the toothed cylinder the seeds and pulp of the fruit.

The Crosby patent appears to be the first mechanism disclosed embodying the fundamental idea of impaling the fruit upon a series of closely-spaced teeth by an elastic or yielding body, whereby the skin of the fruit is ruptured, and, with the pulp, pressed into the spaces between the teeth, the seeds being held upon the points until specially removed. But this device proved ineffectual for seeding fruit in commercial quantities, and permitted undue waste of the substance of the fruit, with more or less cracking of the seeds. Nearly 30 years later La Due entered the field of invention, and, though following the ideas embodied in the Crosby patent, by employing a plurality of presser rolls, adjusted progressively nearer to the toothed cylinder, instead of the single presser roll, he produced a fruit-seeding machine capable of handling 5,000 pounds of fruit in an hour, with a saving of about 4.99 cents per pound over the processes previously in use. This great increase in speed and saving in cost brought the machine up to commercial requirements, and it may be practically considered the first successful fruit-seeding machine. The fact that he succeeded where many failed, entitles him to a place among inventors. *Bath Co. v. Mayor*, 77 Fed. 736; *Telephone Cases*, 126 U. S. 1, 2, 8 Sup. Ct. 778; *Loom Co. v. Higgins*, 105 U. S. 580; *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 11 C. C. A. 528, 63 Fed. 962; *Western Electric Co. v. Capital Telephone & Telegraph Co.*, 86 Fed. 769; *Willcox & Gibbs Sewing Mach. Co. v. Merrow Mach. Co.*, 93 Fed. 206.

The validity of the complainant's patent having been determined, the decision of the court must depend upon the question of infringement.

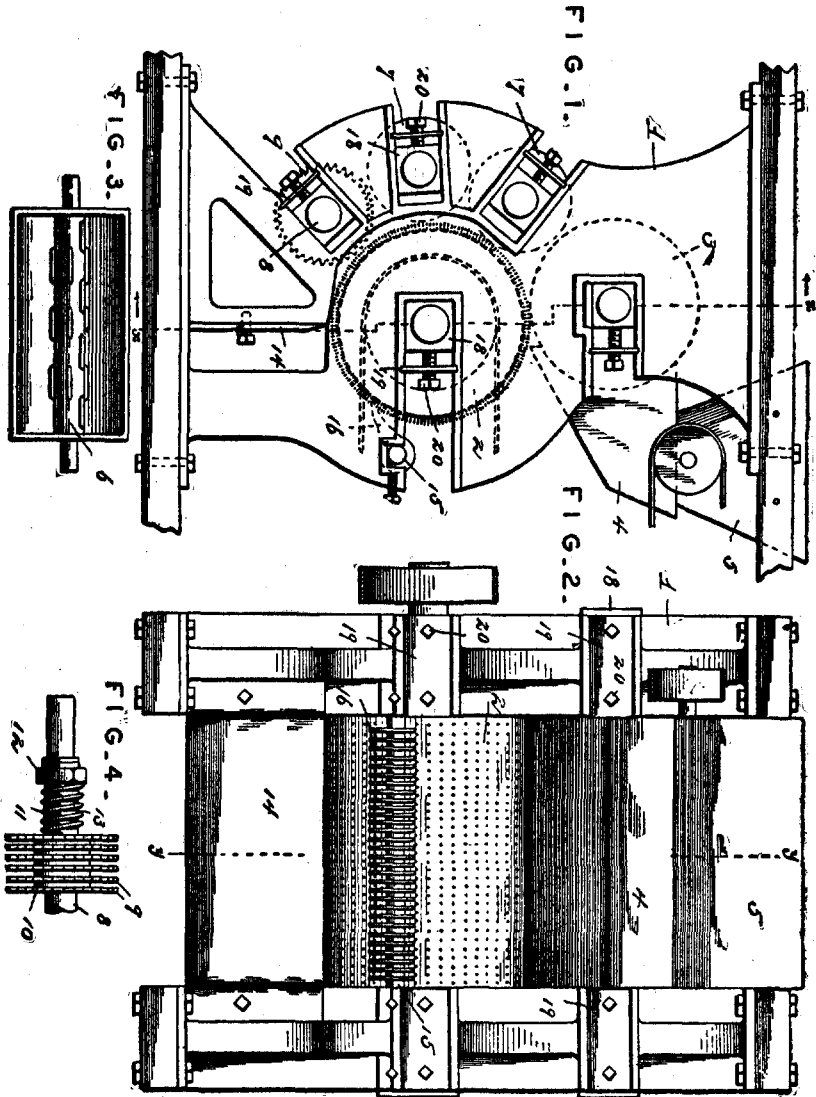
It appears that respondents' machines were made in accordance with letters patent of the United States numbered 608,108, granted on July 26, 1898, to Cary S. Cox, of Fresno, Cal., and to the Phoenix Raisin-Seeding & Packing Company, as assignee of one-half thereof, excepting that the roller made up of serrated disks, termed a "seed loosener," and shown in Fig. 8 of the patent, was not in respondents' machine. The specifications and drawings of the Cox patent are as follows:

"Be it known that I, Cary S. Cox, residing at Fresno, in the county of Fresno and state of California, have invented certain new and useful improvements in raisin seeders; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same:

"This invention relates to a machine or apparatus for seeding raisins; and it consists, essentially, of a pair of rolls operated to turn towards each other, and one of which is provided with impaling projections so closely arranged that, while the pulp of the fruit is forced into the same, the seeds, being hard and of too great size to enter the dividing spaces, remain at the projecting ends or

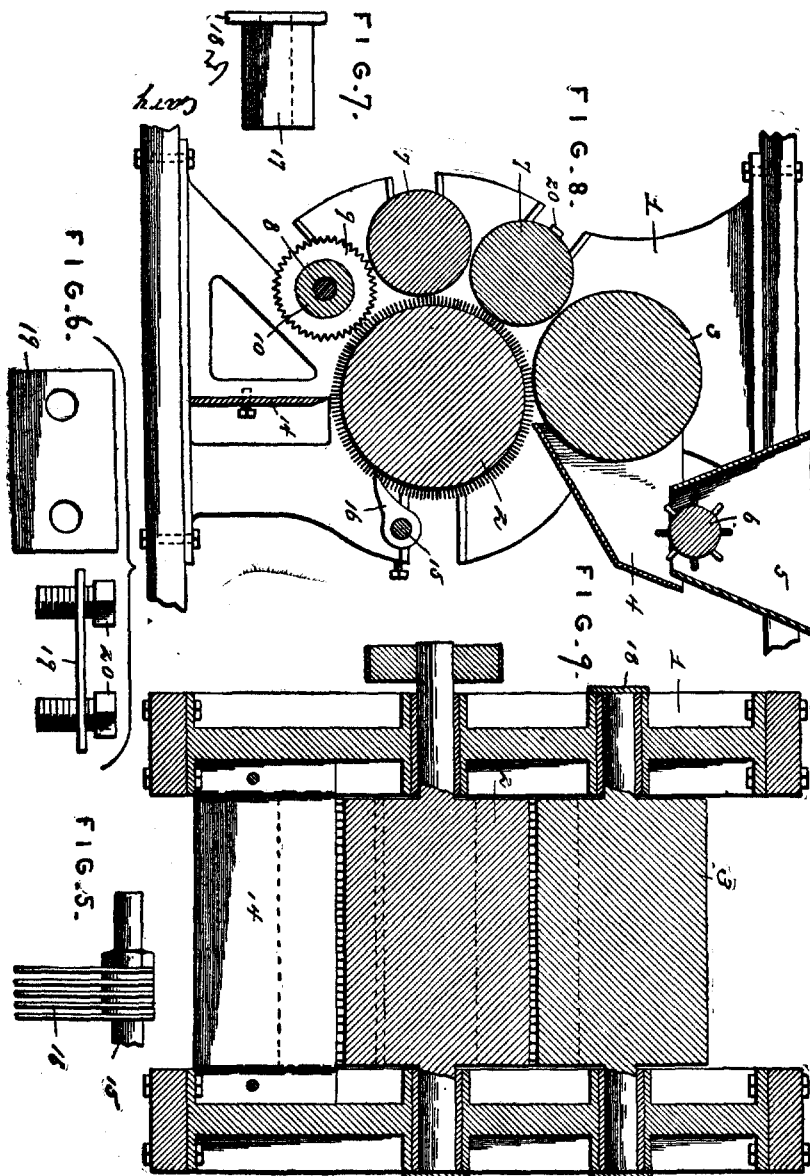
points thereof, and are thus thrust through the skin of the fruit, which breaks to allow their exit, and are afterwards removed by auxiliary devices, which will be hereinafter fully set forth, and forming the gist of this invention; the said impaling devices being acted upon by suitable strippers, located at a proper point, to release the raisins from the roll after they have been seeded. The invention further consists in the details of construction and arrangement of the several parts, which will be more fully hereinafter described and claimed. The present invention, as all others of this class, is based upon the principle established by the mechanisms shown and described in the patent to J. B. Crosby, No. 56,721, dated July 31, 1866, and in view of which other inventions have been invented by me, and it is intended that the present device add still further to the improvements. It is the object of the present invention, therefore, to render devices of the character specified more positive and satisfactory in their operation through the medium of attachments which will facilitate the thorough seeding of the raisins, and conveniently separate the seeds from the pulp; the parts being simple and effective in their construction and operation, strong and durable, easily and readily operated, and comparatively inexpensive in cost of manufacture. In the accompanying drawings, Fig. 1 is a side elevation of a machine embodying the invention, showing parts in dotted lines. Fig. 2 is a front view of the machine. Fig. 3 is a detail view of the hopper used in connection with the device. Fig. 4 is a detail view of the seed loosener. Fig. 5 is a detail view of the stripper. Fig. 6 shows detail views, in edge and front elevations, of plates used to secure adjustment of the bearings. Fig. 7 is a detail view of one of the bearings. Fig. 8 is a vertical longitudinal section on the line, y, y, Fig. 2. Fig. 9 is a transverse section on the line, x, x, of Fig. 1. Referring to the drawings, wherein similar numerals of reference are employed to indicate corresponding parts in the several views, the numeral 1 designates an adjustable metal frame constructed with openings and supports for the adjustment and proper positioning of the several rolls and incidental devices, which will be presently more particularly referred to. In the center of the frame is mounted an impaling or perforating roll, 2, having peripheral projections arranged closely together and circumscribing the entire roll. Engaging the said impaling or perforating roll is an upper rubber frictional roll, 3, both of said rolls being driven towards each other, and at their point of engagement, or near the same, the lower end of a chute, 4, is directed, which leads from the bottom of a hopper, 5, positioned at the upper portion of the machine, and having therein a feed roller, 6, from which, at regular intervals, feeding projections extend of a length sufficient to draw the raisins around towards the bottom outlet of the hopper. Coacting with the impaling or perforating roll, 2, are adjacent holding rolls, 7, adjustably mounted, and below the lowermost holding roll, 7, is a seed loosener comprising a shaft, 8, on which are a series of serrated disks, 9, spaced apart from each other a suitable distance by intermediate washers, 10. These serrated disks are loose on the shaft, 8, and have an independent movement. Surrounding the shaft, 8, is a coil spring, 11, which exerts a tension on the disks, and is adjustable through a nut, 12, to increase or decrease the said tension, the said nut being movable on a screw-threaded surface, 13. These seed-loosening disks strike and are carried around by the impaling or perforating roll, 2, and clear out the seeds by a dragging movement, and cause them to fall away from the impaling or perforating roll. To further cleanse and remove the seeds, a knife, 14, is positioned in advance of the seed loosener, and is gaged to a line with the plane of the outer terminating ends of the devices carried by the impaling or perforating roll. Above the said knife, 14, a shaft, 15, is mounted in the frame, 1, and carries a series of strippers, 16, which bear against the roll, 2, between the peripheral projections thereon, and strip the latter of the seeded pulp. The bearings of the shafts are made adjustable by means of sleeves, 17, having outer rectangular heads, 18, and made adjustable in the openings in the machine frame, and in said openings, on opposite sides, metal plates, 19, are mounted, and carry set screws, 20, which engage the sleeves or boxes, 17, and are used for adjusting the said sleeves, and consequently the rolls or rollers used therewith. These plates, 19, slip in from either side in a groove, and, while they hold the rolls in perfect adjustment, they can at any time be removed by loosening the set screws for the purpose of disconnecting the rolls for the purpose of cleaning or

repairing the same. If the seed loosener does not completely remove the seed from the pulp, the knife in advance of the same will fully complete this operation, and it will be understood that the serrated disks not only break the skin of the fruit and pull away the seeds that may have been forced out by engagement with the projections of the impaling or perforating roll, 2, but also attack the pulp in such manner as to loosen up the seed which may still remain therein. In their operation the seed looseners operate between the projections of the said impaling or perforating roll, and by an independent motion cause the seed to be pushed to the outer terminations of the said projections, and to be taken off by the knife. It is obviously apparent that many minor changes in the details of construction, proportions, and dimensions of the several parts might be made,



and substituted for those shown and described, without in the least departing from the nature or spirit of the invention.

"Having thus described the invention, what is claimed as new is: (1) In a machine of the character described, the combination of an impaling or perforating roll, adjustable rolls coacting therewith, a seed loosener, comprising a shaft supporting a series of independently movable serrated disks, a knife in advance of said seed loosener, and stationary strippers for removing the pulp



from the impaling or perforating roll, substantially as described. (2) In a machine of the character described, the combination of an impaling or perforating roll having peripheral projections, a hopper with a feed roll, a chute leading from said hopper to the impaling or perforating roll, a roll above the impaling or perforating roll and coacting therewith, adjustable side rolls, also coacting with the impaling or perforating rolls, a seed loosener consisting of a shaft supporting a series of serrated disks having independent movement on said shaft, a spring engaging said disks and having an adjusting nut bearing thereon for regulating the movement of the disks, a knife in advance of said seed loosener, and strippers to engage the impaling or perforating roll, substantially as described."

Omitting from the Cox patent the device termed a "seed loosener," a reading of the claims and specifications, and examination of the drawings, readily show that not only the general appearance of the machines, but, with certain exceptions to be noticed hereafter, the various parts and the results of their operation, are almost identical. In complainant's machine there is a carrier for conveying the fruit, which is provided with a series of teeth spaced to engage the seed of the fruit. In respondents' machine this mechanism is described as an impaling or perforating roll. In complainant's patent there are two or more rolls adjusted at different distances from the carrier, and successively acting by pressure to partially impale the fruit on the carrier teeth, and rupture and displace the skin of the fruit lying over the seed, preparatory to removing the seed. In respondents' machine there are adjustable pressure rolls, coacting with the impaling or perforating rolls, which perform substantially the same function as the corresponding rolls in complainant's patent. Considering the pressure mechanism, we find that in the claims of complainant's patent the character of the material forming the different pressure rolls is not specified, except in claim 3, which describes the second roll of the pressure mechanism as "a brush roll acting to rupture the skin of the fruit lying on, and to force the same off, the seed, substantially as set forth." In construing a patent, if explanation is required, the entire description of the invention is applicable to the true interpretation of the claims. 2 Rob. Pat. § 745; Johnson v. Root, 1 Fish. Pat. Cas. 351, Fed. Cas. No. 7,411.

If a claim of a patent contain the phrase, "substantially as described," or its equivalent, the entire specification is entitled to be considered in connection with the claim. The third, fourth, and fifth claims of complainant's patent conclude by a reference to the specifications, "substantially as set forth." Accordingly, examining the explanation of the drawings, we find that "12 is a removable brush roll, journaled in brackets or other like supports fixed to the machine, and which roll is the impaling roll, or the one which forces the fruit upon the teeth of the carrier; the roll being so adjusted relatively to the fruit-carrier surface, and the character of its surface of fiber, bristles, or other yielding substance being such, that the fruit is impaled upon the teeth without being, at least to any essential extent, ruptured by the action of the roll." And again: "13 is a similar roll, similarly mounted, * * * and the bristles or operative surface of this roll may be stiffer or less yielding than that of the roll 12." Also: "14 is a similar roll, similarly supported on the frame, the brush or yielding surface of which," etc. This language

is sufficiently broad to include rolls having a rubber surface, and so deprives respondents of one of the novel features claimed in their invention. In fact, by reference to the file wrapper, we find that the examiner refers to a fluted rubber roll as a mere interchange of well-known equivalents for a brush roll, in considering a prior application for patent by La Due, complainant's assignor. A change of well-known material alone is not invention. 1 Rob. Pat. § 243; *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. 1027. "In determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines, or their several devices or elements, in the light of what they do, or what office or function they perform, and to find that one thing is substantially the same as another, if it performs substantially the same function, in substantially the same way, to obtain the same result." *Machine Co. v. Murphy*, 97 U. S. 120. "The superior utility of the defendant's machine is not of itself a certain test, because it may contain the whole substance of the plaintiff's invention, and something in addition, and yet be an infringement." *Pitts v. Wemple*, 5 Fish. Pat. Cas. 10, Fed. Cas. No. 11,194. It follows that the respondents, in substituting laminated rubber rolls for brush rolls, in the pressure mechanism operating with the impaling or perforating roll, have infringed claims 1, 2, 3, 4, and 5 of complainant's patent.

The stripping blade of respondents' machine appears to operate as a substitute for the two distinct devices of complainant's patent, which are the essential elements of claims 6 and 7. These devices are (1) the stripping wires, located between the teeth, and acting to lift from the teeth the fruit impaled thereon, described in claim 6; and (2) the cleaning blades, located in the circumferential spaces between the teeth, and acting to remove therefrom collections of pulp and gum. It is claimed by the respondents that the stripping device of their machine removes the raisins from the teeth of the impaling or perforating roll in a condition which leaves the raisins practically whole, and containing all the meat, while the pressure rolls of complainant's machine leave the raisins in such a condition that the cleaning blades are necessary to gather up and remove the pulp that clings to the carrier. Whatever may be the difference in the function, it sufficiently appears that respondents' single stripping device differs so materially in construction and operation as to avoid the charge of an infringement of claims 6 and 7 of complainant's patent.

Claim 8 is for a combination of (1) a carrier; (2) pressure mechanism, acting to press the fruit upon the carrier; (3) puncturing mechanism, acting, independently of the pressure mechanism, to open the fruit and expose the seeds thereof; and (4) a seed-removing mechanism. Nowhere in the specifications is there any reference to "puncturing mechanism, acting independently of the pressure mechanism." Furthermore, in claim 2, the patentee uses this language: "Pressure mechanism, having motion angularly with relation to the carrier, and acting to partially impale the fruit upon the carrier, and by further action to puncture or rupture the skin." The

term "further action" seems to include the middle or puncturing roll as a part of the pressure mechanism. Claim 5 contains the following: "And a series of two or more rolls, adjusted at different distances from said carrier, and successively acting to partially impale the fruit on the carrier teeth, and rupture and displace the skin of the fruit." Again, in claim 7: "A series of two or more rolls, acting to impale the fruit upon the teeth and exclude the seeds therefrom." In claims 9, 10, and 11, the "pressure mechanism" includes all three rolls, acting to impale the fruit and exclude the seeds therefrom. Claim 8 would therefore seem to some extent to be inconsistent with the other claims of the patent, in that it calls for a "puncturing mechanism, acting independently of the pressure mechanism." In addition to the apparent intention of the patentee, as evidenced by the foregoing extracts from the claims, an examination of the practical operation of the La Due device does not seem to disclose such independently acting puncturing mechanism. If it could be said, however, that there is such a mechanism covered by the specifications and claims (taken as a whole) of complainant's patent, the respondents' device does not infringe claim 8, as it does not contain such an independently acting device. It follows that there is no infringement of claims 6, 7, and 8. The evidence is, however, sufficient to entitle the complainant to a decree on claims 1, 2, 3, 4, and 5.

DICKERSON v. ARMSTRONG.

(Circuit Court, S. D. New York. May 24, 1899.)

PATENTS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—EFFECT OF ERROR AS TO DEFENDANT'S NAME.

Defendant, whose true name was James, made sales of an article in infringement of a patent thereon. A suit for infringement was commenced by the owner of the patent against "Frank Armstrong, alias James"; and an order issued therein restraining "the said defendant, Frank Armstrong," from making further sales, which order was served on the defendant. *Held* that, defendant being in fact the person guilty of the infringement complained of, he was bound by the order, and subsequent sales of the article by him subjected him to punishment for contempt.

On Motion to Punish for Contempt in Disobeying Injunction.

Anthony Greff, for the motion.

Joel Marks, opposed.

LACOMBE, Circuit Judge. A statement of the facts which are conceded, either by express admission of the individual attached, or by his failure to controvert the moving affidavits, will relieve this case of all difficulty. In the month of March, 1898, and prior thereto, William T. James, the person now under attachment, resided at No. 97 Perry street, in this city, and there occasionally sold phenacetine, in infringement of the patent, "as an accommodation," to one Frank J. Armstrong, who made his headquarters there. On March 3, 1898, one Klappenburg came to 97 Perry street, and there met said James, whom, in the course of conversation, he referred to as Armstrong.

James thereupon informed him that his name was — James, and that he came from Wales, Great Britain. He there and then sold to Klappenburg 10 boxes of infringing phenacetine, showed him about 250 packages of phenacetine, offered to sell him 100 boxes at \$25, and told him that he had about \$500 worth of goods on hand. On April 1, 1898, a deputy marshal called at 97 Perry street, and asked James, who opened the door, for Mr. Armstrong. Upon being informed that Armstrong was not in, the marshal asked his name, and, upon his replying "James," handed him an order to show cause, with a restraining order, in this cause. The order is entitled, "Edward N. Dickerson v. Frank Armstrong, alias James;" and the order restrained "the said defendant, Frank Armstrong" (i. e. Frank Armstrong, alias James), from continuing the sale of the infringing article. The order was accompanied with affidavits which showed that the Frank Armstrong named as defendant was the individual who had sold the 10 boxes of phenacetine to Klappenburg, and had offered to sell the latter a much larger quantity, and who on that occasion represented himself to be "— James." Inasmuch as it was James' act which was complained of, and the sale of the goods which he exhibited that was sought to be enjoined, and the papers served on him enjoined the individual offender, whether his true name was Armstrong or James, it seems clear that the recent sale by James of a further lot of the infringing article was in disobedience of the order. In punishment of his contempt he may stand committed for 15 days (the time of confinement under attachment to be credited), and until he shall pay a fine of \$250.

SMITH et al. v. UHRICH.

(Circuit Court, E. D. Pennsylvania. May 26, 1899.)

No. 22.

1. PATENTS—INFRINGEMENT BY IMPROVERS.

AN improvement may be itself patentable, but the inventor of the improvement acquires no right to appropriate the main invention to which his improvement relates; and it is of no consequence that a patented article be so dealt with as to impair its usefulness, if its essential features be still retained.

2. SAME—INTRODUCTION OF EVIDENCE.

The defendant should complete his evidence with respect to the state of the art before the taking of complainant's testimony in rebuttal, and any additional testimony and exhibits thereafter taken, even for the sole purpose of narrowing the claims, will be suppressed on motion.

3. SAME—VALIDITY AND INFRINGEMENT—SPRING-TOOTH HARROWS.

The Smith patent, No. 522,435, for improvements in spring-tooth harrows, construed, and held valid and infringed as to claims 1 and 2.

In Equity.

M. W. Jacobs, for complainants.

Clark C. Wood, for respondent.

DALLAS, Circuit Judge. This is a suit upon letters patent No. 522,435, dated July 3, 1894, granted to William E. Smith, for im-

provements in spring-tooth harrows. The claims alleged to have been infringed are as follows:

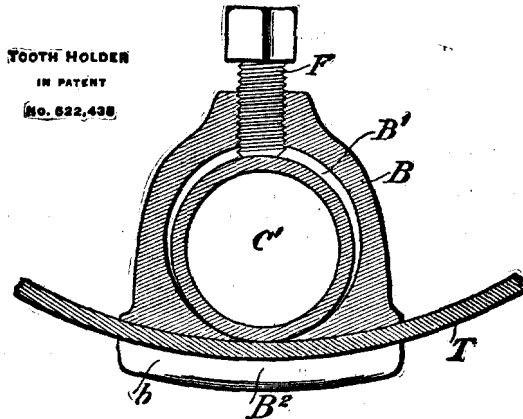
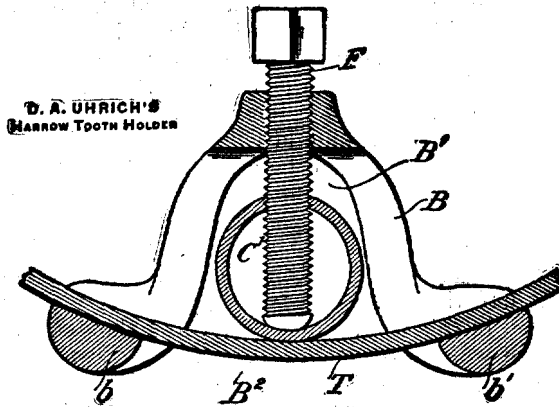
"(1) The combination of the hub and spring tooth mounted therein, of the cylinder mounted in the hub, and means for pressing the cylinder onto the tooth to secure it in position, substantially as described. (2) The combination with the hub, having ribs forming a recess for the reception of the tooth, and having an opening therethrough of a cylinder fitting the opening loosely, and bearing on the tooth, and means for pressing the cylinder in position, substantially as described."

The presumption of its validity which arises from the grant of this patent has not been overcome. The invention to which it relates is, however, neither a primary nor a great one. It follows that it must be sustained, but that the monopoly which it creates is not to be expanded by interpretation. Yet, although its claims are to be confined to the specific combinations which they describe, their scope should not be so restricted as to admit of the avoidance of infringement by resort to merely colorable and evasive variations; and, in my opinion, the differences between the combination of the two claims in suit and that of the defendant amount to nothing more. This, in substance, has been testified to by the complainants' expert, upon grounds which I think entirely satisfactory; and the correctness of his conclusions has been impugned but by two witnesses, neither of whom can be said to be disinterested, and one of whom, at least, does not appear to be free from bias. The complainants' expert to whom I have referred, produced a drawing, prepared by himself, illustrating the constructions in controversy, upon which he had marked the corresponding features and component parts of the respective devices, with the same reference letters. The following is a reproduction of that drawing.

In explanation of this drawing the witness testified as follows:

"It will be noted that each of the devices illustrated in the blue print embodies the hub or yoke, B, which may be made of cast metal or otherwise, but it is shown therein that it is cast in one piece; and each is provided with the opening, B¹, and the underside is provided with lugs, bb¹, projecting inwardly, and forming the seat for the shank of the tooth, T. Each of said structures has also the opening, B², through the bottom, between the ribs, and to the opening B¹. And the said ribs are so arranged that when the tooth is in position it will extend slightly into the opening B¹. Through the opening B¹ passes a cylinder or piece of metal tubing, which is termed the connector, C, in the specification of the patent. Said connector is employed to tie together the longitudinal bars of the frame, by the aid of a bolt passing through the longitudinal bars and through said connector. Therefore the said connector performs the same function and is the equivalent of the crossbar of an ordinary harrow frame. I furthermore observe, in said blue print, that in each instance the aforesaid tube or connector is pressed down on the underlying tooth shank so as to effectually clamp it on the ribs, bb¹, by the setscrew, F, connected to the hub or yoke, B, in substantially the same manner."

Upon the whole evidence, I am satisfied of the substantial identity of the parts as thus indicated. In appearance, of course, the two devices are not precisely alike; but this, in itself, is immaterial. Perhaps the most striking differences are that in the defendant's arrangement the setscrew is longer than in that of the patent, and extends through a hole in the cylinder, and presses upon its inner surface, and that the ribs are in the one device transverse, while in the



other they are longitudinal; but that the real purpose, mode of operation, and effect of these elements is the same in both instances is perfectly plain.

It has been contended that the defendant has attained some advantages which the patentee had not attained, and that he has relinquished others which the patentee must have regarded as important. I have not been persuaded that this is true, but, if it were, it would not be material. An improvement may be itself patentable, but the inventor of an improvement acquires no right to appropriate the main invention to which his improvement relates; and it is of no consequence that a patented article be so dealt with as to impair its usefulness, if its essential features be still retained. The attempt has also been made to differentiate the two constructions by reason of the absence of a disk and bolt from that of the defendants, but

these parts are not included in claims 1 and 2, and are expressly added in claim 3, which is not alleged to have been infringed.

The motion made by counsel for the complainants to suppress a portion of the deposition of Clarence E. Bement, taken on June 23, 1898, and certain exhibits referred to in said deposition, must be allowed. The defendant should have completed his evidence with respect to the state of the art before the taking of complainants' testimony in rebuttal. He had no right to introduce additional testimony and exhibits, even for the sole purpose of narrowing the claims, after the evidence of the complainants had all been taken, and their expert had been fully examined with reference to the prior art as it had then been made to appear. A number of patents were introduced in this irregular manner, and the only witness called to explain them was Clarence E. Bement, who did not do so in sufficient detail to adequately support the opinions which he expressed. Yet, being reluctant to disregard any matter which might possibly be persuasive, I have, with such aid as could be derived from Mr. Bement's testimony and the arguments of counsel, examined these patents, but cannot find that, if offered in due season, they would have changed the conclusion which I have reached. Decree for complainants.

**WESTINGHOUSE ELECTRIC & MANUFACTURING CO. v. CATSKILL
ILLUMINATING & POWER CO.**

(Circuit Court, S. D. New York. May 17, 1899.)

PATENTS—VALIDITY—ELECTRICAL TRANSMISSION OF POWER.

The Tesla patent, No. 511,559, for certain new and useful improvements in "electrical transmission of power," is not void on its face, as covering merely a mode of operation involving only the function of certain machines or apparatus, but is for a new method of producing an electrical result, which method is carried out by the use of apparatus.

This was a suit in equity by the Westinghouse Electric & Manufacturing Company against the Catskill Illuminating & Power Company for alleged infringement of certain patents. The bill was demurred to by defendant, in so far as it was based upon letters patent No. 511,559, issued December 26, 1893, to Nikola Tesla for certain new and useful improvements in the "electrical transmission of power"; the ground of the demurrer being that the patent, on its face, is for a mode of operation involving only the function of certain machines or apparatus, and therefore covering a process not patentable under the law.

The patent, excepting the formal parts, was in full as follows:

"In certain patents, heretofore granted, I have shown and described a system of electrical power transmission, in which each motor contained two or more independent energizing circuits, through which were caused to pass alternating currents, having in each circuit such a difference of phase that by their combined or resultant action they produced a rotary progression of the poles or points of maximum magnetic effect of the motor, and thereby maintained the rotation of its movable element. In the system referred to and described in said patents, the production or generation of the alternating currents, upon the combined or resultant action of which the operation of the

system depends, is effected by the employment of an alternating current generator with independent induced circuits, which, by reason of the winding or other construction of the generator, produced currents differing in phase, and these currents were conveyed directly from the generator to the corresponding motor coils by independent lines or circuits. I have, however, discovered another method of operating these motors, which dispenses with one of the line circuits, and enables me to run the motors by means of alternating currents from a single original source. Broadly stated, this invention consists in passing alternating currents, obtained from one original source, through both of the energizing circuits of the motor, and retarding the phases of the current in one circuit to a greater or less extent than in the other. The distribution of current between the two motor circuits may be effected by induction or by derivation. In other words, I may pass the alternating current from the source through one energizing circuit, and induce by such current a second current in the other energizing circuit; or, on the other hand, I may connect up the two energizing circuits of the motor in derivation or multiple arc with the main circuit from the source. In either event, I make due provision for maintaining a difference of phase between the currents in the two circuits or branches. In carrying out my invention I have used various means for securing this result. For example, when I induce a current in one of the circuits from the current flowing in the other, I employ a form of converter, or bring the two circuits into such inductive relations as will produce the necessary difference of phase; or, when I obtain the two energizing currents by derivation, I make the two circuits of different degrees of self-induction by inserting a resistance or a self-induction coil in one of said circuits, or I combine these devices in different ways, as I shall more specifically describe hereinafter. The accompanying drawings, to which I now refer in further illustration of my invention, are a series of diagrams illustrating, not the specific construction of the particular devices which I may or may not have used, but, rather, the electrical connections and relations to be adopted in carrying out the present system by means of devices which are now well known.

"Figure 1 is a diagram illustrating the method of operating the motors by inducing one of the energizing currents by the other. Fig. 2 is a similar diagram of the method of operating the motors where the two energizing currents are obtained by derivation from a single source. Fig. 3 is a modified application of this principle. Referring to Fig. 1, let A represent the source of alternating currents which are to be utilized in operating the motor or motors. It will be understood that, considered as a source of current, it may be either a primary or secondary generator. B, B, designate the conductors of the circuit, which convey the alternating currents to one or more motors. The motor has two energizing circuits, or sets of coils, C, D. One of these circuits, as C, is connected directly with the circuit, B. The other set of coils, as D, is connected up in the secondary circuit of an electrical transformer or induction coil, T. The primary coil, P, of this transformer, is included in the circuit, B. The alternations of current in the circuit, B, tend to establish, in their passage through the coils, C, a polarity at right angles to that set up by the coils, D, and, if the currents in the two sets of coils accord in their phases, no rotary effect would be produced. But the secondary current developed in the coil, P', of the transformer, will lag behind that in the primary, which lag or retardation may be increased, as I have shown in another application, to a sufficient extent to practically obtain the same result as though two independent alternating currents were used to energize the motor. In Fig. 2 the two energizing circuits of the motor are shown connected in multiple arc to the circuit, B, B, and in one of these circuits is a resistance, R. Assuming the two motor circuits to have the same self-induction and resistance, no rotary effect will be produced by the passage through them of an alternating current from the source, A. But if one of the motor circuits, as C, be varied or modified by the introduction of a dead resistance, R, the self-induction of that circuit or branch is reduced, and the phases of current therein retarded to a correspondingly less extent. The relative degrees of retardation of the phases of the current in the two motor circuits, with respect to those of the unretarded current in the circuit, B, thus produced, will set up a rotation of the motor, which may be practically utilized for many purposes. In Fig. 3, the

FIG. 1

The diagram shows a motor with four poles. Two brushes, labeled 'a' and 'b', are positioned on opposite poles. The brush 'a' is connected to a circuit containing a resistor, labeled 'R'. The brush 'b' is connected to a circuit containing a self-induction coil, labeled 'S'. The motor is shown in a cross-sectional view, with the stator and rotor parts visible.

FIG. 2

The diagram shows a motor with four poles. Two brushes, labeled 'a' and 'b', are positioned on opposite poles. The brush 'a' is connected to a circuit containing a resistor, labeled 'R'. The brush 'b' is connected to a circuit containing a self-induction coil, labeled 'S'. The motor is shown in a cross-sectional view, with the stator and rotor parts visible.

FIG. 3

The diagram shows a motor with four poles. Two brushes, labeled 'a' and 'b', are positioned on opposite poles. The brush 'a' is connected to a circuit containing a resistor, labeled 'R'. The brush 'b' is connected to a circuit containing a self-induction coil, labeled 'S'. The motor is shown in a cross-sectional view, with the stator and rotor parts visible.

arrangement of the parts is similar to that shown in Fig. 2, except that a self-induction coil, as S, is introduced into one branch or energizing circuit of the motor. The effect of thus increasing the self-induction in one of the circuits is to retard the phases of the current passing therein to a greater extent than in the other circuit, and in this way, to secure the necessary difference in phase between the two energizing currents to produce the rotation of the motor.

"In an application filed, of even date herewith, I have shown and described other ways of accomplishing this result, among which may be noted the introduction of a resistance capable of variation in each motor circuit, or the use of a resistance in one circuit and a self-induction coil in the other. In the above description I have referred mainly to motors with two energizing circuits, but it is evident that the invention applies equally to those in which there are more than two of such circuits; the adaptation of the same being a matter well understood by those skilled in the art. I do not claim in this application the specific devices employed by me in carrying out the invention, having made these the subjects of other applications. What I claim herein is: (1) The method of operating motors having independent energizing circuits, as herein set forth, which consists in passing alternating currents through both of the said circuits, and retarding the phases of the current in one circuit to a

greater or less extent than in the other. (2) The method of operating motors having independent energizing circuits, as herein set forth, which consists in directing an alternating current from a single source through both circuits of the motor, and varying or modifying the relative resistance or self-induction of the motor circuits, and thereby producing in the currents differences of phase, as set forth."

Thos. B. Kerr, for complainant.

Seward Davis, for defendant.

SHIPMAN, Circuit Judge. The bill of complaint, so far forth as it relates to letters patent No. 511,559 is demurred to upon the ground that the patent is for a mode of operation which involves only the function of certain machines or apparatus, and is therefore, upon its face, for a process which is not patentable under the law. The patent is not for a function, but is for a new method of producing an electrical result, and the method is carried out or produced by the use of apparatus. The Telephone Cases, 126 U. S. 531, 8 Sup. Ct. 778. The demurrer is overruled, with costs.

LAFOURCHE PACKET CO. v. HENDERSON.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 810.

1. APPEALS IN ADMIRALTY—ASSIGNMENTS OF ERROR.

An assignment "that the court erred in holding that libelant was entitled to any compensation for the injuries received" by him is too general.

2. SHIPPING—INJURIES TO SEAMEN—LIABILITY OF SHIP.

It seems that, under the general admiralty practice, a seaman injured through the use of defective appliances furnished by the owners of the ship may proceed against the ship for damages.

3. SAME—NEGLIGENCE—DEFECTIVE APPLIANCES.

Where a skid used to stow barrels into the hold was broken on a prior voyage, to the knowledge of the ship's officers, so that, through the sagging of one side of it, a bolt worked up and caught a barrel being sent down, and threw it off and against a seaman engaged in the work, the ship was liable for the injuries inflicted.

4. SAME—ASSUMPTION OF RISK.

A seaman does not assume the risk involved in the use, under orders, of patently defective appliances furnished him by the master.

5. SAME—DAMAGES—EXCESSIVENESS.

Where both bones of the leg of a seaman were broken through negligence, and after the injury he was grossly neglected by the officers of the ship, and the injury was permanent and greatly damaged him in his earning capacity, damages of \$2,000 were not excessive.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

On or about March 8, 1898, William Henderson, appellee, was shipped at New Orleans, La., as a seaman in the service of the steamboat Lafourche, for a voyage to Thibodaux, La., in Bayou Lafourche, and return to New Orleans, at the wages of \$80 per month and found. The boat made the outward trip with libelant in the service thereof. On the return trip, and while said vessel was lying at a plantation on Bayou Lafourche, the said Henderson, with others of the crew, was duly ordered to go into the hold or hull of said steamboat to aid and assist in storing cargo. Accordingly he proceeded to the place or part

of said hull or hold designated, and proceeded in the discharge of the duties required of him. While so occupied, and while cargo was being taken on board and stowed in the hull of said vessel, said Henderson was required by the proper officers of said vessel, and the duty assigned him, to stand by the lower end of the skid leading from the main deck down to the floor in the hull, so that, as barrels of sugar skated or "skidded" into the hold of said boat from the main deck would arrive at a point near, he could "cut" (turn) them around, for others of the crew engaged thereabout to roll them to the afterpart of the hull for storage. While said Henderson was performing the duties above mentioned, a barrel of sugar was placed on the skid and started on its way down. After this barrel had gotten about halfway down, and while traveling with great velocity, it turned around, and, instead of continuing down the skid, it rapidly rolled off over the side; and, before libellant could escape, his left leg was caught by the barrel against a stanchion, and both bones of the leg were broken. To the knowledge of the officers of said steamboat, acquired on a prior trip, one side of the skid was weak, one hook broken off, and the iron facing of the runner broken. After sustaining the injury complained of, libellant was carried up out of the hull, taken aft, and placed on some freight. A doctor came on board and professed to set the broken limb, which was then bandaged; and libellant was laid on some stuff spread on the boat's deck, made to answer the purpose of a mattress. Appellant was injured about 4 or 5 o'clock Wednesday afternoon, and from that time until Thursday night he was left on the boat's deck, as above mentioned. When the crew was paid off, his wages were sent down to him. After the trip was concluded, the crew soon left the boat, except libellant who was permitted to lie on the boat's deck in his helpless condition. Some hours after the arrival of the vessel in port, a harbor police officer came on board, and found appellee lying in a helpless condition on deck, ascertained from him the nature of his injury, and sent for the Charity wagon, which in due time arrived, and took appellee to the Charity Hospital. All these facts are undisputed. The opinion of the court deals with controverted matters. Because of the injuries sustained, the loss of wages, and the impaired capacity to earn wages, the physical pain, and the neglect of appellee after he was injured, he brought this libel in rem to recover the sum of \$3,000. After a hearing of the case, and after a personal inspection of the skid causing appellee's injuries, the court rendered a decree in favor of the libellant for the sum of \$2,000. On this appeal, the following are the assigned errors: "(1) That the court erred in holding that libellant was entitled to any compensation for the injuries received; (2) that the injuries complained of in the said libel were not caused by any fault or negligence on the part of the claimant, or any person for whom claimant was responsible; (3) that the defect, if existing at all, was a patent defect, and the risk assumed was one of the assumed risks of the employment, and was known to libellant; (4) that, even if libellant was entitled to any allowance whatever, the allowance granted herein is excessive."

Hewes T. Gurley, for appellant.

John D. Grace and A. B. Phillips, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts, the opinion of the court was delivered by PARDEE, Circuit Judge:

The first assignment of error is too general to warrant attention, but it is the only one to cover the point sought to be raised,—that, while the district court, sitting in admiralty, had jurisdiction of the demand, yet the libellant had no right to proceed in rem, because he had no maritime lien on the ship, nor any lien under the domestic law for damages resulting from his personal injuries, as set forth in the libel. In the district and circuit courts in this circuit, it has never been seriously disputed that, under the general admiralty practice, a seaman who is injured through the use of defective appliances furnished by the owners of the ship has a right to proceed against

the ship to recover his damages. Several cases of the kind have been brought to this circuit court of appeals since its organization, and the jurisdiction to proceed in rem has been taken for granted. *The Whisper*, 2 U. S. App. 618, 4 C. C. A. 654, and 54 Fed. 896; *Johnston v. Johansen*, 30 C. C. A. 675, 86 Fed. 886. The right of other persons than regular seamen, employed on a ship, to proceed in rem to recover damages for personal injuries, has been tacitly recognized in all the courts of the United States, and has been affirmatively recognized in *The Christobal Colon*, 44 Fed. 803, decided in the Eastern district of Louisiana; and there may be other cases to the same effect. We know of none to the contrary. The precise question now presented is not necessarily raised on this appeal, because the domestic law gives the libellant a lien and privilege. The *Lafourche* was owned in Louisiana, and was running from New Orleans to various places through Louisiana waters; and the injuries complained of were suffered on Bayou Lafourche, in the state of Louisiana. Article 3237 of the Louisiana Revised Civil Code provides as follows:

"The following debts are privileged on the price of ships and other vessels, in the order in which they are placed: * * * (12) Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water craft or raft, the party injured shall have a privilege to rank after the privileges above specified. * * *

The second assignment raises the question whether the injuries to the libellant were caused by any negligence or fault on the part of the ship. As recited in the statement of facts, it is undisputed that the libellant received his injuries while in the line of his duty, and while using with his fellow servants a broken skid, and that the skid so used had for some time been broken, on or before a prior voyage, and its condition was known to the officers of the ship. The evidence of the libellant and his witnesses is to the effect that, through the sagging of one side of the skid on which side the hook was broken, a bolt worked up about the middle or belly of the skid, which caught the barrel then being sent down into the hold, cut one of the hoops, and otherwise threw it off the skid, resulting in the libellant's injury. John Williams, the witness who testified the clearest on this point, was the man who placed the barrels upon the skid, starting them down the hold. His evidence is so pointed that we extract as follows:

"Q. Do you know what the cause was of that barrel twisting around on that skid? A. When the barrel twisted around on the skid, and this man hollered, I went down in the hold to assist him; and when I went down in the hold to assist him I looked on the side of the skid, and I saw there was a bolt just about that high up,—that had risen up about an inch,—and the hoop of the barrel had struck it, and the hoop was cut plumb in two. Q. Was it proper for that bolt to be extending up over and above the side of the skid? A. No, sir. Q. What was the cause of the bolt extending up that way? A. The skid was broken one side. It had only one prong, whereas it should have had two. One was broke, and they were fixing the skid with a block,—working the skid with a block. It was put underneath the skid, and it would slip out, and that would make this bolt work up. Q. Whose duty was it to pay attention to those blocks? A. Most any that was in the hold. Q. What blocks were they? A. They were little, short blocks, put under the skid to keep it from sliding up. Q. Pieces of 'plunder,' they call it on the boat? A. Yes, sir. Q. You say this

bolt had worked up through there? A. Yes, sir. Q. To your mind, was the working up of the bolt the cause of the catching of this barrel and throwing the barrel off? (Objection is urged, being a matter of opinion.) A. Yes, sir. Q. Was there any other thing present, or the skid in any other condition, that could have brought about that result, except the fact that this skid was broken, and blocks put under it? A. The skid was broken on the side, and it was kept propped up with these blocks; and, when these blocks slipped out, it let the skid down, and that would make this bolt jump up. Q. Do you know whether a complaint was made to the carpenter about the condition of that skid? A. Yes, sir; I made it myself. Q. When? A. While the boat was coming down Bayou Lafourche. Q. What did you tell this carpenter? A. I said that the skid ought to be fixed,—it was mighty dangerous,—and he told me it was none of my business. * * * Q. After Henderson got hurt, was any more barrels put down on that side? A. Yes, sir; I went down and shoved the block down underneath the skid, and took a long piece of iron and drove the bolt back; and the next man that took his place, cutting off the barrels, I told him to be particular of that block underneath, and whenever it got loose to let me know, and I would stop the work so that he could put it underneath again. * * * Q. They didn't put anybody down there to look after the blocks, then? A. No, sir. Q. I speak about this block underneath the skid. A. That was his business, but he didn't know it. No one didn't tell him about it. That was his first trip on the boat. He thought the skids were in proper shape. He didn't pay any attention to the blocks at all. Q. No one had warned him about the defective condition of the skid? A. No, sir. * * * Q. You said something awhile ago about a bolt that was in the skid,—about a catching on this hoop of the barrel and cutting it. Where was that bolt? (Objection is urged to this examination, nothing about which has been brought out on the cross-examination.) A. The swagging of the broken part— When the block would slip out, it would swag this way, and make the bolt rise up on the right-hand side. Q. About how far down the skid was this bolt? A. It was about middle ways. Q. Each side of the skid consists of several pieces of wood bolted together. Now, this bolt was one of the bolts that belonged to the skid? A. It was one of the bolts that held the band on the skid. Q. About how far down? About the belly of the skid? A. About middle ways of the skid. Q. You spoke about the hook being broken. That allowed the skid to swag? A. Yes, sir; and it made the bolt rise up. Q. And that made the bolt down in the belly of the skid work up? A. Yes, sir."

Williams' evidence is corroborated by his fellows, and is not disputed by facts testified to by any of the claimant's witnesses.

The contention of the appellants is that the libelant was injured through the negligence of a fellow servant in placing barrels on the skid, and that the broken hook of the skid cut no figure in the matter. This contention has no support in the evidence, because the persons who were engaged in placing the barrels on the skid directly deny it,—deny that any were improperly placed on the skid,—and there is no evidence whatever to show that the one barrel which injured the libelant was improperly placed upon the skid.

Some argument is made in the brief as to the character of libelant's witnesses, but, from an inspection of the record, we are unable to see that they were any less intelligent or more prejudiced than those witnesses offered by the claimant. The result, to our minds, on all the evidence, is the firm conviction that the libelant received his injuries through the use of the broken skid, which was an insufficient and defective, if not actually dangerous, appliance furnished by the ship.

Under the third assignment of error the appellant contends that if the skid was broken and defective, and the libelant was injured in using the same, still he cannot recover, because the defect was patent,

and he knew it, or ought to have known it, from contact with and observation of it, and in continuing to use the same he accepted the risk. The learned counsel, in a very strong brief, supports this contention by the citation of text-books and adjudged cases in the common-law courts,—particularly citing Bailey, Mast. Liab. pp. 198, 199; Way v. Railroad Co., 40 Iowa, 341; Sullivan v. Manufacturing Co., 113 Mass. 398; McGlynn v. Brodie, 31 Cal. 380; Hayden v. Manufacturing Co., 29 Conn. 548; Wormell v. Railroad Co., 79 Me. 405, 10 Atl. 52, in which last-mentioned case it is declared as follows:

"It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such damages as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere."

Without discussing or disputing the law as declared in the authorities mentioned, we are of opinion that it is not applicable to the case in hand. There must be a different rule as to the risks assumed by seamen on board ship from the rule as to the risks assumed by servants and other employes on land.

Curtis on the Rights and Duties of Merchant Seamen (page 11) says:

"The contract of hire for marine service belongs in general to the entire class of contracts for the hire of services, but it also involves, and is governed by, principles peculiar to itself, and which carry it, in very important particulars, beyond the rules applicable merely to contracts of service upon land. Thus, by the common law of England and of this country, when a man lets himself to hire, and neglects or refuses to fulfill his engagement, he cannot be compelled to perform it by any restraint put upon the freedom of his person. The remedy of the other party is solely in the damages he may recover for breach of the contract. The same principle prevails in the civil law (*nemo potest præcise cogi ad factum*), and the same remedy only is afforded to the injured party. But by the law of most countries the mariner's contract is an exception to this general principle. By the French ordinance, the seaman who fails to render himself on board according to this contract can be pursued and arrested wherever he is found, and constrained to complete his engagement. The same provision for his apprehension and compulsion is made in England and in this country. There is also another peculiarity of this contract, in which it differs from other contracts for the hire of services. It is the only form of service stipulated to be rendered by a freeman of full age, known to the common law, in which the employer, by his own act, can directly inflict a punishment on the employed for neglect of duty or breach of obligation. By the positive law of some countries, also, and perhaps by the general law of the sea, the seamen are bound to assist, at the risk of their lives, in defending the ship against pirates; and a refusal to fight is punished criminally. Such is the law of France and of England. All these peculiarities of the contract are founded in deep reasons of policy and necessity; and, although they do not give a character to this service which takes it out of the general rules and principles applicable to the whole class of contracts for the hire of services, they are important to be stated at the outset, as the prominent features of distinction, reminding us that those general rules and principles will sometimes fall far short of satisfying the exigencies of a contract so strongly marked by principles of its own."

In *Robertson v. Baldwin*, 165 U. S. 275, 282, 17 Sup. Ct. 329, the supreme court say:

"From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving to a certain extent the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained, — as Molloy forcibly expresses it, 'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and in some cases the safety of the ship itself. Hence the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion or absence without leave during the life of the shipping articles."

A seaman aboard ship is bound to perform such services as may be required of him in the line of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. Masters of ships exercise large powers, and they may legally compel obedience to orders. A seaman necessarily surrenders much of his personal liberty and freedom of action, and he is never at liberty, like the landsman, to quit or make much objection to the circumstances surrounding the work commanded. In *Johnson v. Johansen*, *supra*, which was a case in many respects similar to the one in hand, in answer to the same objection as the one now made, this court said:

"It may be, as urged so strongly by the appellant, that the libellant received these appliances and proceeded to use them without objection; but, if this be so, it must be considered that on board ship a sailor is not expected to, nor, as for that matter, permitted, before executing an order, to question the propriety of the order, or the sufficiency of the materials furnished."

The remaining assignment of error is that the damages allowed by the district court are excessive. Considering the very serious injury received by the appellant, in the breaking of both bones in the leg, his physical suffering, and the neglect he received from the hands of the officers of the boat, and the undisputed fact that the libellant is permanently injured, and greatly damaged in his earning capacity, we are not disposed to disturb the amount allowed by the district court. No case is made for the division of damages because of contributory negligence. The decree appealed from is affirmed.

LEARNED et al. v. BROWN et al.

RUMBLE et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 814.

1. MARITIME LIENS—SUPPLIES FURNISHED IN HOME PORT.

Where a vessel is owned by resident citizens of a state, and her headquarters are at a port therein, such place must be treated as her home port, and no lien is given by the general maritime law for supplies furnished at such port, which are presumed to have been furnished on the credit of the

owners, and any liens asserted for such supplies must rest upon the laws of the state.¹

2. SAME—UNDER STATUTES OF LOUISIANA—PRESCRIPTION.

Under the statute of Louisiana relating to liens or privileges against vessels (Code 1870, art. 3237), as construed by the courts of the state, a vessel owned in the state, and trading in its waters, is not considered as making voyages, within the meaning of that article, and the privileges granted thereby may be asserted at any time within six months, without regard to the number of trips made by the vessel during that time.²

3. SAME—LIEN FOR MONEY ADVANCED.

The statute of Louisiana grants no lien for money advanced to the master or owners of a vessel in the home port, no matter for what purpose.

4. SAME—WAIVER OF LIEN.

Parties who have united in a libel of intervention against a vessel do not waive their right to a lien by withdrawing such libel and filing separate libels.³

5. SAME—LIEN BY PART OWNER.

The statute of Louisiana does not authorize a part owner of a vessel to assert a lien against it for wages due him, as against creditors of the vessel.

6. SAME—PREMIUMS FOR INSURANCE.

There is no lien on a vessel, either under the general maritime law or under the Code of Louisiana, for premiums due on insurance policies taken for the benefit of the owners, and from which lienholders would receive no benefit in case of loss.

7. ADMIRALTY—FURNITURE OF VESSEL.

Where a dealer in musical instruments placed a piano on a steamer as an advertisement, under a verbal agreement with the captain under which it could be removed at any time, at the option of either party, such piano remained the property of the dealer, and did not become any part of the furniture of the vessel, so as to pass under a mortgage of the vessel and her apparel and furniture; nor did it pass under a sale of the vessel in admiralty as a part of her property, it having been removed by leave of court after her seizure, but before the sale.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

From April, 1898, to the 22d day of September, 1898, the steamboat *Liberty*, owned by W. P. Aucoin and J. P. McElroy, resident citizens of the state of Louisiana, with headquarters at New Orleans, was running in the Bayou Lafourche trade, making frequent short trips, wholly within the state of Louisiana. On the last-mentioned date she was seized on an admiralty warrant under a libel filed by a seaman for wages. On the 24th day of October, 1898, the *Liberty*, her tackle, apparel, engines, furniture, etc., were sold under an order of the court, and realized the sum of \$2,600. During the time the *Liberty* was running in the Lafourche trade, her owners incurred many debts on her account, and numerous creditors intervened in the district court, claiming to have advanced money, provisions, supplies, etc., to said steamboat, and asserting, on account thereof, a lien and privilege, under the laws of Louisiana. After much evidence, and a report by the commissioner, the district court made a decree of distribution as follows:

"This cause came on this day for confirmation of the tableau of distribution, filed by the commissioner, in conformity to the decree herein entered, and, no opposition having been made thereto, it is ordered, adjudged, and decreed that said tableau be, and the same is hereby, approved and confirmed,

¹ As to maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.

² As to maritime liens under state statutes, see note to *The Electron*, 21 C. C. A. 21.

³ As to waiver and extinguishment of maritime liens generally, see note to *The Nebraska*, 17 C. C. A. 102.

and that the proceeds herein in the registry of the court be distributed accordingly, to wit:

Gross proceeds deposited in registry.....	\$2,600 00
Amount paid under order of court of October 28, 1898, to marshal for keepers' fees and cost of pumping.....	\$102 50
Amount paid to mariners under decree of December 10, 1898, for wages.....	576 46
	<u>678 96</u>

Balance now in registry.....	\$1,921 04
From which is to be paid:	
Clerk's costs.....	\$ 89 50
Registrar's fee, \$2,600 at 1 per cent.....	26 00
Marshal's costs.....	148 80
Proctor's docket fee to H. W. Robinson.....	10 00
Proctor's dep. fees to H. W. Robinson.....	75 00
Commissioner for report and tableau.....	75 00
Stenographer.....	382 60
	<u>806 90</u>

Balance.....	\$1,114 14
Claims to be paid by preference:	
(1) To J. P. McElroy, wages as clerk.....	\$112 50
(2) To C. A. Healy, as subrogee.....	130 00
	<u>242 50</u>
	\$ 871 64

Balance to be distributed pro rata, as follows, to wit:	
Names.	To Receive.
Samuel S. Brown.....	\$463 21
Samuel S. Brown.....	12 14
La. Construction & Imp. Co.....	7 55
M. G. T. Stemple.....	4 44
Ins. Co. of North America.....	23 70
St. Paul Fire & Marine Ins. Co.....	23 70
Greenwich Ins. Co.....	23 70
Providence Washington Ins. Co.....	23 70
Ins. Co. of North America.....	14 30
M. Waller.....	8 40
Donaldsonville Fdy. & Mach. Co.....	16 90
J. P. Hogan.....	7 50
Salmen Brick & Lumber Co.....	20 70
A. E. Hotard.....	31 00
Newman & Spranley Co., Ltd.....	19 70
M. D. Lagan.....	11 40
A. S. Daniels.....	62 95
Estate Alfred Tufts.....	17 08
Paul D'Herete.....	42 17
C. W. Ward.....	3 00
Geo. Boning.....	22 50
John Laskey.....	4 20
Wid. A. Ferrandez.....	3 20
William Thomson.....	60
James Cummings.....	60
George Clevis.....	60
W. Thomas.....	60
Cooley Williams.....	60
	<u>\$870 14</u>
W. P. Aucoin for 1 day's witness fee.....	1 50

\$871 64 \$ 871 64

"It is further ordered that the piano claimed by the Medine Music Company, marked 'Schubert No. 19,014,' as per the claim of said company herein, be restored to them, and the bond furnished by it for the release thereof canceled, and the surety thereon released."

From this decree R. F. Learned, S. E. Rumble, and T. V. Wensel, mortgage creditors of the steamboat Liberty, and interveners for remnants, appealed to this court, assigning errors, as follows: "(1) That inasmuch as the steamboat Liberty is owned by residents of the state of Louisiana domiciled in the city of New Orleans, in said state, no lien or privilege attaches to said vessel, or against the proceeds thereof, in favor of domestic material and supply men, for materials, supplies, and money furnished said steamboat, excepting such privilege as is allowed by the statute of said state. Hence the court erred in decreeing in favor of the material and supply men (each and every one of whom is named in the judgment passed in this cause in their respective favor) for and on account of materials, supplies, and money furnished said steamboat on voyage and voyages prior to the last voyage of said steamboat. (2) That the court erred in allowing the claim of Samuel S. Brown for thirty dollars towage and one thousand one hundred and forty dollars for coal supplied, because said services and supplies were rendered and furnished upon the credit of the owners of said steamboat Liberty, and not upon the credit of said vessel, and were not rendered for, or on, or in aid of, the last voyage. (3) That the court erred in allowing judgment in favor of C. A. Healy, because—First, said C. A. Healy did not furnish money under such circumstances or conditions sufficient to create a lien and privilege therefor on said steamboat; second, that no subrogation occurred in favor of said C. A. Healy for and on account of the money paid out by him; third, that said C. A. Healy did not furnish any money for the necessities of said steamboat for, on, or during its last voyage. (4) That the court erred in decreeing in favor of M. D. Lagan, A. S. Daniels, estate of Alfred Tufts, Paul D'Herete, C. W. Ward, George Boning, and John Laskey because—First, said interveners waived their lien and privilege, if any they had, upon said steamboat Liberty, by voluntarily releasing the seizure they caused to be effected in this cause; and, second, because the price of the materials and supplies decreed for in favor of said interveners was not on account of materials and supplies furnished during or for the necessities of the last voyage of said steamboat. (5) That the court erred in decreeing in favor of J. P. McElroy wages as clerk, said J. P. McElroy being a part owner of said steamboat during the time such services were rendered. (6) That the court erred in awarding to the Medine Music Company the piano taken off of said steamboat Liberty under order of court, and erred in entering decree for cancellation of the bond furnished by said company binding themselves to return said piano or the sum of two hundred and fifty dollars (its admitted value), as the court might direct, as said piano was a part of the furniture of said boat, and, if the purchasers of said boat did not acquire the ownership of said piano at the marshal's sale in this case, then these petitioners, together with the other creditors of said vessel, are entitled to said piano, or the value thereof, for payment of their claims and demands against said steamboat. (7) The court erred in decreeing in favor of the following named insurance companies, to wit, Insurance Company of North America, St. Paul Fire & Marine Insurance Company, Greenwich Insurance Company, Providence Washington Insurance Company, Insurance Company of North America, because the insurance written by said respective underwriters was for the sole and exclusive benefit and use of the owners of the steamboat Liberty, and, further, because no lien and privilege exists in favor of said companies, or in favor of any of them, on the said steamboat, or against the proceeds thereof, for or on account of anything. (8) That the court erred in declining to decree in favor of petitioners, appellants herein, who were petitioners for surplus remaining after payment of all liens and claims of prior rank to their mortgage; that, after payment of such liens and claims, a surplus should exist, which was disbursed among interveners, who were and are without lien and privilege on said steamboat Liberty, or the proceeds thereof, and therein the court further erred. (9) That the court erred in decreeing in favor of interveners, who made no due tender or offer of testimony to support their claims; these petitioners, S. E. Rumble and T. V. Wen-

sel and Samuel S. Brown, being the only parties before the court who offered testimony to support their respective claims and demands."

S. E. Rumble and T. V. Wenzel, who were the purchasers at the marshal's sale, also appealed, assigning errors as follows: "(1) That the court erred in awarding to the Medine Music Company the piano taken off of said steamboat Liberty under order of court. (2) That the court erred in refusing to award to petitioners the said piano, which was a part of the furniture and apparel and appurtenances of said steamboat Liberty at the time said vessel, together with her furniture, apparel, appurtenances, etc., was purchased by petitioners at marshal's sale, made under order of court in this cause. (3) That the court erred in not dismissing the intervention of the Medine Music Company, because said interveners did not offer evidence to substantiate the allegations of their petition."

John D. Grace, for appellants.

Guy M. Hornor, for appellee Brown.

W. C. McLeod, for appellee Medine Music Co.

J. A. Woodville, for appellees Lagan and others.

J. H. Ferguson, for appellees Insurance Cos.

G. W. Flynn, for appellees Hotard and others.

T. M. Gill, for appellee McElroy.

Richard Peet, for appellee Healey.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

'After stating the facts, the opinion of the court was delivered by PARDEE, Circuit Judge.

The owners of the steamboat Liberty being resident citizens of the state of Louisiana, with headquarters at New Orleans, the port of New Orleans must be treated as the home port of the vessel. See *The Thomas Fletcher*, 24 Fed. 375; *The Rapid Transit*, 11 Fed. 322. The privileges asserted by the material men involved in this appeal are for supplies and materials furnished in the home port, which, under general maritime law, are presumed to have been furnished upon the credit of the owners, and no maritime lien resulted. The question presented, then, is whether these material men had a lien and privilege under the law of Louisiana. The appellants concede that the statutes of Louisiana grant a privilege, but contend that, as to the material men, the privilege is granted for the last voyage only. As the Liberty was trading within the state, making short and frequent trips from New Orleans to Bayou Lafourche and return, the effect of the appellants' contention, if successful, is that none of the supplies and material furnished are privileged, except those furnished during the last trip; and the practical result would be to deny all credit, under the law of Louisiana, to steamboats owned in Louisiana and trading within the state.

Civ. Code La. 1825, art. 3204, is as follows:

"The following debts are privileged on the price of ships or other vessels, in the order in which they are placed: (1) Legal and other charges, incurred to obtain the sale of a ship or other vessel, and the distribution of the price. (2) Debts for pilotage, wharfage and anchorage. (3) The expenses of keeping the vessel from the time of her entrance into port, until sale, including the wages of persons employed to watch her. (4) The rent of stores, in which the rigging and apparel are deposited. (5) The maintenance of the ship and her tackle and apparatus, since her return into port from her last voyage. (6) The wages of the captain and crew employed on the last voyage. (7) Sums lent to the cap-

tain for the necessities of the ship during the last voyage, and reimbursement of the price of merchandise sold by him for the same purpose. (8) Sums due to sellers, those who have furnished materials and workmen employed in the construction, if the vessel has never made a voyage, and those due to creditors for supplies, labor, repairing, victuals, armament and equipment, previous to the departure of the ship, if she has already made a voyage. (9) Money lent on bottomry for refitting, victualling, arming and equipping the vessel before her departure. (10) The premiums due for insurance, made on the vessel, tackle and apparel, and on the armament and equipment of the ship. (11) The amount of damage due to freighters for the failure in delivering goods which they have shipped, or for the reimbursement of damage sustained by the goods through the fault of the captain or crew."

Article 3212 is as follows:

"A ship is considered to have made a voyage when her departure from one port and arrival at another shall have taken place, or when, without having arrived at another, more than sixty days have elapsed between the departure and return to the same port, or when the ship, having departed on a long voyage, has been out more than sixty days without any claim on the part of persons pretending a privilege."

Construing these articles, the courts of the state held that ships trading inland, making short trips on the Mississippi river and its bayous, were not making a "voyage," within the sense of the statute, every time the ship made one of these short trips, but as for such vessels the voyage should be considered a period of 60 days, during which time liens for supplies and materials might be asserted. *Shirley v. Fabrique*, 15 La. 140; *Lee v. Creditors*, 2 La. Ann. 599; *Scott v. Creditors*, 3 La. Ann. 40; *Blanchin v. The Fashion*, 10 La. Ann. 49; *Mooney v. The Hondurino*, 11 La. Ann. 538; *Van Wickle v. The Belle Gates*, 12 La. Ann. 270; *Gails v. The Osceola*, 14 La. Ann. 544.

This construction as to the term of privileges upon ships, steamboats, and other vessels trading in the inland waters of Louisiana was enforced until 1858, when the following act was passed:

"An act relative to prescription of privileges against ships, steamboats and other vessels, approved March 16, 1858.

"Section 1. Be it enacted," etc., "that from and after the passage of this act the term of prescription of privileges against ships, steamboats, and other vessels, shall be six months.

"Sec. 2. Be it further enacted," etc., "that all laws, or parts of laws conflicting with this act, be and they are hereby repealed."

Since the passage of this act, the uniform jurisprudence in the Louisiana courts, and in the courts of the United States dealing with the same, has been to give the material men a domestic lien or privilege on ships, steamboats, and other vessels owned in the state of Louisiana and trading in the inland waters of Louisiana, for a term of six months. In 1870, when the Civil Code of Louisiana was revised, article 3204 of the Code of 1825, concerning the privileges on ships and merchandise, was revised, becoming article 3237 of the Code of 1870, and the act of 1858 was incorporated therein, as follows: "The term of prescription of privileges against ships, steamboats and other vessels shall be six months." There may be room for argument, under the Code as revised, that the general provision with regard to prescription is controlled by the special provisions contained in some of the articles as to the time

when privileges may be asserted; but we think that under the jurisprudence of the state, and following the reason of the case, the proper construction of the article in the Revised Civil Code is that steamboats owned in Louisiana, and trading in the waters of the state, are not making "voyages," within the sense of the article, and the privileges granted by the article on such vessels may be asserted within six months. This disposes of the first assignment of error.

The second assignment is directed against the privilege claimed by Samuel S. Brown for coal furnished the Liberty within four months prior to her seizure; the contention being that, under the evidence in the case, this coal was furnished by Brown upon the personal credit of the owners, and not on the credit of the steamboat. As we read the evidence, Brown did not furnish the coal on the personal credit of the owners, but did furnish it upon the credit of the steamboat.

The third assignment of error is directed against the privilege claimed by C. A. Healy for moneys furnished to the master for the purpose of paying off wages and other claims against the Liberty. The Louisiana Code grants no lien for money advanced to the master or owners of the ship in the home port, no matter for what purpose. "In *Grant v. Fiol*, 17 La. 158, we held that a creditor for advances or loans in money made to the owner, and applied to the use of a vessel, has no privilege allowed him by law, because he is not subrogated to the rights of those whose privileged claims have been paid out of the money loaned. The claim of the appellants comes within none of the cases provided for by article 3204 of the Civil Code, by which privileges are allowed on the price of ships or other vessels." *Hill v. Boat Co.*, 2 Rob. (La.) 35, 36. "The advance was made to the owner at the vessel's home port, and, under the authority of repeated decisions of our predecessors, conferred no privilege. In the case of *Grant v. Fiol*, 17 La. 158, the interveners, Sloo & Byrne, claimed a privilege for a sum of money which, they alleged, was loaned by them to the owner of the vessel, and was applied to the payment of the ship carpenter, sailmaker, and crew of the vessel, in order to enable her, by the payment of those claims, to prosecute her intended voyage. It was then held that the expression 'supplies' ('fournitures'), used in the eighth paragraph of article 3204 of the Civil Code, applied to materials sold or furnished to the vessel, not to money or funds advanced. It was also held that the subsequent application of the money by the shipowner to the payment of carpenters, sailmaker, and crew, privileged creditors, did not operate to the lender's benefit; that there was no legal subrogation, and no conventional subrogation was pretended; that privileges were stricti juris, and not to be extended by implication or analogy. The doctrine laid down in *Grant v. Fiol* was reiterated in the cases of *Bank v. The Barque Jane*, 19 La. 1, and *Hill v. Boat Co.*, 2 Rob. (La.) 36." *Hyde v. Culver*, 4 La. Ann. 9, 10. See *Wickham v. Levistones*, 11 La. Ann. 702. It follows that the lower court erred in decreeing a privilege in favor of Healy.

The fourth assignment of error, complaining of the decrees in favor of Lagan, Daniels, and others, because the said interveners

waived their lien and privilege, if any they had, upon said steamboat Liberty, by voluntarily releasing the seizure they caused to be effected, is not well taken. The parties united in a common libel of intervention. On objection being made thereto, the libel was withdrawn, and the parties filed individual libels. It is difficult to see how these interveners lost or abandoned any rights or privileges.

The court below decreed in favor of one of the owners of the steamboat, J. P. McElroy, for his wages as clerk. It is difficult to conceive how an owner can have a lien on his own property, and assert the same against the debts which he individually owes. Such a lien was denied in *Dowling v. The Reliance*, 1 Woods, 284, Fed. Cas. No. 4,042, and *Kellum v. Emerson*, 2 Curt. 79, 83, Fed. Cas. No. 7,669. The article of the Louisiana Civil Code giving liens on ships contemplates no such result.

We think the court also erred in decreeing in favor of the insurance companies. The insurance written was for the sole and exclusive benefit of the owners of the steamboat, and in no wise inured to the benefit of the ship or maritime lienholders.

In *The John T. Moore*, 3 Woods, 61, 68, Fed. Cas. No. 7,430, the late Mr. Justice Woods dealt with the question as follows:

"Exception is also taken to the report of the master because he rejected claims of certain insurance companies for premiums on certain policies of insurance taken on the John T. Moore by her owners. I know of no law which gives a lien upon a vessel for the premium for an insurance taken on her by her owners for their own benefit. It is a contract with the owner for his own benefit. It does not aid the vessel. In case of loss, the maritime liens upon the vessel are displaced, and do not follow the insurance money. The money goes to the owner, for his own benefit, and not to the lienholder, who may insure his own interest. *Thayer v. Goodale*, 4 La. 221; *Steele v. Insurance Co.*, 17 Pa. St. 290; *Turner v. Stetts*, 28 Ala. 420; *White v. Brown*, 2 Cush. 412; *Stilwell v. Staples*, 19 N. Y. 401; *Slark v. Broom*, 7 La. Ann. 337. The master was right, therefore, in deciding that the claims of the insurance company for premiums were no lien upon the vessel."

The authorities cited are to the effect that lienholders receive no benefit from the insurance, and the learned justice probably considered that paragraph 10, art. 3237, Civ. Code La., referred to and included only premiums due for insurance beneficial to lienholders, freighters, and others relying on the credit of the vessel. The record shows that the insurance companies accepted negotiable notes for the premiums, and each policy shows that the consideration to the insurance company had been received. In such a case, the supreme court of Louisiana denied the privilege. *Tiner v. The Bride*, 5 La. Ann. 756.

When the steamboat Liberty was seized, September 22, 1898, there was on board a piano, which had been placed there by the Medine Music Company. The boat not having been bonded, on October 12, 1898, a writ of venditioni exponas was issued, and on the same day the Medine Music Company presented its claim to the court for the piano, and asked to be allowed to bond the same, pending the final determination of its rights. This application was granted, and thereupon, on October 20th, and before the steamboat Liberty was sold, the piano was removed from the steamboat. The decree of the dis-

strict court awards the piano to the Medine Music Company, and directs the cancellation of its bond. This ruling is assigned as error by Learned, Rumble, and Wensel, holders of the mortgage on the steamboat Liberty, and interveners for remnants, and also by Rumble and Wensel, appellants, purchasers of the steamboat at the sale made by the marshal. The facts appear to be as follows:

"The Medine Company made an arrangement—a verbal agreement—with Capt. Aucoin, of the Liberty, whereby it placed a piano on the boat, and took to its store the one then on board. Mr. Medine, in his testimony, says that he made this arrangement as an advertisement for his company, and that it was well understood between him and the captain that the piano he put upon the boat and the one he took therefrom and brought to his store were to be held at the risk of the respective owners thereof; that he could have taken his piano off the boat at any time, and returned the one taken off her, the captain having a like privilege. The Medine store, with the boat's piano stored in it, having been destroyed by fire, it cannot be restored. Capt. Aucoin corroborates Mr. Medine's evidence in a measure. It is in evidence that there was no sign upon the piano to indicate to a third person, or any one visiting the boat, or any creditor, that it was not part of the furniture thereof."

From these facts, it is clear that the Medine Music Company never parted with its ownership of the piano, and the owners of the boat never bought the same. The mortgage never covered the piano, as it never formed a part of the property of the boat, nor constituted any necessary part of her tackle, apparel, or furniture. See 1 Pars. Shipp. & Adm. p. 78, and notes. Besides, the mortgage creditors are before the court intervening for remnants only, and it can hardly be contended in their behalf that the court should go outside, and find remnants for them. As the piano did not belong to the owners of the boat, and was not on the boat at the time it was sold, but had been withdrawn by the order of the court before the sale, and as it constituted no necessary part of the boat's tackle, apparel, or furniture, we are clear that the purchasers of the steamboat acquired no right to, or interest in, the piano in question.

For these reasons the decree of the district court is reversed, and the cause is remanded, with instructions to the district court to dismiss the libels of intervention of J. P. McElroy, C. A. Healy, as subrogee, the Insurance Company of North America, St. Paul Fire & Marine Insurance Company, the Greenwich Insurance Company, and the Providence Washington Insurance Company, with costs, and thereupon distribute the proceeds of the steamboat Liberty remaining in the registry of the court among the intervening libelants, appellees in this case, who have proved their claims as furnishers of supplies to the steamboat Liberty within six months prior to her seizure, the same to be distributed pro rata, if there are not enough funds in the registry to pay in full, and, if any balance be left after paying the material men, to award the same to Learned, Rumble, and Wensel, mortgage creditors of the steamboat Liberty. The costs of this appeal are to be paid, one-half by Rumble and Wensel, appellants, who take nothing by their appeal, and the other half by the intervening libelants, appellees, whose libels are dismissed, to wit, J. P. McElroy, C. A. Healy, the Insurance Company of North America, St. Paul Fire & Marine Insurance Company, Providence Washington Insurance Company, and the Greenwich Insurance Company.

THE KENSINGTON.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 147.

1. SHIPPING—DESTRUCTION OF PASSENGER'S BAGGAGE—NEGLIGENT STOWAGE.

Libelants were passengers on a transatlantic steamer, and their trunks, constituting their baggage, with those of other passengers, were broken to pieces, and the contents destroyed, during the voyage. The vessel encountered unusually rough weather on the passage, and rolled heavily. A witness for libelants, who entered the compartment where the baggage was stowed immediately on the opening of the hatch at the end of the voyage, testified that he examined carefully, but could find no evidence that the trunks had been lashed or otherwise secured against movement in rough weather, and the compartment was not filled. *Held* that, in the absence of any evidence on the subject from claimants, such testimony was sufficient to support the libelants' contention of negligent stowage.

2. SAME—CONTRACT OF CARRIAGE—PROVISION EXEMPTING CARRIER FROM LIABILITY.

Where both carrier and passengers are citizens of the United States, and the place of completion of the contract of carriage is within this country, a stipulation for exemption from liability in the contract, authorized by the law of a foreign country, by which the contract is by its terms to be governed, but which is contrary to the public policy of this country, is not enforceable in its courts.

3. SAME—HARTER ACT.

The provisions of section 2 of the Harter act as to the limiting of liability by bills of lading or shipping documents do not apply to passenger tickets.

4. SAME—PASSENGER TICKETS—PROVISIONS RELATING TO BAGGAGE.

A provision in a passenger ticket relating to a limitation of the carrier's liability for loss of baggage, plainly printed in the face of the ticket above the signatures of the ship's agent and the passenger, is a part of the contract.

5. SAME—LIMITATION OF LIABILITY FOR LOSS OF BAGGAGE—VALIDITY.

A stipulation in a passenger ticket for second-cabin passage which limits the liability of the carrier for loss of baggage to 250 francs, unless the passenger declares the value of his baggage in excess of such amount, pays for the transportation of the excess in proportion to its value, and takes a bill of lading therefor, is not so unreasonable as to be void as against public policy.

6. SAME—SCOPE OF LIMITATION.

Such a provision, though in terms limiting the liability of the "ship-owner or agent" only, inures to the benefit of the ship itself, when sought to be held by proceedings in rem solely on the ground that the owner did not fully perform the contract.

Appeal from the District Court of the United States for the Southern District of New York.

These are cross appeals from a decree of the district court (88 Fed. 331) holding the libelants entitled to recover the equivalent of 250 francs apiece. The facts sufficiently appear in the opinion.

Roger Foster, for libelants.

H. G. Ward, for claimants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On December 2, 1897, the libelants, citizens of the United States, and residents of New Jersey, being at

the time in Paris, France, purchased of an agent of the claimant, a New Jersey corporation, a ticket for their passage from Antwerp to New York by the British steamer Kensington, of the Red Star Line. They proceeded to Antwerp, where on December 10th they paid the balance of the purchase money, delivered their trunks to the vessel, and received a baggage check stating that said trunks were shipped "subject to the conditions contained in the company's ticket and bill of lading." The ticket, which is dated December 2, 1897, begins with a recital of the names of the passengers, and numbers of state-rooms and berths, and states that it "is good for second-cabin passage of the persons named in the margin * * * by the British steamship Kensington from Antwerp on the 11th of December, * * * unless prevented from unforeseen circumstances, with 20 cubic feet of personal baggage for each adult passenger free of charge, excess being charged for at the rate of 125 francs per cubic foot." Immediately succeeding is the caption, "Notice to Passengers," and these words, "It is a condition upon which this ticket is granted, and is mutually agreed for the consideration aforesaid, that"— Here, as the district judge finds, follow 10 paragraphs in type somewhat smaller than the preceding type, but perfectly clear and legible, stating numerous conditions. The whole concludes with the clause: "All questions arising hereunder are to be settled according to Belgian law, with reference to which this contract is made." Then follows the signature, "John Macklin, for General European Agents." The relevant conditions included in the above-mentioned 10 paragraphs are these:

"(c) The shipowner or agent are not under any circumstances liable for loss, death, injury, or delay to the passenger or his baggage arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the seas, rivers, or navigation, accidents to or of machinery, boilers, or steam, collisions, strikes, arrest or restraint of princes, courts of law, rulers, or people, or from any act, neglect, or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner. * * * The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state and well found, but does not warrant her seaworthiness. (d) The shipowner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure."

When their baggage was delivered to the company at Antwerp on December 10th, no statement was made of its value, and no freight was paid on its excess over 250 francs. The trunks were stowed in the after part of what is known as "No. 2 Upper Steerage Deck." Upon the arrival of the steamer in New York, it was discovered that the libelants' trunks, and baggage of other passengers, which, with some crates of china, had been stowed there, had been broken to pieces, and the contents of the trunks destroyed by water, dye, and dirt.

1. The first contention of the claimant upon this appeal is that the district judge erred in holding that the claimant was bound to

give proof of good stowage. There was evidence that the voyage was one of exceptional roughness; that on December 20th the steamer labored so heavily that she had to heave to for 14 or 15 hours, which had not previously occurred in the master's experience of 23 years; that she is a steamer of over 8,000 tons gross register, from 14 to 15 knots speed, and accustomed to make the trip in 10 days, but on the voyage in question she took 12 days; that the clinometer indicated that she rolled from 38 to 45 deg. either side. Upon these facts it is insisted that enough appears to show that the loss occurred by a peril of the sea, and that in this stage and posture of the case the burden was upon the plaintiffs to establish negligence of some kind on the part of the ship. In support of this contention, counsel cites *Clark v. Barnwell*, 12 How. 272; *The Victory*, 168 U. S. 423, 18 Sup. Ct. 149; *The Neptune*, 6 Blatchf. 193, Fed. Cas. No. 10,118. There was evidence, however, given by one of libelants' witnesses, who was present when the hatch was removed, that he descended immediately, and that, although he examined carefully, he could find no indications that the contents of No. 2 upper steerage had been lashed or otherwise secured against movement in rough weather. It is true that at the time of his examination the contents of the compartment were in such a chaotic state that the inferences to be drawn from his failure to discover any evidence of lashing down are not particularly strong; but, in the absence of any testimony whatever on the part of the ship as to how such contents were stowed and secured against the movements incidental to rough weather (the compartment was not filled), the evidence is sufficient to support the libelants' contention.

2. The claimant further contends that it should have the benefit of the provision in the contract of carriage exempting it from liability for the act, neglect, or default of its servants; such stipulation being authorized by the Belgian law. In reply it is sufficient to refer to *Worsted Mills v. Knott*, 27 C. C. A. 326, 82 Fed. 471, in which a majority of this court held that such a stipulation, being against the public policy of this country, was not enforceable by its courts. We are unanimous in the opinion that it cannot be enforced where both parties to the contract are citizens of the United States, and the place of completion of the contract is within this country. We concur also in the conclusion of the district judge that the provisions of the second section of the Harter act as to bills of lading and shipping documents do not apply to passenger tickets.

3. The main contention of the libelants is that the stipulation in the ticket against liability for injury to baggage in excess of the stated value of 250 francs is void, either because it did not amount to a contract, or because it is contrary to public policy, or because the sum named (250 francs) is unreasonably small. The same question was discussed by this court in *The Majestic*, 9 C. C. A. 161, 60 Fed. 624. That decision was reversed by the supreme court (*The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597) on the ground that the conditions or limitations relied upon in that case "were not included in the contract proper, in terms or by reference"; being printed on the back without any reference in the contract to such indorsement. In

the case at bar, however, the clause relied upon is plainly included in the contract itself, above the signature of the ship's agent; and the reasoning of the opinion of this court in *The Majestic*, supra, applies. However unreasonable would be a "condition" attempting to relieve the carrier entirely from liability in excess of some named amount, there seems to be no impropriety in the carrier's requiring the passenger to declare the value of his baggage in excess of such named amount, to take regular bill of lading therefor, and to pay for its transportation in proportion to its value, with the proviso that, if he fails so to do, the carrier shall not be liable. As to the question whether the sum named (250 francs) is too small, the supreme court, in *The Majestic*, supra, intimated some doubt as to the reasonableness of £10 in the case of a first-cabin passenger's baggage, but rendered no decision thereon. In view of the circumstance that the condition complained of contained an offer to carry the excess value under a regular bill of lading, we are not prepared, in the absence of authority, to hold that 250 francs is an unreasonable valuation for personal baggage of a second-cabin passenger not thus carried.

The proposition contended for, that the clause in question provides only for the relief of the "shipowner or agent," and does not inure to the benefit of the ship itself, which in this suit is called upon to respond only because, as is alleged, the owner did not fully carry out its contract, seems to be without merit. The decree of the district court is affirmed, but, since both sides appealed, without interest or costs.

BOLAND et al. v. COMBINATION BRIDGE CO.

(District Court, N. D. Iowa, W. D. June 24, 1899.)

1. NAVIGABLE WATERS—BRIDGES—FAILURE TO OPEN DRAW FOR PASSAGE OF VESSEL.

A steamer passing down the Missouri river at 5 o'clock in the morning, on approaching a bridge, and discovering that the draw would not be opened in time for its passage, attempted to make the shore, but struck some sunken piles, and was injured, and, being unable to pass the obstruction, was carried by the current down against the draw, then partially opened, and received further injury, which caused her to sink, and she became nearly a total loss. The failure to open the draw for the passage of the boat was due to the negligence of the bridge tender employed by defendant, owner of the bridge, who had been notified of the time she would pass down, but who was not on hand. *Held*, that his negligence, for which defendant was responsible, was the cause of the injury of the vessel as well from the collision with the piling as with the bridge, it appearing that she was free from fault, and that defendant was liable for her value, less the value of such parts as might have been saved by reasonable diligence and effort after she sank.

2. SAME—STATE SUNDAY LAWS.

The fact that states on either side of a navigable river have in force statutes prohibiting the doing of certain kinds of work on Sunday does not relieve the owner of a bridge spanning the river from the duty of opening the draw on Sunday to admit the passage of vessels engaged in commerce on the river.

3. SAME—FAULT OF VESSEL—ACTION IN EMERGENCY.

Where the failure of a tender of a bridge across a navigable river to open the draw in time for the passage of a steamer approaching from up the stream imposed upon those in charge of the vessel the necessity of hasty action to prevent a collision with the bridge, an error of judgment on their part, committed in the haste and confusion incident to the situation, will not be imputed to the vessel as a fault.

This was a libel in admiralty by the owners of the steamer Benton against the Combination Bridge Company to recover for the loss of the boat. Heard on pleadings and proof.

Henderson, Hurd, Lenehan & Kiesel and Strong & Owens, for libelants.

Taylor & Burgess, for respondent.

SHIRAS, District Judge. The Combination Bridge Company, the respondent herein, is a corporation created under the laws of the state of Iowa, and is the owner of a combined railroad and wagon bridge across the Missouri river at Sioux City, Iowa, which bridge was erected under the provisions of the act of congress approved March 2, 1889 (25 Stat. 849) and the act amendatory thereof, approved April 30, 1890 (26 Stat. 79). On the evening of July 17, 1897, the steamer Benton, which was then employed in the freight and passenger business upon the Missouri river, passed through the draw of the bridge on its way to the Big Sioux river, which enters the Missouri some four miles above the bridge, and the captain of the steamer notified the bridge tender, James Walsh, that the boat would return down the river, and pass the draw, at 5 o'clock, or thereabouts, the next morning, to wit, Sunday, July 18th. The draw was turned by hand power, and Walsh, the bridge tender, who testifies that he was in charge of the draw in July, 1897, also testifies that it required eight men to properly operate the sweeps, two in number, with which the draw was turned. The evidence further shows that the bridge company did not keep a force of men on the bridge at all times to aid in manipulating the draw; that there were but few passages made by boats through the draw, and that it was the practice of the company to call on men living in the neighborhood of the bridge for aid when it was necessary to open the draw; that on the evening of July 17th Walsh notified a number of these men that the draw was to be opened the next morning at 5 o'clock, and in pursuance of this notice these men were at the draw at about the time named. The evidence further shows that the steamer left the landing in the Big Sioux river on the morning of the 18th, reaching the Missouri at 5 minutes past 5, and at 10 minutes past 5 the proper signal for the opening of the draw was given by the steam whistle on the boat, and was repeated at short intervals as the boat came down the river, the signals being heard by the men who were to open the draw. The Benton continued on its way towards the bridge until it reached a point about 1,200 feet from the draw, and, the draw not being then open so as to admit the passage of the steamer,

the captain attempted to make the shore on the Nebraska side of the river, but in approaching the same the boat struck upon some submerged piles in the river, knocking a hole in the hull. The effort to land proved futile, and the steamer was swept down by the current into the draw, which by that time had been partly opened, and the pressure of the boat forced the draw open, so that the steamer passed through, and it was finally landed on the Iowa shore, near the foot of Jackson street, in Sioux City, where it finally sunk, and became practically a total wreck and loss. The evidence further shows that the reason why the draw was not opened more promptly was due to the failure of the bridge tender, Walsh, to reach the draw, and direct its opening, in accordance with the notice he had received the evening previous. The evidence shows that when the men who had been notified by Walsh to be in attendance saw the boat coming down towards the bridge, they did not undertake to open the draw. They evidently acted in the belief that they had no authority in the premises in the absence of Walsh. When they found that Walsh was not present, they sent at least two messengers to hunt him up, and notify him that the boat was coming, but they did not attempt to open the draw until they had received a signal to that effect from Walsh, who testifies that he gave the signal by waving his hand, and calling out to them, as he was coming towards the draw; and in obedience to this signal the men began to open the draw about 20 minutes past 5. There can be but one conclusion drawn from the evidence on this point, and that is that the failure to open the draw more promptly was due to the negligence of Walsh in not being at the draw in proper season. The duty of the bridge company was to open the draw with all reasonable promptness for the passage of the Benton on the downward trip, and, as it is not questioned that the bridge company had been notified through its agent, the bridge tender, that the Benton proposed to pass the draw at about 5 o'clock, it was the duty of the company to use ordinary care to have the draw open when the boat came down the river in pursuance of the notice given the evening before. The evidence shows that it requires about 10 minutes to open the draw, and yet with this knowledge Walsh did not come to the draw until fully 20 minutes after 5, and, under the circumstances developed in the evidence, it must be held that Walsh was clearly negligent in the performance of the duty imposed upon him, and his negligence in this particular is chargeable to the bridge company.

It is urged in argument on behalf of the bridge company that, as this accident happened on a Sunday, there was no obligation resting upon the company to open the draw on that day, and therefore the company cannot be held liable for the failure in this particular, and in support of this proposition counsel cite the provisions of the statutes of the states of Iowa and Nebraska forbidding the doing of certain kinds of labor on that day; but both of these statutes contain the proviso that nothing therein contained shall be construed to prevent persons traveling or families emigrating

from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending to the same, and it would seem, therefore, that attendance upon this bridge would come within the exception to the statute, even if it should be held that these statutes are applicable to bridges across the navigable rivers of the country such as the Mississippi, the Missouri, and the like, which, as avenues and means of commerce between the states, are under the control of the national government. It would certainly be a novel proposition to hold that steamboats upon these great rivers, engaged in the transportation of passengers and freight thereon, cannot pass the bridges now spanning the same on Sunday, because the so-called Sunday laws of the states forbid the manual labor necessary to open the draw.

It is further urged on behalf of the respondent company that the injury to the boat was caused by its striking upon the submerged piling in the attempt to make a landing, and for the injury caused by the collision with the piling the bridge company is not responsible. The evidence shows that part of the injury to the boat was the result of the collision with the piling, and part was caused by the boat striking the bridge when it was forced through the draw, but these successive injuries resulted from one and the same cause, to wit, the failure to promptly open the draw upon the approach of the boat, which failure was due to the negligence of the person to whom the bridge company had intrusted the duty of controlling the opening of the draw. It was the failure on part of the company to have the draw opened that created the necessity for making a landing, and the collision with the piling has the same causal connection with the negligence of the company as has the collision with the bridge when the boat was forced through the draw; and, if the company is liable for the injuries resulting from the latter collision, it must be equally liable for the injury resulting from the collision with the piling. Thus it is well settled that if one vessel negligently runs against another that is moored to a dock or wharf, and thereby breaks the fastenings of the latter, thus setting it adrift, and it is carried by force of the current against the shore, or against some obstruction in the river or harbor, and by collision therewith is caused to sink, the colliding vessel is liable not only for the injury caused by the actual collision between the two vessels, but also for that resulting from the striking against the shore or other obstruction; and this rule is applied in cases wherein there was no collision between the vessels, as in the case of *The Leo*, 15 Fed. Cas. 325, wherein a propeller, while at a pier, created such a swell in the water that it broke the fastenings of a canal boat, which then collided with a bulkhead, causing it to sink, and the propeller was held liable for the loss of the canal boat. So, in *The C. H. Northam*, 5 Fed. Cas. 644, a steamer was held liable for the damage to a canal boat forming part of a tow in charge of a tug, which resulted from the suction and swell caused by the rapid movement of the steamer in close proximity to the tow, whereby the canal boats were dashed

against each other. If the draw had been opened in due season, the Benton would undoubtedly have safely passed the bridge, but through the negligence of the respondent the boat was compelled to make the attempt to reach the shore, and the bridge company must be held responsible for the risks involved in so doing. Having, by negligence on its part, created the necessity for making a landing on part of the boat, it cannot escape liability for the injuries caused to the Benton in the effort to reach the shore, on the theory that there was no causal connection between the act of negligence, to wit, the failure to open the draw, and the striking of the submerged piles by the boat in the effort to reach the shore.

It is further contended on behalf of the bridge company that, admitting it to be shown that there was negligence on its part in that the draw was not promptly opened, nevertheless the parties in charge of the Benton were also negligent in that they approached so near to the bridge before attempting to make a landing, it being apparent to them that the draw was not open. There can be no question of the fact that it was the duty of the parties in charge of the Benton to use all due care in the management of the boat when approaching the bridge, and the contention of the respondent is that as the boat came down the river, and for a distance of at least two miles, the bridge was in plain sight, so that the parties in charge knew that the draw was not open, and with that knowledge they should have stopped the boat at a safe distance from the bridge, and that the failure so to do constituted negligence on their part, contributing to the accident. The evidence shows that the boat was moving at a moderate rate of speed, and the parties in charge saw the men at the draw; and, in view of the notice given to the bridge company the previous night of the need of having the draw open, was it not a reasonable supposition on their part that the men in charge would commence to open the draw in time for the passage of the boat, and therefore can it be said that the Benton was in fault because those in charge of the steamer brought it within 1,200 feet of the bridge before attempting to stop its progress? It is clear from the evidence that, had it not been for the submerged piles in the river, the boat would have safely reached the shore, so that the facts do not present the question that would have arisen had the boat been allowed to come so close to the bridge that, when the parties in charge attempted to arrest its course, it could not be done, and the boat collided with the bridge. The evidence justifies the conclusion that the boat could have been safely landed had it not been for striking against the hidden piles, and therefore the fact that the landing was not attempted until the boat was within 1,200 feet of the bridge does not prove want of due care on part of the Benton. The evidence shows that both the captain and pilot of the Benton knew that there were sunken obstructions above the bridge, and in the neighborhood of the place where the attempt to land the boat was made, but it is not shown that they knew the exact location of these obstructions, and, taking the entire facts into consideration, it cannot be said that the parties in charge of the steamer were negligent in attempting to make a landing where it was attempted.

If, through the fault of the bridge company, a sudden necessity was imposed upon the Benton to make a landing to avoid being swept against the bridge, and in making the landing the boat had been swept against the shore itself, and had been injured, it would not be open to the bridge company to escape liability by claiming that the Benton could see the shore, and ought not to have approached it. The rule is well settled that, where the negligence of one party imposes risk and danger upon another, an error of judgment, committed in the haste and confusion incident to the situation, will not be imputed as a fault to the party thus compelled to act without time for careful investigation of his surroundings. Thus, in the case of *The Belle*, 3 Fed. Cas. 127, it was said:

"The movement was made in a moment of alarm and of imminent and overwhelming peril,—peril into which the vessel had been brought by the fault of the *Belle*, and by no fault of the *Tempest*. The error of a vessel thus brought into immediate jeopardy by the fault of another, committed in a moment of alarm, will not subject her to damages, nor prevent her recovery. This is a perfectly familiar principle of constant application by courts of admiralty."

In the case of *The Favorita*, 8 Fed. Cas. 1099, the rule was stated as follows:

"The pilot was acting in good faith, in a situation of great peril; and an opinion formed after the event, which should pronounce his judgment erroneous, ought not to be decisive of fault on his part, casting the loss upon the libelants. It is a familiar and well-settled rule that when a vessel is placed in imminent jeopardy by the fault of another the discretion which her mariners are called upon instantly, and in the very jaws of the peril, to exercise to effect deliverance, is not to be closely criticised, nor their conduct to be condemned, unless very plainly negligent or unskillful. Sudden danger and unavoidable alarm in a degree disqualify for the exercise of that calm weighing of chances and a deliberate choice of the best possible mode of escape which may, under other circumstances, be required."

After the event has occurred, it is an easy matter for witnesses to point out that the accident might have been prevented by slight changes in the action of the parties in charge of the Benton, but that is not the final test which determines the question of negligence on their part. Wisdom that comes from the contemplation of an event after it has happened is of easy acquirement, but it cannot be made the test for determining whether there was or not a lack of care on part of the actors, preceding the occurrence of the event. When it became apparent to the officers of the Benton that the draw was not to be opened, and that immediate action must be taken to prevent the boat from striking the bridge, there was not time nor opportunity for making an examination of the shore for hidden obstructions, nor for selecting a certainly safe place to make a landing. The pressing necessity was to get the Benton to the shore, and the risks inhering in the situation should not be cast on the Benton, but upon the bridge company, by whose negligence the necessity for making the landing was created. Upon this branch of the case the conclusion must be that it is not made clear that there was negligence on part of the Benton, and therefore it is not a case for a division of the

damages, but the whole liability must be adjudged against the bridge company.

In discussing the amount of the damages to be awarded, counsel for the bridge company earnestly contend that after the Benton passed through the draw the parties in charge should have taken the boat to a point where the water was shallow, so that, even if the boat did sink, it could have been raised and repaired, thus preventing a total loss; and that this could have been done either by the power of the Benton, in its disabled condition, or by procuring the services of another steamer. The evidence shows that the Benton, after passing the bridge, was badly disabled, and does not support the conclusion that the boat could have been landed or taken by its own machinery to any other point than the one to which the current swept the boat after passing the draw; nor does the evidence make it certain, or even probable, that the Benton could have been towed by any other steamer to a safer landing. It was, of course, the duty of those in charge of the Benton to do all that was reasonably in their power to keep the boat from sinking, or, if that could not be prevented, to save as much as possible of the machinery and appurtenances; but the evidence justifies the conclusion that the sinking of the boat is not to be attributed to any lack of care on part of the officers of the boat, and therefore the respondent must be held liable for the fair value of the Benton, deducting therefrom such sum as fairly represents the value of what might have been saved by the exercise of proper care on part of those in charge of the boat. Upon the question of the actual value of the Benton, the witnesses are widely apart in their estimates. In the libel the value is placed at \$8,000, and the witnesses on behalf of the libelants place the value at from \$8,000 to \$10,000, whereas the witnesses for the respondent put their estimate at from \$1,000 to \$3,000, thus making the fair average of these estimates about \$6,000. The evidence shows that the Benton was built in 1875, and by repairs to the hull and machinery had been kept in good condition. T. B. Sims, one of the libelants, bought the boat at marshal's sale in the spring of 1896 for the sum of \$1,450, having instructed his agent, through whom he made the purchase, to bid as high as \$3,000 for the boat. In the spring of 1897, he sold one-half of the boat to his co-libellant, James P. Boland, for the sum of \$1,500. After the boat had been taken to Sioux City, Boland offered on behalf of Capt. Sims to sell his interest at the rate of \$2,500 to \$3,000 for the half interest, which would make a total value of from \$5,000 to \$6,000. Taking into consideration the entire evidence on the question of the value of the boat, it fairly justifies the conclusion that the actual value of the Benton at the time of the accident would not exceed \$6,000. The evidence further shows that, after the boat was landed at the foot of Jackson street, the larger part of the machinery and appurtenances of the boat could have been removed, and Capt. Boland was making progress in that direction when a writ of attachment was served on the boat by the sheriff of Woodbury county to secure payment of a bill for coal, due from the boat, and when this was done no further effort was

made to save the machinery, and the boat became practically a total loss. The respondent is nowise responsible for the cessation of the work of salvage following the service of the writ of attachment, and it is clear that with proper effort on part of Capt. Boland, the work of saving the machinery could have been proceeded with notwithstanding the service of the attachment; and the evidence tends strongly to show that with proper effort the larger part of the machinery on the boat could have been saved, and to an amount that would probably have netted the sum of \$1,500 over and above the expense of salvage. Deducting this sum from the value of the boat, leaves a difference of \$4,500 as the amount of the damages to which the libelants are entitled, and a decree in their favor for that amount and costs will therefore be entered against the respondent.

THE JOHN B. DALLAS.

(District Court, D. New Jersey. June 12, 1899.)

1. COLLISION—SUIT FOR DAMAGES—PARTIES.

A purchaser of a vessel, who had made part payment thereon, and was in lawful possession, under a covenant to keep her in good repair and running order, at the time she was injured in a collision, although the legal title remained in the vendor, may maintain a suit in admiralty to recover damages for the injury.

2. SAME—SETTLEMENT WITH THIRD PERSON.

The claimant of a vessel libeled for collision cannot relieve the vessel from liability to the libelant by any settlement made after the suit was commenced with one not a party to the record, and without the libelant's consent.

This was a suit in rem to recover damages for collision.

Hyland & Zabriskie, for libelant.

Deady & Goodrich, for claimant.

KIRKPATRICK, District Judge. The canal boat Hunt while in tow came in collision with the steam tug John B. Dallas, and was seriously injured. It is admitted that the Hunt was in no way responsible for the collision, and that she is entitled to damages. The libel in this case was filed by Joseph D. Lafayette, who at the time was the captain of the Hunt, and in lawful possession of her under a contract of sale which provided for payments to be made from time to time, the title to remain in the vendor until all of the payments had been made. The contract of sale also provided that the said Lafayette was to "keep the said boat in good repair and running order at his own cost and expense." There is some controversy over the amount which had been paid by Lafayette on account of the purchase price of the Hunt at the time of the collision, but it is conceded that it was in excess of the one-half of the purchase price. The legal title of the Hunt was, however, still in the vendor,—one Jesse Billings. The question presented for consideration is whether

the libelant, having an equitable interest in the Hunt, being in lawful possession of her at the time of the accident, under a covenant to keep her in "good repair and running order," has a status in this court to maintain an action in rem for damages resulting from collision. This question, it seems to me, must be answered in the affirmative. The case is, in principle, analogous to *The Minna*, L. R. 2 Adm. & Ecc. 97, in which the plaintiffs had hired a barge upon the terms that she was to be at their risk, and to be returned by them to her owners in as good condition as when delivered to the plaintiffs. The barge was injured in collision while in plaintiffs' care, and, upon suit brought, it was contended that plaintiffs had no right or title to maintain the action. But Philemon, J., said that the court of admiralty should take jurisdiction. With *The Minna* as a precedent, his honor, Judge Acheson, held in *The Venture*, 18 Fed. 463, that he saw no good reason for denying to bailees, who might maintain an action at common law for their damages, the right to recover in admiralty full damages for an injury to property under bailment, whether the suit was in personam or in rem.

But it is contended on behalf of the claimants that the libelant ought not to maintain this suit, because the claimants have made a settlement with the holder of the legal title of the Hunt. That settlement, the record shows, was not made until after suit was begun by the libelant herein for the enforcement of his rights and the protection of his interests. The claimants herein had at that time full knowledge of the equitable interest of Lafayette in the Hunt, and of his contract obligation to keep her in repair. Billings, the holder of the legal title, was not a party to the suit, nor did the claimants take any steps towards making him so. The settlement was made without the intervention of the court, against the protest of the libelant herein, and not until after the claimants herein had received a bond indemnifying them against loss for so doing. Under these circumstances the claimants herein could not by any payment to Billings, not a party to the suit, relieve themselves and the tugboat John B. Dallas from their known liability to Lafayette, compel him to abandon his suit lawfully begun, and remit him, contrary to his will, and perhaps his interests, to an uncertain remedy against a third party. There could not be any settlement of the amount of damages to which the libelant herein was entitled, without his consent. The voluntary payment to Billings will not prevent Lafayette from prosecuting his suit in this court. There should be an interlocutory decree in favor of the libelant, with usual order of reference.

ALABAMA IRON & RAILWAY CO. v. AUSTIN et al.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 786.

1. EQUITY—JURISDICTION—NATIONAL BANKS—PREFERENCES.

Equity has jurisdiction of a bill by a receiver of a national bank to set aside a transfer of notes made by the bank to prefer a creditor.

2. SAME—PLEADING AND PROOF—VARIANCE.

A bill by the receiver of a bank to set aside a preferential transfer of notes, in violation of Rev. St. § 5242, is not sustained by proof that the notes were put into the transferee's hands for payment by him, and that, instead of paying them, he wrongfully kept them.

3. SAME—EVIDENCE—RES JUDICATA.

Where an order dismissing a law case is pleaded in bar in an equity suit, and no proof is offered except the order itself, defendant cannot show the nature of the law case by affidavit after trial.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

In April, 1893, R. W. Austin, as receiver of the First National Bank of Sheffield, Ala., filed his bill of complaint in the United States circuit court for the Northern district of Alabama against the Alabama Iron & Railway Company. He alleged that he was duly appointed by the comptroller of the currency to the office of receiver of said bank; that on the 11th day of November, 1889, the First National Bank of Sheffield was indebted to the Sheffield & Birmingham Coal, Iron & Railway Company in the sum of \$10,000; that at that time said First National Bank was largely indebted, and that the amount of its liabilities exceeded the value of its assets; that this fact was known to the president, cashier, and directors of the bank, and it was known and apparent to said officers that said First National Bank would presently be unable to meet its obligations, and that it would soon be obliged to suspend its business; that in contemplation of such insolvency, and with a view of giving preference to Jacob G. Chamberlain, receiver of the Sheffield & Birmingham Coal, Iron & Railway Company, over its other creditors, and also with a view and for the purpose of preventing the application of its assets in the manner prescribed by the laws of the United States, said First National Bank did on the 11th day of November, 1889, transfer, assign, and deliver to said receiver, as collateral to secure its said previous debts, certain seven notes of H. B. Tompkins, aggregating \$8,506.27; that Chamberlain was appointed by said court receiver of said Sheffield & Birmingham Coal, Iron & Railway Company, which was subsequently dissolved and reorganized under the name and style of the Alabama Iron & Railway Company; that said notes were by said receiver, Chamberlain, delivered to the defendant corporation, the Alabama Iron & Railway Company, and that said notes are held by said defendant corporation, and were received by it, with full notice of all the facts above stated; that the defendant corporation also holds and owns the said claim against the said bank; that the defendant corporation now holds the said assets, and claims the right to apply them or the proceeds of their collection to the said debts of said First National Bank to the defendant corporation, and that, if the defendant corporation is allowed to do this, it will be an illegal preference over the other creditors of said First National Bank; that the assets of said bank are insufficient to pay its debts; that the said transfer to the defendant corporation was fraudulent and void; and that the said assets are the property of the orator, Richard W. Austin, to be administered by him as such receiver. The bill of complaint required the defendant corporation to answer, but without oath, the following interrogatories: Whether the defendant corporation, on the 11th of November, 1889, had on account the claim against the First National Bank of Sheffield, and, if so, the amount thereof; whether or not the notes were transferred to the defendant corporation, and, if so, when and on what consideration; whether or not at the time of said transfer the First National Bank of Sheffield was insol-

vent; whether or not at the time of said transfer it was in contemplation of insolvency; whether or not any of said notes so transferred to the defendant corporation have been collected, and, if so, what sums were collected. The bill of complaint prayed that the court decree the transfer of said notes to the defendant corporation to be null and void, and that the same are still the property of said First National Bank; that the defendant corporation be required to deliver the notes to the complainant, or to pay him the proceeds of the collection thereof; that the complainant have a decree against the defendant corporation for the said assets; and that the complainant recover the same, to be administered and applied to the payment of the claims of the creditors of said First National Bank. On October 10, 1894, the defendant corporation filed its answer. It admitted that on the 11th day of November, 1889, the said First National Bank was indebted to the Sheffield & Birmingham Coal, Iron & Railway Company in a large amount of money. It admitted that said bank was at that time largely indebted; but whether its liabilities exceeded the value of its assets, and whether this fact was known to the president and other officers of the bank, and whether it was known and apparent to the officers of the bank that it would soon be obliged to suspend its business, the respondent averred that it did not know, and asked that strict proof of said allegations be required. The respondent admitted that the notes were delivered to Chamberlain, as receiver, but denied that they were transferred in contemplation of insolvency, or with a view of giving a preference to Chamberlain, as receiver. The respondent averred that it was informed and believed that the notes were transferred to Chamberlain in the usual course of business, and denied that they were transferred with the view and for the purpose of preventing the application of the assets of the bank in accordance with the laws of the United States. The respondent further answered that a day or two prior to the 11th day of November, 1889, Chamberlain, as receiver, made a deposit with said bank of a large amount of New York exchange, which was to be collected for him by the bank, and was to be delivered to him when collected; that the cashier of the bank, without instructions to that effect, credited the account of Chamberlain with the amount of such deposit; that on said 11th day of November, 1889, Chamberlain, learning that some drafts drawn by said bank on its New York correspondent had been protested, went to the cashier of said First National Bank, and telegraphed to its president, who was then in New York, and informed both of them that he would stop payment of said drafts if the same were still unpaid, and, if his said drafts were paid, he would demand the proceeds of said collections, and the payment of his account; that the cashier of said bank informed him, when he was about to withdraw the amount to his credit, that there had been protests made of one of its papers, but that the same had been made good, and that the bank was in good condition, and, said Chamberlain insisting on drawing out the amount to his credit, the cashier informed him that he had sufficient funds to pay his deposit, but that the payment of such a large amount of money was more than the bank had expected, and its withdrawal would be a great inconvenience, and would temporarily cripple the institution; that Chamberlain insisted on withdrawing the balance and stopping the payment of his drafts, unless the bank would secure him against loss; whereupon the cashier delivered to him said notes as collateral security for the amount of his account. The respondent denied that the Sheffield & Birmingham Coal, Iron & Railway Company was dissolved, and reorganized under the name of the Alabama Iron & Railway Company, but that the fact is that the property of the former corporation was, by order of said court, sold and purchased by one Napoleon Hill, trustee, and, while it is true that a large part of the property formerly owned by said Sheffield & Birmingham Coal, Iron & Railway Company was subscribed to and became the property of the respondent, yet the respondent denies that said notes were delivered to it by Chamberlain, as receiver, but the same were sold and delivered by the officer of said court, who made sale thereof under its decree to the purchaser thereof, and the notes came in the possession of the respondent by being subscribed to its capital stock for valuable consideration, and without any notice to it of the facts alleged in the bill. The respondent admits that it holds said notes, and claims the right to apply the proceeds of their collection to the debt of said First National Bank, but it denies that such action would give it an illegal preference

over the other creditors of said bank. The respondent admits that the assets of the bank are insufficient to pay its debts in full, but denies that the transfers to the respondent are fraudulent or void, or that the notes are the property of the complainant as receiver. In answer to the interrogatories, the respondent said that it did not at any time have an account or claim against the First National Bank, except as transferee of the account of the Sheffield & Birmingham Coal, Iron & Railway Company, which, on the 11th day of November, 1889, amounted to — dollars; that the notes were transferred to the respondent on the — day of —, and the consideration was —; that, at the time of the transfer of the notes to the respondent, the bank was insolvent, and had been in the hands of complainant, as receiver, for a considerable time; that none of the notes have been collected. On November 1, 1895, it was agreed in open court "that the defendant have leave to amend his answer herein, and to file demurrers, and that 60 days' notice be granted for submission of proof, and that decision may be had in vacation upon arguments or briefs to be submitted within 90 days." On November 12, 1895, the defendant demurred, averring that there is no equity in the bill; that it appears by the allegations of the bill that the complainant has a complete and adequate remedy at law; that it appears by the bill that the notes were never in the possession of said bank after Richard W. Austin was appointed receiver thereof; and that the defendant derived title to and possession of said notes from said Chamberlain, receiver of the Sheffield & Birmingham Coal, Iron & Railway Company. On November 12, 1895, the defendant also filed a plea in bar, averring that before the filing of said bill said complainant had filed in said court, on the common-law side thereof, an action of detinue to recover from the defendant upon precisely the same cause of action as is set forth in said bill of complaint; that said common-law cause was by complainant voluntarily dismissed out of the said court on the 14th day of December, 1894; and that the dismissal of said common-law cause operated as a common-law retraxit of the cause of action upon which it was founded. The replication was filed on November 15, 1895. On April 14, 1898, the parties agreed that the cause might be submitted for decree in vacation, and it was stipulated that the defendant might on the trial of the cause "insist upon the matter of defense set forth in the demurrer, plea in bar, and answer, without waiving any of the rights of defense in either of said pleadings." The cause came on to be heard before the judge, in vacation, by consent of parties. The only proofs for the complainant were the depositions of one T. L. Benham and of Richard W. Austin, the complainant. Benham testified that he was the cashier of the bank; that on November 11, 1889, the bank held among its assets the seven notes of H. B. Tompkins; that on or about that day he received a telegram from the president of the bank, who was then in New York City, instructing him to compute the interest on the notes, and to take them to Chamberlain, and get a check for them; that he complied with the instructions by presenting the notes to Chamberlain for payment; that Chamberlain requested him to hold the notes a few days, and that he would let the witness know then whether he would pay them; that, after waiting a few days, he called on Chamberlain a second time; that Chamberlain requested him to leave the notes with him, saying that he would hold them and consult certain directors of his company, whom he was expecting to arrive soon; that he called on Chamberlain a third time, expecting to receive payment of the notes; that Chamberlain then informed him that said directors had instructed him to retain possession of the notes, and to hold them as collateral security against the amount which the bank owed him as receiver; that 18 days afterwards, namely, on November 29, 1889, the bank failed, Chamberlain retaining possession of the notes. Richard W. Austin, the complainant, testified that, aside from the notes in controversy, the assets of the bank will pay about 25 per cent., and that, if the notes should be recovered and the amounts claimed upon them, the assets will pay about 30 per cent. This was all the evidence offered for the complainant.

The defendant's proof consisted only of an order of dismissal of a cause by Richard W. Austin, as receiver of said bank, against the Alabama Coal, Iron & Railway Company. By an affidavit of H. B. Tompkins, which is found in the record, made on the 18th of November, 1898, evidently after the trial of this cause below, it would appear that all the original papers in the present cause,

as also in the common-law action referred to in the plea in bar, were lost prior to the trial below; that an order was made on April 22, 1897, to re-establish the lost papers; that the papers in this equity cause were re-established, but that the papers in the common-law cause were not. The final decree in this cause was signed on August 15, 1898. It recites that the cause was heard and determined "upon the bill, demurrer, answer, plea, depositions, and other documents on file." The decree adjudged the assignment of said notes to be fraudulent and void, and the same was set aside. The decree further proceeded to adjudge "that complainant have and recover of the defendant the sum of \$8,506.27 for the principal of the seven notes, with \$4,593.37 as interest at 6 per cent. per annum, * * * making in the aggregate the sum of \$13,099.64; and, if the sum is not paid within 30 days, execution should issue on complainant's demand, provided, however, that the delivery of all said notes to the clerk of this court within 30 days shall be accepted in full satisfaction of this decree." The defendant corporation appealed, assigning for error, among other matters, with much particularity and detail, that the demurrer and plea in bar should have been sustained, and that there is no evidence to sustain the decree; also that the decree is not in accordance with the prayer of the bill. In the brief on behalf of appellant it is said: "The scope and object of the prayer was for the recovery of the seven notes, or for the proceeds of the same if they had been collected. * * * A decree for a specific sum of money, without proof of the value of the past-due notes, and when no part of the prayer was for the money value of the notes, unless they had been collected, was obviously erroneous."

H. B. Tompkins and R. C. Alston, for appellant.

M. F. Caldwell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

The appellee contends that, as the demurrer and the plea were filed after the answer, they came too late, and should not be noticed. But it is clear that the complainant consented that the demurrer and the plea might be filed and be passed upon, and he cannot now be heard to object that they were improperly or unseasonably filed. The trial judge evidently was of opinion, and properly so, that the demurrer and the plea were before the court by consent of parties, and in the decree he passed on the demurrer and the plea, as well as on the merits. But there was no force in the demurrer. The bill made out a sufficient case to authorize a court of equity to take jurisdiction. As to the plea, whatever merit it may have had, the defendant failed to offer any proof in its support, and it was therefore proper to overrule it. The order dismissing the law case, standing alone, did not substantiate the plea. The attempts to show by an affidavit made after the trial of this cause the nature of the law action which was dismissed cannot, of course, avail the appellant. On the merits, we are of opinion that the decree of the lower court should be reversed, for the reason that the complainant failed to prove his case. Three different theories as to the facts and circumstances of this case are presented: The bill charges substantially that the notes were transferred by the bank in contemplation of bankruptcy and otherwise, in violation of Rev. St. U. S. § 5242, for a pre-existing debt of the bank. The answer avers, in effect, that the transfer was not to secure a pre-existing debt, but to secure the collection of drafts

by the bank. The proof would make a case where the notes were put in the hands of the receiver of the Sheffield & Birmingham Coal, Iron & Railway Company for payment by him, and where, instead of paying the notes, he kept them without right or authority. Inspection of the testimony of the two witnesses, which constitutes the entire evidence for the complainant, shows that he failed to prove the essentials of his bill of complaint.

In *Railroad Co. v. Bradleys*, 10 Wall. 299, it was said:

"It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

The decree appealed from is reversed, and the cause is remanded to said circuit court, with instructions to dismiss the bill.

REINHART et al. v. AUGUSTA MIN. & INV. CO. MANHATTAN TRUST
CO. v. SAME. VAN VOLKENBURGH et al. v. PROUT et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1899.)

No. 734.

1. CORPORATIONS—RECEIVERS—FUND CHARGEABLE WITH EXPENSES.

A receiver was appointed for a mining corporation, upon a bill alleging insolvency of the corporation, and inability to earn its charges and operating expenses. By consent, he was to operate the mines, and was authorized to borrow money, and was directed to pay all debts for labor and supplies incurred by the corporation within the six months preceding his appointment; payment to be made from earnings and income, or from money borrowed. *Held*, that the expenses of the receivership and the debts for labor and supplies were not payable alone out of the income and revenues of the corporation, but they might be paid out of the corpus of the estate.

2. SAME—MORTGAGES—PRIORITY.

The receivership was afterwards extended to a suit to foreclose a mortgage of the mining property, on motion of the trustee of the mortgage; and a decree was passed, without objection, ordering a sale, and giving the debts for labor and supplies, and the expenses of the receivership, priority over the mortgage. A decree of distribution was passed in accordance with the decree of foreclosure, and no appeal was taken therefrom, except by certain of the mortgage bondholders, who had caused the receiver to be appointed. *Held*, that the mortgage bonds were not entitled to priority over said expenses and debts, since the parties had agreed otherwise.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

On October 12, 1892, Joseph W. Reinhart, Phillip Van Volkenburgh, and others, citizens of the state of New York, filed their bill in equity in the circuit court of the United States for the Northern district of Georgia. The bill was brought for the complainants named in the bill, and such others as might thereafter be joined as complainants. The bill averred that the Augusta Mining & Investment Company, incorporated under the laws of the state of Virginia, owes the complainants certain promissory notes, due on demand, for money loaned said corporation to enable it to carry on its business in Polk county, Ga.; that payment of the notes had been refused, the corporation alleging as a reason for the refusal lack of money to pay the notes, or any part of them; that, in

addition to said notes, said corporation was largely indebted to other parties, its principal indebtedness being the sum of \$400,000 of first mortgage bonds, the majority of which is held and controlled by the complainants; that, while said bonds were not yet due, complainants believed and charged that there was great danger, owing to the character and condition of the assets of the corporation and its inability to properly operate and carry on its business, on account of financial embarrassments, that it would not be able to pay the bonds when they became due; that but recently before the filing of the bill the corporation, being in need of funds to pay its current expenses, and to meet its obligations, which amounted to \$75,000, issued debenture bonds for \$75,000; the principal creditors of the corporation agreeing to take said bonds in payment of their claims, and the complainants hold, as such creditors, a majority of said debenture bonds, to wit, \$40,000; that the interest due on said debenture bonds was not paid by the corporation, because of its inability to pay the same; that the corporation was largely indebted over and above the items of indebtedness above set out; that the corporation was the owner of large quantities of ore lands situated in the states of Virginia, Alabama, and Georgia; that said ore lands were very valuable, if the same could be fully equipped and operated, but that the defendant corporation was operating only three of its ore plants, and had equipped another, and was preparing to operate the same; that, while it was true that the above property was valuable, yet that its value was less than the indebtedness of the company, and, if permitted to be brought to a forced sale or placed upon the market, it would be greatly sacrificed, and would not realize enough to pay any of its indebtedness; that not only was this true, but that the defendant had not been able to earn its fixed charges and operating expenses, but said charges and expenses had been allowed to accumulate until the corporation had become insolvent, and, unless its property and assets were taken in charge by a court of equity, the complainants and other creditors would not receive payment of their debts; and that, even under the best management, it was very doubtful if the corporation could meet its liabilities, and especially would this be true if the defendant were not protected from vexatious litigation and attachments, and other proceedings which were then threatened against it, the effect of which would be to entirely destroy all prospects for the payment of the complainants' claim then due, and the utter ruin of the only security which the complainants hold, being first mortgage bonds and debenture bonds. The complainants, in their own behalf, and in behalf of such other creditors as might become parties to the bill, prayed that the corporation might be brought to sale, or that if it should be deemed advisable, on account of the peculiar nature and character of the property, and on account of the fact that some of the debts were due and some not due, that no sale of the property should be had, but that the property should be kept together and operated by a receiver, and the profits of such business should be applied to the payment of the complainants' debts and such other debts as might be due, and the corpus maintained intact for the payment of the debts not due, then the complainants prayed that the court might decree accordingly. They prayed further for the appointment of a receiver to take possession of the property, with the usual powers of receivers in such cases, with the power to manage and operate all of the ore banks then equipped and in operation, and with power to equip and operate more if it should be deemed advisable, and receive all the earnings and income thereof during the pendency of the suit, and with such other powers as should seem to the court right and proper.

On the same day on which the above bill of complaint was filed, to wit, on October 12, 1892, Charles W. Haskins was appointed temporary receiver, the defendant corporation consenting to the appointment. The receiver was directed by the order appointing him to take possession of all the property of the corporation, with power as prayed for in the bill of complaint, and to manage, operate, and maintain the several ore banks, with authority to employ officers, employees, and workmen, to keep the property equipped and in operation, and to collect all rents and revenues derived from the property over and above all expenses and liabilities authorized by the order of appointment. The receiver was specially authorized to pay all necessary and current expenses in the operation of the ore banks. It was also ordered that the debts for labor and for supplies and materials done or furnished since July 1, 1892, be paid by the receiver. The above

order of October 12, 1892, was made on the motion of complainants. On October 19, 1892, the receiver reported to the court that by the order appointing him he was authorized to pay for materials and supplies furnished to the company, and wages for labor, since July 1, 1892, but that on account of extraordinary work done by the company, in building a railroad from the company's property to the East & West Railway, he had not sufficient funds in hand to pay all these expenses covered by the court's order; and the receiver therefore asked that he be authorized and empowered to borrow not more than \$12,000, or such part thereof as might be necessary, upon his note or notes, drawing not more than 8 per cent. interest, and the notes extending for a period not exceeding 12 months,—the receiver to report his action in the premises to the court. Upon this application, the court, on October 19, 1892, with the consent of the complainants, made an order authorizing the receiver to borrow not exceeding \$12,000, under the terms and for the purposes set forth in the application. On October 31, 1892, on the motion of the complainants for the appointment of a permanent receiver, the defendant corporation consenting, the court appointed Charles W. Haskins as permanent receiver. Amongst other things, the order provided that: "It is further ordered, in addition to the powers heretofore vested in said receiver by the orders of this court, that he is hereby authorized to pay out of such fund, as such receiver, that may come into his hands, from the earnings and income of the property, or that he has been or may be authorized by this court to borrow for such purposes, all the debts due for labor and wages and for materials and supplies done and furnished to said defendant corporation for six months prior to his appointment as receiver. * * * It is further ordered that all matters and things set forth in the order appointing said Haskins temporary receiver, and also in the order heretofore granted by the court authorizing said receiver to borrow money for the purposes set forth in said order, be, and the same are hereby, ratified and reaffirmed, and made a part of this order, in so far as they are appropriate and proper." On the 31st of May, 1893, the Manhattan Trust Company filed its bill of complaint in the United States circuit court for the Northern district of Georgia. It alleged that it was the trustee of a mortgage executed by the Augusta Mining & Investment Company to secure an issue of \$396,000 of first mortgage bonds; that the defendant corporation had made default in the payment of interest due upon the bonds; that by reason of such default the bonds had become due, under the terms of the mortgage; and that the complainant was entitled to a foreclosure of the same. The bill made special reference to the bill of complaint filed on October 12, 1892, by Joseph W. Reinhart and others, which has already been stated. Special reference was also made to the appointment of Haskins as receiver, and to the above-mentioned orders of court concerning said receiver. The bill alleged that the earnings of the Augusta Mining & Investment Company for the past year had been, and still were, greatly inadequate to meet and discharge the accruing obligations of interest upon its bonded indebtedness, or the payment of its current expenses, charges, and indebtedness. The bill also averred that said corporation was wholly insolvent. The bill prayed for the appointment of a receiver to the property of the corporation, and for the foreclosure of the mortgage.

On May 31, 1893, a motion for the appointment of a receiver on the bill of complaint of the Manhattan Trust Company, or to extend the receivership in the cause in which Reinhart and others were complainants, came on to be heard before the court; and, on the motion of counsel for the Manhattan Trust Company, it was ordered that the receivership of the property of the Augusta Mining & Investment Company, theretofore made, by the appointment of Haskins as permanent receiver, be extended to the second cause, and that Haskins be appointed and continued as receiver in the second cause, with all the rights and powers as such receiver in the second cause which were conferred upon him under the said decrees of the court entered in the suit by Reinhart and others, of date October 12, 1892, and October 31, 1892, respectively. Subsequently, on motion of the attorneys for the complainants in the above causes, the attorneys for the defendant consenting, the two causes were consolidated, and it was agreed that the final decree be taken in said causes as consolidated. On January 23, 1895, the decree of foreclosure was signed. The decree fixed the amount which the defendant corporation should pay into the registry of the court to

prevent foreclosure, and classified the same as follows: "First, a sufficient sum of money to cover the expenses of the receivership, including obligations and debts incurred by the receiver under the order and direction of the court, and the compensation of the receiver and his counsel, and any other preferential claims and debts that may be allowed by the court to parties to this cause, and the court costs;" second, the expenses of complainants, including counsel fees; third, the amount of the mortgage bonds. In case these amounts were not paid, the decree provided that the property be sold, and also provided for the payment of: "First, all court costs, and the costs of the master commissioner in making the sale under the decree; second, the payment of the fees of the receiver of the property, and his reasonable attorney's fees, to be fixed by the court, and all proper obligations incurred by him under the authority of the court, as the same shall be determined and allowed by the court." On August 2, 1897, a master in chancery was appointed by the court to report, among other things, upon all debts and claims against the defendant corporation and the receiver which were alleged to be prior in rank to the bonds secured by the mortgage made to the Manhattan Trust Company as trustee. The master found and reported that all parties holding receiver's certificates for indebtedness due by the Augusta Mining & Investment Company prior to October 12, 1892, have no priority over the mortgage bonds, but that all the debts contracted by the receiver since his appointment are entitled to a preference over the mortgage bonds. Joseph W. Reinhart, Phillip Van Volkenburgh, and others, all alleging themselves to be bondholders of the Augusta Mining & Investment Company, excepted to that part of the master's report which gave priority over the bonds to the debts contracted by the receiver since his appointment. The parties whose claims were postponed to the bonds by the master excepted to such postponement. No exceptions were taken by the Manhattan Trust Company. On February 28, 1898, the court made a decree by which it confirmed the master's report as to the debts which he had found to be prior to the mortgage bonds, but overruling the master as to the debts which he had found to be inferior to the mortgage bonds. The decree recited that: "The exceptions filed to the report of the master are overruled, except as hereinafter specified; and the report of the master, except as so specified, is hereby confirmed, and made the judgment and decree of the court. It appears from the report of the master that certain notes were made by the receiver, under orders of this court entered October 12, 1892, and October 19, 1892, in payment of debts against the Augusta Mining & Investment Company for wages of employes and for materials and supplies furnished to said company for six months prior to the appointment of the receiver, which notes are specifically set out in Schedule No. 3 of the supplemental report of the master. The master found in his report that these notes, made under said orders of this court, were not entitled to priority of payment over the bonds secured by the mortgage to the Manhattan Trust Company; and to this finding of the master each one of the parties holding said notes set out in Schedule No. 3, as above mentioned, filed exceptions. It is ordered that the exceptions so filed be, and the same are hereby, sustained and allowed, and that the holders of said notes take precedence, as receiver's expenses, in the fund arising from the sale of the property described in the mortgage to the said Manhattan Trust Company. It is further ordered and decreed that the fund arising from the sale of the property be distributed according to the priorities set out and fixed in the original decree of foreclosure."

H. E. W. Palmer, for appellants.

Alex. W. Smith, Alex. C. King, Jack J. Spaulding, and T. A. Arnold, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge (after stating the facts as above). All the claims in dispute in this case are just and proper in themselves, the only contest being as to their rank. The theory upon which the appellants have proceeded, both in the lower court and in this court,

is that the expenses of the receivership, and the debts for labor and supplies incurred by the Augusta Mining & Investment Company during the six months which preceded the appointment of the receiver under the Reinhart bill, should be paid out of the income and revenues of the corporation, and not out of the corpus, and also that the mortgage bonds are entitled to a priority over all such expenses and debts. The appellants are bondholders of the corporation, who have undertaken to proceed independently of the trustee of their bonds, and, it would seem, in opposition to the trustee's views of the correctness of the decree appealed from. These appellants are, in the main, the same parties who instituted or joined in the Reinhart bill, under which the receivership was inaugurated. The bill which they filed to obtain from the court the appointment of a receiver shows that the corporation was insolvent, and that it was even unable to earn its charges and expenses. If we are to believe the appellants, they asked the lower court to do an apparently impossible thing, and the court undertook to do it. The appellants' contention amounts to saying that the court, looking solely to the income and revenues of a corporation which was shown to be insolvent, and even unable to meet its charges and expenses, engaged in the task of maintaining and carrying on the business of the corporation, and of paying, not only its running expenses, but also its debts for labor and supplies incurred during the six months which preceded the appointment of the receiver. The Reinhart bill even prayed that the receiver be empowered to equip and operate other ore banks than those which were then being operated. It could not be contended seriously that, if the orders of the lower court had borne only on such revenues as might be expected from a corporation in the ruinous condition in which the Reinhart bill alleged that the Augusta Mining & Investment Company was, any one could have been found to lend money to the receiver. It may then be fairly said that Reinhart and others are attempting to show that they asked the court to undertake the receivership under impossible conditions. There were no limitations placed upon the temporary receiver as to payment out of revenues, in the order authorizing him to borrow money. This order was specially consented to by Reinhart and others. They then applied for the appointment of a permanent receiver, and upon that application the temporary receiver was appointed as permanent receiver, the previous order authorizing the temporary receiver to borrow money was affirmed, and the permanent receiver was directed to pay all debts for labor and supplies incurred during the six months preceding his appointment, not only from earnings and income, but also from such moneys as he was or might be authorized by the court to borrow for the purpose. Subsequently the Manhattan Trust Company, trustee of the mortgage, caused the receivership to be extended to the foreclosure suit, and it is plain that the trustee adopted all prior proceedings and orders. The decree of foreclosure again made it evident that the debts and expenses paid by the receiver were to outrank the mortgage. The appellants did not complain of the decree; and it should be specially noticed that the Manhattan Trust Company, which, as trustee of the mortgage, represents

the appellants as well as all other bondholders, has never complained of the action of the lower court in postponing the mortgage to the debts and expenses paid by the receiver. The trustee did not complain of the foreclosure decree, nor did it except to the master's report, nor has it appealed from the decree of February 28, 1898. It is not even intimated that the trustee has been derelict in its duty to protect the interest of the bondholders. It is plain that the trustee has acquiesced in the correctness of the decree appealed from.

Fosdick v. Schall, 99 U. S. 235, and other cases, have been cited to us by appellants' counsel, who urge that, under the doctrine of those cases, the lower court had no power to postpone the mortgage to the debts and expenses paid by the receiver. The case before us is not one in which the principles of the cited cases come into play. The present case is simply one in which the matters complained of have been consented to by the parties. There is no error in the decree appealed from, and it is therefore affirmed.

UNITED STATES v. CENTRAL PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 481.

PUBLIC LANDS—RAILROAD GRANT—PRE-EMPTION CLAIMS.

A pre-emption settler on unsurveyed public lands, who, at the time a railroad grant attached by the definite location of the line of road, had in no way indicated the boundaries of his claim, cannot, by thereafter extending his improvements over a tract which he had not at that time claimed or improved, and which by the subsequent survey was shown to be within a section granted to the railroad company, acquire any claim or rights there-to as against the railroad company.

Appeal from the Circuit Court of the United States for the Northern District of California.

Marshall B. Woodworth (H. S. Foote, of counsel), Asst. U. S. Atty. W. Singer, Jr. (Wm. F. Herrin, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This suit is brought to cancel a patent issued to the defendant the Central Pacific Railroad Company, as the successor in ownership to the California & Oregon Railroad Company, on January 24, 1880, to the E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 33, township 22 N., range 4 E., M. D. M., on the ground that it was issued "through mistake, inadvertence, and error." The land in controversy is within the land grant made to the California & Oregon Railroad Company under the act of congress of July 25, 1866 (14 Stat. 239). This act granted to the railroad company 10 odd sections of land on each side of the railroad line, not "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of." The map of the definite location of the road was filed in the office of

the secretary of the interior September 13, 1867, and on October 29, 1867, the lands lying within the limits of the grant were withdrawn from sale by the commissioner of the general land office. The question presented is whether one Michael Lannon had acquired a right of pre-emption to the land prior to September 13, 1867, when the line of the railroad was definitely fixed and located.

It appears from the testimony that in 1858 the said Michael Lannon, being then an alien, and engaged in the business of mining near the land in controversy, settled upon the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34, township 22 N., of range 4 E. This and the land in controversy were adjoining subdivisions of the then public, unsurveyed land, containing 80 acres each. The land was surveyed in September and October, 1878, and the official plat of this survey was filed in the land office December 14, 1878. Lannon on February 11, 1867, qualified himself to make a pre-emption claim by filing his intention to become a citizen of the United States. In 1869 Lannon cleared the land in controversy, in 1870 he cultivated a portion of the land, and in 1871 he built a house and moved upon the land. Prior to that time he lived in his house on section 34, upon the 80 acres of land which is not in controversy in this suit. On May 21, 1879, Lannon filed his declaratory statement with the register of the land office at Marysville, Cal., upon the 80 acres of land in section 34; and on December 20, 1879, he filed an application to amend his pre-emption declaratory statement so as to include the 80 acres in controversy, which was allowed by the acting commissioner of the land office.

We are of opinion that Lannon was not, at the date the railroad's grant attached, to wit, September 13, 1867, entitled to pre-empt the land in controversy. He was not a pre-emption settler upon the land, within the provisions of section 2259, Rev. St., which declare that:

"Every person * * * who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant."

There is no testimony in the record which shows that prior to September 13, 1867, when the map of the definite location of the railroad was filed, the said Lannon had ever entered upon the land in controversy, or claimed or intended to claim the same, or made any improvements thereon of any kind, or exercised any act of dominion or control over it in any manner whatsoever. The ground floor, upon which the entire superstructure of appellant's argument is built, is based upon the proposition "that Lannon intended to and did claim to have settled upon, cultivated, and improved 160 acres from the time of his original settlement to the date of his official survey in 1878," and that the land in controversy was embraced in said claim, and it is contended that these facts are "established by the evidence beyond contradiction." The testimony upon which appellant chiefly relies is, as stated by counsel, "best described in Lannon's own simple style." In his direct examination, Lannon testified as follows:

"Q. What was your object in settling here and building a house? A. My object was to make a home, if I lived to be old. Q. Did you know how much land you were entitled to as a pre-emptor or a homesteader? A. I did, but I never had any way to file on it until the government survey was made. * * * Q. You did know how much you was entitled to? A. Yes. Q. Did you at any time prior to May, 1871, indicate in any way— How much land did you understand you were entitled to? A. I understood I was entitled to 160 acres of land,—of government land from the government. Q. Did you, prior to May, 1862, in any way and in what manner, indicate what particular 160 acres of land you intended to make your home? A. Yes; that land that suited me, that was suitable for a man to take, that could be cultivated. Q. The question is, did you indicate it, and, if so, by what means; that is, did you fence it round, run furrows around it, or stake it, or blaze it, or anything of that kind? A. No, sir; there was nothing in that part of the country staked out or blazed out by any settler until the government survey was made. Q. Did you assert ownership or claim to any particular 160 acres? A. Yes. Q. What was it? A. Just this same land now that I live on,—that I made my improvements on. That is the same land. * * * Q. What did you mean by making affidavit that you moved on it in 1858? A. There was no odd sections and no even sections there then. I claimed 160 acres of government land whenever it came on the market. When the north and south line was run, it cut my improvements in two, like that, and threw all my buildings and orchard and vineyard upon this odd section. Q. What 160 acres of land did you claim, sir? A. I could not say what 160 acres it was. There was no sections. How could a man claim any 40 or 80? How could he name it?"

It will be noticed that this testimony is in many respects uncertain and indefinite. The effect of his testimony is made more specific upon his cross-examination, as follows:

"Q. You moved on this land in 1870, didn't you, Mr. Lannon,—this particular piece of land in controversy? I think you stated that you cleared it in 1869 and 1870, and moved on and built your house in 1871. A. Exactly; moved and got a crop of hay in June, 1871. Q. You were on the land before 1869, were you not? A. I was not living on it, but I had labor done,—cleared and cropped. Q. In 1869? A. In 1870. Q. Had you done anything on this land before 1869? You had not done anything, had you, on the land before 1869? A. Nothing more than cutting brush. Q. What year did you do that first? A. In 1869 and '70. Q. Then in 1868 you had not cut any brush or cleared the land at all, had you? A. No, sir. * * * Q. When was it that you first went on this particular piece of land? In what year was it,—1868, 1869, or 1870? A. 1871,—1870 and 1871. * * * Q. You have repeatedly stated that you did not settle on this land because it was not surveyed. Now, without regard to the survey, without describing it by the survey, what 160 acres did you claim around and about your house there,—the cabin,—the first house you put up? A. The portion of land that I wanted was where I put in a crop; that could be cultivated; all cleared and cropped. That was the land that I intended to claim, if it ever came on the market, and that is the land I improved. Q. You intended to; but did you claim, or did you simply intend to claim, it? A. I intended, when it came on the market, that I would claim it. Q. The question is, did you claim it from the time you settled there, or did you simply intend to do it? A. Yes. Q. Which? Did you intend to, or did you, claim it? Did you claim it always? Did your neighbors know what particular 160 acres you claimed there? A. They did not know. Q. I do not mean by description, but did they know the particular tract of land you claimed, without regard to the description of it by survey? A. They did not. Q. Couldn't you have gone and pointed out the lands independent of any survey? A. I could not, because the miners were scattered back and forth in these ravines. I have always claimed 160 acres. Q. What 160 acres? A. This same land I made my improvements on."

If Lannon had indicated by act or deed his intention prior to September 13, 1867, to claim the land in controversy as a part of the land he had located upon in 1858, then his improvements and dwell-

ing on the 80 acres where he first resided might have been sufficient to enable him to maintain his claim thereto, unless the legal questions discussed by counsel would deprive him of that right. But in the absence of any such indication until after September 13, 1867, we think the facts are wholly insufficient. Lannon gained no additional rights by his entry, settlement, and residence upon the land in controversy after September 13, 1867. We are of opinion that the action of the circuit court in refusing to cancel the patent upon this ground was correct.

It is evident from the testimony quoted that Lannon is an illiterate man, and it is argued that allowance ought to be made upon that ground in considering his testimony. The courts have always been liberal in their construction in favor of the rights of settlers upon the public land, but ignorance of the law, or failure to comply with it, cannot be considered in the acquisition of a right created by statute, where the statutory requirements have not been complied with. As was said in *Maddox v. Burnham*, 156 U. S. 544, 547, 15 Sup. Ct. 449:

"It cannot be that when he falls, even by reason of his poverty, to do that which the law prescribed as the initiation of any rights in the land, he is nevertheless entitled to the same protection which he would receive had he complied with the statute. Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statute in respect to the creation of rights in the public lands."

The decree of the circuit court is affirmed.

TRAVIS PLACER MIN. CO. v. MILLS.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1899.)

No. 503.

WATER COURSES—USE OF WATER FOR MINING PURPOSES—ENJOINING POLLUTION.

A company having the right to use the waters of a stream for placer mining cannot complain of an injunction restraining it from so using them as to render them unfit for use in supplying the inhabitants of a city for domestic purposes, where the injunction does not interfere with defendant's use in its ordinary and accustomed manner.

Appeal from the Circuit Court of the United States for the District of Montana.

Toole, Bach & Toole and Shober & Rasch, for appellant.

Clayberg, Corbett & Gunn, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was a suit in equity, by which the complainant sought to enjoin the defendant placer-mining company the appellant here, "from in any manner or to any extent fouling muddying, polluting, or discoloring the waters of Ten Mile creek, which flow down to the place where the same are diverted into the water plant and system operated by your orator during the time it is necessary for your orator to use said water for furnishing the

city of Helena and its inhabitants with water." The decree of the court from which the appeal is taken enjoins the defendant company and all persons acting for or under it "from conducting placer-mining operations on Ten Mile creek, in Lewis and Clarke county, state of Montana, in such a manner as to foul, pollute, or muddy the waters of said Ten Mile creek at the place of diversion into the water plant and system now operated by complainant, between the fifteenth day of July of each year and the tenth day of April of the succeeding year, so as to prevent the plaintiff from obtaining water suitable for domestic purposes and reasonably pure and wholesome from said creek."

An examination of the evidence shows that, in respect to the merits of the case, there is no substantial conflict in it. It shows that in the year 1864 certain of the waters of Ten Mile creek were appropriated and diverted at a point in Lewis and Clarke county, Mont., by the predecessors in interest of the Helena Consolidated Water Company, of which the appellee is the duly appointed, qualified, and acting receiver. That appropriation was for placer-mining purposes. During the next year (that is to say, in 1865) certain other of the waters of the same creek were appropriated by the predecessors in interest of the appellant for the working of placer-mining claims situated on and along Ten Mile creek, and have been continuously used for that purpose ever since by the appellant and its predecessors in interest. Many years after the appropriation under which the appellant claims was made, the appellee changed the use of the water appropriated by its predecessors in interest from that of mining to domestic purposes, and also changed the point of its diversion from the creek in question. That neither such subsequent change of use, nor of the place of diversion, could prejudice or in any wise affect the appropriation, or proper use thereunder, of the waters of the creek by the appellant and its predecessors in interest, is too well settled to require the citation of authorities. In the use of the waters appropriated by the appellant and its predecessors in interest certain reservoirs were and are employed for the storage of the waters, from which the water is discharged as required in the operation of mining. The evidence in the case shows that the appropriation and use of the waters of Ten Mile creek by the appellant never worked any diminution in the quantity, or injury to the quality, of the waters thereof diverted and used by the appellee, except for three days during the year 1897, to wit, August 18th, 19th, and 20th. The evidence shows that during those three days the appellant discharged from one of its reservoirs a very much larger quantity of the waters of the creek than it was accustomed to discharge, resulting in so befouling the remaining waters of the creek as to render them, at the place of diversion by the appellee, unfit for domestic use. This unusual and unaccustomed use of the waters of the creek by the appellant was not only without legal right, but there is some evidence in the record tending to show that it was done with the design of compelling the appellee to purchase of the appellant its right in and to the waters of the creek in question. Whether, if the appeal had been brought by the complainant, the decree could be

held sufficiently definite to sustain it, need not be determined. The decree does not purport to prevent the use of the waters of the creek by the appellant in its accustomed manner, which the evidence shows, without conflict, results in no injury to the remaining waters at the place at which, and for the purpose for which, the appellee diverts and uses them. We are of opinion that the appellant has no just cause to complain of the decree as entered, and it is therefore affirmed.

KENDALL v. HARDENBERGH et al.

(Circuit Court, S. D. New York. June 8, 1899.)

WILLS—JUDGMENT IN PROBATE SETTING ASIDE FUND FOR ANNUITIES—RES JUDICATA.

Where, under a will directing the executors, as trustees, to retain in their hands a sufficient amount of the property of the testatrix to produce certain annuities bequeathed by the will, the sole executor who qualified set aside for that purpose certain specific property, and his action in so doing was confirmed by a judgment of the surrogate's court in proceedings to which all persons in interest were parties, the right of the annuitants to be paid their annuities from the income of such property thereby became *res judicata*, as between all parties thereto; and they could not be deprived of such right by a decree of another court, in a suit to which they were not parties, directing the trustee to transfer a portion of such property to another fund for the benefit of other legatees.

On Final Hearing on Pleadings and Proofs.

Hamilton Wallace, for complainant.

Robert Thorne, for defendant De Forest.

Richard S. Emmet, for defendant New York Life Ins. & Trust Co.

LACOMBE, Circuit Judge. The complainant is an annuitant under a codicil to the last will and testament of Blandina B. Andrews, which codicil contained the provision:

"I direct that my executors retain a sufficient amount of my real and personal estate in their hands to produce the said annuities, or such portion thereof as shall at any time remain payable."

Mr. De Forest, the only executor who qualified, set aside two specific pieces of property as a proper and sufficient amount to retain for that purpose; and his action in so doing was confirmed by a judgment of the surrogate's court, which decreed that he might retain in his hands for such purpose these two pieces of property, "or such other investments as the said property may from time to time be converted into." To the proceeding in the surrogate's court all persons in any way interested were parties, and it has never been in any way modified or abrogated. Between the annuitants and all other parties thereto it is *res adjudicata*. No one disputes the proposition that the property so set apart, and the subsequent investments in which the proceeds of the parcel sold were placed, are, and always have been, abundantly sufficient to produce the annuities. The executor, as trustee, retained this property and these investments until some time in August, 1894, when he paid out part of the fund to

other beneficiaries under the will, and transferred to himself, as trustee for another and different fund created by the will, \$33,000 more of said annuitants' fund. It appears that the executor (trustee) thus parted with so much of the annuitants' fund in compliance with a decree of the supreme court of the state of New York made in an action in which he asked leave to account and to have a new trustee substituted. Inasmuch, however, as none of the said annuitants were parties to such action, the decree was powerless to affect their rights. It appears, however, that the balance of the annuitants' fund turned over to the new trustee, plus the \$33,000 thus improperly diverted to some other fund, and which is also in the hands of the new trustee, will be amply sufficient to produce the annuities. Therefore it will not be necessary to enter upon any discussion as the extent of liability of the executor (trustee) personally. A decree directing the new trustee to pay over to the annuitants the arrears of annuities unpaid, and to retain the entire fund originally set apart for the purpose of producing such annuities, or the proceeds of such fund in whatever subsequent investments it may now be placed, will afford abundant relief, and to such relief the complainant seems clearly entitled. Decree accordingly.

DRAPER v. SKERRETT et al.

(Circuit Court, E. D. Pennsylvania. June 27, 1899.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Although the rule is well settled that a preliminary injunction against alleged unfair competition will only be awarded where the right is plain, and the wrong beyond reasonable doubt, when it clearly appears, from the proofs and by comparison, that the packages in which defendants inclose and sell their goods are a misleading simulation of those of plaintiff, and intentionally so, an injunction against their use will be granted.

This is a suit in equity to enjoin alleged unfair competition in trade. On motion for preliminary injunction.

Edward Brooks, Jr., for complainant.

John W. Jennings, for respondents.

DALLAS, Circuit Judge. This is an application for a preliminary injunction. It has been so frequently said by this court, and by the court of appeals for this circuit, that such an injunction should be awarded only where the right is plain and the wrong beyond reasonable doubt, that this matter, at least, must now be regarded as settled. The present bill prays for an injunction more comprehensive than, upon the proofs as now made, and at this stage, the plaintiff is entitled to; but I am entirely satisfied that the envelope in which the defendants inclose and sell their goods is a misleading simulation of that of the plaintiff. To this extent an examination of the respective envelopes, in connection with the affidavits submitted, is thoroughly convincing. The only substantial difference between them is in the coloring; and this, in view of the undisputed fact that the color now used by the defendants is that which, at their request, they had been permitted to use when acting under agreement with

the plaintiff, is immaterial. The variation in details which is pointed out in the affidavit of one of the defendants is, when so pointed out, entirely obvious, but that an ordinary purchaser would be likely to mistake the one for the other seems to me to be evident. Moreover, no attempt has been made to satisfactorily account for the general resemblance of the two envelopes, which, notwithstanding minor differences, unquestionably exists; and, in the absence of intent to imitate the plaintiff's envelope, the striking similarity to it of that of the defendants would be quite inexplicable. Besides, the affidavit of John G. Sachs, from which it appears that the defendants in fact sent the affiant a package of the tissue in question, inclosed in one of their own envelopes, although he had asked for tissue of the plaintiff, has not been controverted, and is very persuasive as to the defendants' actual motive and design. In my opinion, a preliminary injunction to restrain the defendants from using the particular envelope complained of in the bill, or any other envelope made in imitation of that of the plaintiff, but to this extent only, ought now to be awarded, and it is so ordered.

DYGERT et ux. v. VERMONT LOAN & TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 501.

1. USURY—WHAT LAW GOVERNS.

Where a note executed in one state is made payable in another, under the laws of which it is not usurious, while it is usurious under the law of the state where made, the law of the state of performance will govern as to usury.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The question whether a promissory note is governed, as to usury, by the law of the state where it was executed and in which suit is brought, or of the state in which it is made payable, in the absence of a state statute on the subject, is one of general law, upon which a federal court is not bound to follow the decisions of the supreme court of the state.

3. USURY—PLEADING—BURDEN OF PROOF.

The burden of alleging and proving usury in a note rests on the maker when sued thereon, and the plaintiff is not required to allege that the note, when payable in a different state, was so made for convenience and in good faith, and not for the purpose of evading the usury laws of the state where it was executed, and such an allegation, if made, need not be proved.

Appeal from the Circuit Court of the United States for the District of Idaho.

S. C. Herren, for appellants.

A. E. Gallagher, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On November 17, 1892, the appellants, Albert Dygert and Flora T. Dygert, his wife, executed to the appellee, the Vermont Loan & Trust Company, a promissory note, dated at Spokane, Wash., payable December 1, 1897, for \$3,400, with interest after date at 6 per cent. per annum, both the principal and in-

terest payable at Spokane, Wash., interest payable annually according to the six interest coupon notes made at the same time. The interest coupon notes provided for interest after maturity. To secure the payment of the notes, the appellants executed to the appellee a mortgage on real estate in Idaho. The appellee brought suit to foreclose the mortgage. The appellants answered the bill, alleging that the loan was affected by the usury laws of the state of Idaho; that the loan was for \$3,000, and that the \$400 added to the principal thereof was a commission for making the loan; that said commission was charged in violation of sections 1264-1266, c. 10, Rev. St. Idaho, and is therefore void. Upon the pleadings and the proofs, a decree was rendered in favor of the appellee.

On the appeal to this court, it is conceded that the contract is usurious if it is controlled by the laws of Idaho, but that it is not usurious if tested by the law of Washington, where the notes were made payable. The principal question presented is, by the law of which state is the contract governed? In *Andrews v. Pond*, 13 Pet. 78, Chief Justice Taney, speaking for the court, said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury." The language so quoted was approved in *Miller v. Tiffany*, 1 Wall. 298, 310, and again in *Coghlan v. Railroad Co.*, 142 U. S. 101, 110, 12 Sup. Ct. 150. In *Junction R. Co. v. Ashland Bank*, 12 Wall. 226, 229, the court said: "With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is made payable." In *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104, the supreme court of Iowa said: "When a contract is made in one state, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other, state, the parties will be presumed to contract with reference to the laws of the state wherein the stipulated rate of interest is lawful." Of similar import are *Peck v. Mayo*, 14 Vt. 33; *Healy v. Gorman*, 15 N. J. Law, 328; *Arnold v. Potter*, 22 Iowa, 194; *McAllister v. Smith*, 17 Ill. 328; *Butler v. Edgerton*, 15 Ind. 15. In no decision to which our attention has been directed has a different doctrine been held, except in the case of *Trust Co. v. Hoffman*, 49 Pac. 318, very recently decided by the supreme court of Idaho. In that case the court said: "The other contention of petitioner, that the notes which the mortgage sought to be foreclosed in this case was given to secure were made payable in the state of Vermont, and that, therefore, the contract must be construed by the laws of that state, is not only utterly untenable, but not one single authority of the multitude cited by counsel in his petition supports the contention." The appellants rely upon the ruling of the court in that case, and contend that it construes a statute of the state of Idaho, and therefore creates a precedent which is binding upon this court. But the question involved in that case did not

depend upon the construction to be given to a statute of the state. It was purely a question of general law. The inquiry was, what law shall govern a contract made in Idaho, but made payable in another state? It was not affected by any statute of Idaho. The statutes of that state are silent upon the subject. While it is the duty of a federal court, in a case of doubt as to a doctrine of general law, to lean towards the decisions of the state court (*Brown v. Furniture Co.*, 7 C. C. A. 225, 58 Fed. 286; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191), the decisions of the state court are not controlling, and will not be followed, when they are opposed to the underlying principles of the law and the clear weight of authority (*Telegraph Co. v. Wood*, 6 C. C. A. 437, 57 Fed. 471; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914).

It is contended that the court erred in ruling that the complainant was not required to prove the allegation of the bill that the notes were made payable in the state of Washington for its convenience in transacting its business, and not for the purpose of evading the usury laws of Idaho. The bill contained that allegation. The answer met it with the allegation that the defendants had never "heard or been informed, save by the complainant's said bill, whether said notes and mortgage were made payable at Spokane, Wash., for convenience to plaintiff in the transaction of its business, and not for the purpose and with the intent or design to avoid or evade any of the laws of the state of Idaho, and are therefore without sufficient information either to admit or deny the same." The court held that, the allegation of the bill "not being denied by defendants, no evidence upon the subject was ever given or required, it must be concluded that there was no bad faith in making the notes payable at Spokane, and it must follow that they are not usurious." If it be conceded that the answer does not admit the truth of the averment of the bill, it does not follow that the court erred in ruling that there was no proof of usury in the contract. The burden of proving usury was upon the defendants. 27 Am. & Eng. Enc. Law, 1045; *Berdan v. Trustees*, 47 N. J. Eq. 8, 21 Atl. 40; *Kihlholz v. Wolf*, 103 Ill. 362; *Valentine v. Conner*, 40 N. Y. 248. It was unnecessary for the complainant to allege in its bill that the notes were made payable in Washington in good faith, and not for the purpose of evading the usury law of Idaho. It was for the defendants to make the plea of usury, and to allege the facts in which it consisted, and, if it was believed that the notes were made payable in the state of Washington in evasion of the usury laws of Idaho, the defendants should have averred and proven that fact. The allegation in the bill was superfluous and no proof of it was required upon the part of the complainant. We find no error for which the decree should be reversed. It is accordingly affirmed.

CITY OF HELENA v. MILLS.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 510.

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LIMITATION OF INDEBTEDNESS — CONTRACT FOR WATER SUPPLY.

Under the constitution of Montana, which limits the indebtedness of municipal corporations, and provides that all obligations in excess of the amount so limited shall be void, a city not authorized by statute to levy and collect a special tax for water purposes, and which is already indebted beyond the constitutional limit, has no power to bind itself by a contract for a supply of water to be furnished for municipal purposes; and a claim accrued for water furnished under such a contract is, within the constitutional prohibition, and cannot be enforced.

In Error to the Circuit Court of the United States for the District of Montana.

It is sought by the writ of error in this case to review a judgment rendered by the circuit court upon the pleadings in an action brought by the defendant in error to recover for water furnished to the city of Helena under a contract made in pursuance of an ordinance of the city approved by the mayor on August 17, 1897.

The ordinance provided, among other things, that James H. Mills, as the receiver of the Helena Consolidated Water Company, should furnish "a full, ample, sufficient supply of good, pure, wholesome and clear water through said plant and system and the hydrants thereto connected, to the city of Helena for fire, sewerage and other municipal purposes, for a period of five years from the first day of August, A. D. 1897." The ordinance further provided that if, within 30 days after its passage, the receiver should file with the city clerk his acceptance of its terms, it should go into effect and operate as a contract between the parties. The receiver accepted the ordinance, and has since supplied the city with water. In May, 1898, the city refused to pay therefor. The complaint alleged these facts, and further stated that the water plant operated by the receiver is the only one in the city of Helena, and was the only one at the time of the passage of the ordinance; that no other person or corporation was able at the time when said ordinance was passed, or for a long time prior thereto, or at any time since, to furnish water to the city of Helena for the purposes specified in the ordinance; that the city has since the passage of the ordinance levied and collected taxes sufficient to meet the amount provided for in the ordinance. The answer admitted all of said facts, but alleged that at the time when the contract was entered into, and at all times since, the city of Helena could have entered into a contract with responsible parties to supply it with water within six months from the making of such contract, and that within such period the city could have been supplied with water from sources other than those controlled by the defendant in error, and that the contract was entered into without advertising for bids, and that, had the city asked for bids, and offered to enter into a contract with the successful bidder to supply it with water within six months thereafter, responsible parties other than the defendant in error would have bid; that prior to the ordinance the receiver and the water company had for more than two years supplied the city with water without any express contract. The answer further alleged that the city is, and ever since the passage of said ordinance has been, indebted beyond the constitutional limit; that during none of such time has the assessed value of property in the city exceeded \$12,656,783, nor the aggregate indebtedness been less than \$559,704. A judgment was rendered upon the pleadings in favor of the plaintiff in the action.

T. J. Walsh and Edward Horsky, for plaintiff in error.

Clayberg, Corbett & Gunn, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is contended that the contract between the city of Helena and the receiver of the water company is void—First, because it was entered into without asking for bids, as required by section 4807 of the Political Code of Montana; and, second, because the city was indebted beyond the constitutional limit when the contract was made,—and that, even if the contract is not void, the judgment could not lawfully be rendered against the city, because it was indebted beyond the constitutional limit at the time when the indebtedness became due. The constitution of Montana, which was in force when the contract was made, provides as follows (article 13, § 6):

“No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void.”

From the pleadings it appears that at the time of making the contract, and ever since, the actual indebtedness exceeded \$559,000, whereas the permitted indebtedness was no more than \$379,703.49. Did the amount due, and for which judgment was recovered, constitute an indebtedness against the city, within the meaning of that term as it is used in the constitution? The question has heretofore been twice presented to the supreme court of Montana. The case of *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, involved the validity of a contract for a water supply made by the city of Helena. The charter of the city at that time prescribed “that said city shall not be authorized to incur any indebtedness on behalf of said city for any purpose whatever to exceed the sum of \$20,000.” At the time of making the contract the bonded indebtedness of the city was \$19,500, and its floating debt, consisting of outstanding warrants, was \$15,000. The court held that no further indebtedness could be incurred until some of the outstanding debt had been discharged. In reaching that conclusion the court considered the nature of the obligation incurred by the city for its annual supply of water, and held that it was an indebtedness, within the meaning of the provision of the charter. It distinguished that case from cases in which a special provision had been made for levying a special tax to meet water rental, as in the case of *Water Co. v. Woodward*, 49 Iowa, 61, and said:

“In all of the water cases arising in the state of Iowa, we are met with the general statute which authorizes all cities to contract for the erection of water-works, and to pay for the water used by a special fund raised by a special annual tax not to exceed five mills on the dollar. Such contracts with water companies were held not to create a debt against the cities, because the water companies could never have any general claim against cities, but were held to look to the special fund alone.”

After the decision was rendered in that case an act was passed by the legislature of Montana providing for the levy of a special tax of $1\frac{1}{2}$ per cent. upon the assessable property to create a special fund for the payment of bills for fire and water. While that statute was in force, and while Montana was still a territory, the city of Great Falls entered into a contract for the supply of water; and in the case of *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15, the question arose whether the liability so incurred was an indebtedness, within the meaning of the act of congress limiting the indebtedness of municipal corporations in the territories. The act of congress provided as follows:

"That no political or municipal corporation, county, or other subdivision in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness." 24 Stat. 171.

The court said:

"The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature, in said act, contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose. The case of *Davenport v. Kleinschmidt*, supra, does not disapprove the Iowa cases, holding that, because a general law provided for payment from a special fund, a liability incurred by a city to supply its inhabitants with water was not a debt, in the sense of the term as employed in the constitution of Iowa. * * * It follows from this view of the case that neither under the organic act of the territory of Montana nor the constitution of the state of Montana is or was the liability incurred by the city of Great Falls under Ordinance 17 a debt, in the sense prohibited."

But when the Montana Codes were adopted, in the year 1895, the statute which controlled the decision in the *Great Falls Case* was repealed. There was no longer a statute creating a special fund for the payment of water rentals. The conditions again existed under which the ruling had been made in *Davenport v. Kleinschmidt*. The provisions of the law which governed the city when the present indebtedness was incurred are the following (Pol. Code, § 4872):

"The council must, on the second Monday in August in each year, by resolution, determine the amount of city or town taxes for all purposes, to be levied and assessed on the taxable property in the town or city for the current year, and the city clerk must at once certify to the city treasurer a copy of such resolution, and the city treasurer must collect the taxes as in this article provided."

And Pol. Code, § 4814:

"The amount of taxes to be assessed and levied for general municipal or administrative purposes must not exceed one per centum on the assessed value of the taxable property of the city or town, and the council may distribute the money into such funds as are prescribed by ordinance."

Recurring to the two decisions of the Montana courts, it may be said, in brief, that *Davenport v. Kleinschmidt* is authority for the proposition that a liability incurred for water rental is a debt, within the prohibition of the statute, for it is payable out of the

general taxes levied and collected for the current expenses of the city, and that the Great Falls Case is authority for the proposition that such liability is not such an indebtedness, if express authority has been given the city to levy a special tax, and thus create a separate fund for the payment thereof. The defendant in error contends that the provisions of the general law of Montana governing cities at the time when the contract involved in the present case was entered into are equivalent to a provision for a special tax, and the creation of a special fund for the payment of water rental, for the reason that the council is given the authority to estimate the current expenses of each year, and to raise a general tax sufficient to meet them all, which would, of course, include rent for water, and because the ordinance under which the contract was made appropriates out of such general fund each year an amount sufficient to pay the annual sum which was agreed to be paid for water. It is argued that there is no difference between a fund arising from the levy of a special tax for fire and water purposes, and a fund appropriated for those purposes out of moneys received from taxes levied for general purposes. The same argument was applicable to the case of *Davenport v. Kleinschmidt*. The city of Helena, at the time when the contract was made in that case, had the power—as, indeed, have cities generally—to estimate its current expenses, and to include therein a tax for water and fire purposes. It also had the authority by ordinance to appropriate out of such taxes a sum sufficient to meet its contracts for such purposes. But those facts, in the opinion of the court, created no exception to the limitation of the charter. In the later case of the City of Great Falls the doctrine of *Davenport v. Kleinschmidt* was not questioned, but was approved. The Great Falls Case was distinguished from the former case on the ground which we have just indicated. Both cases are in harmony with the general doctrine established by the decided weight of authority,—that the contract of a municipal corporation for a useful and necessary thing, such as water or light, which is to be paid for annually as furnished, does not create an indebtedness for the aggregate sum of all the yearly payments since the debt of each year comes into existence only when the annual compensation has been earned, but that, if the amount agreed to be paid in any installment in compliance with such contract transcends the amount of permitted indebtedness, the city is not liable therefor. *City of Walla Walla v. Walla Walla Water Co.*, 19 Sup. Ct. 77; *Grant v. City of Davenport*, 36 Iowa, 396; *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415; *Merrill Railway & Lighting Co. v. City of Merrill*, 80 Wis. 358, 49 N. W. 965; *Prince v. City of Quincy*, 105 Ill. 138; *Foland v. Town of Frankton*, 142 Ind. 546, 41 N. E. 1031; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Wade v. Borough of Oakmont* (Pa. Sup.) 30 Atl. 959. Such was the decision of this court, also, in the case of *Keihl v. City of South Bend*, 22 C. C. A. 618, 76 Fed. 921, where it was held that a contract entered into by a city at a time when the full amount of its permitted indebtedness had been incurred did not of itself create an indebtedness in con-

travention of the state constitution, but created a condition upon which such a debt might arise, and that the city was not liable for an annual installment thereunder which came due at a time when the city was taxed beyond the limit. In the case of *City of Walla Walla v. Walla Walla Water Co.*, 19 Sup. Ct. 77, the supreme court had under consideration a provision of the charter of the city of Walla Walla, in the state of Washington, which limited the indebtedness of the city to the sum of \$50,000. On March 15, 1887, an ordinance was passed granting to the water company for the period of 25 years the right to place and maintain mains and pipes in the streets of the city for the purpose of furnishing the inhabitants with water; the city to pay therefor each year the sum of \$1,500. After the contract had been in force for about six years an ordinance was passed to provide for the construction of a system of waterworks to supply the city and its inhabitants with water. The water company brought suit to enjoin the infringement of its rights, and in its answer to the bill the city set up the defense that its contract with the water company was void because it created an indebtedness in excess of the charter limitation. The supreme court, after reviewing the authorities, said:

"But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred provided the contracting party perform the agreement out of which the debt may arise. * * * The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes, to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts, regardless of the statutory limitation,—provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor."

In that decision the supreme court construed no more liberally the powers of municipal corporations to enter into contracts for supplies of necessities than did this court in *Keihl v. City of South Bend*. It will be noted that in the language of the opinion so quoted a limitation is placed upon the extent of the indebtedness which may be incurred in the face of the statutory prohibition. Cities are declared to be at liberty to make certain kinds of contracts, regardless of the limitation, provided "that the amount to be raised each year does not exceed the indebtedness allowed by the charter." The present case does not meet the requirement of the test so established. The amount to be raised each year under the contract between the city and the receiver exceeded the total indebtedness allowed by the law of Montana. At the time when the debt for which this suit was brought was contracted, and when

it fell due, the city was indebted in an amount largely in excess of the statutory limit. As the judgment must be reversed upon this ground, it becomes unnecessary to consider the other question which the record presents. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with the foregoing opinion.

HOWARD INS. CO. OF NEW YORK v. SILVERBERG et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 490.

1. APPEAL BOND—PLACE OF EXECUTION.

An undertaking on appeal given to stay proceedings pending the appeal is not delivered, so as to become effective, until filed, and hence, though signed in another state, is "executed" in the state where filed.

2. LIMITATION OF ACTIONS—APPEAL UNDERTAKING—EFFECT OF FURTHER APPEAL.

The running of the statute against an action on an appeal undertaking given on appeal to the general term of the superior court of the city of New York is not affected by the taking of a further appeal from the judgment of the general term to the court of appeals.

In Error to the Circuit Court of the United States for the Northern District of California.

This action was commenced in the circuit court of the Northern district of California to recover upon an undertaking on appeal which had been executed by the defendants in error on August 9, 1892, in a case then pending in the superior court of the city of New York, in which the Howard Insurance Company of New York was the plaintiff, and Julius Jacobs and George Easton were the defendants, and in which a judgment had been rendered for the plaintiff in the sum of \$7,485.83. A condition of the undertaking on appeal was that the defendants in the action should pay all costs and damages which might be awarded upon the appeal, and that, if the judgment appealed from should be affirmed, they would pay the amount thereof. The appeal was taken to the general term of the superior court of the city of New York. On January 15, 1894, the appellate court affirmed the judgment. 26 N. Y. Supp. 1133. On December 13, 1894, Jacobs and Easton appealed from the judgment of affirmance to the court of appeals of the state of New York, and in 1896 the latter court affirmed the judgment so appealed from. 45 N. E. 1132. On December 22, 1897, the present action was brought against the sureties on the appeal bond.

The circumstances under which the undertaking was executed, as they are set forth in the complaint, are as follows: Jacobs and Easton, the defendants in the action in the superior court, desiring to appeal from the judgment of that court, requested the plaintiff in the action to accept a bond on appeal, to be signed by Silverberg and Pease, who were residents of California, as sureties. The plaintiff acceded to the request, an undertaking was signed by Silverberg and Pease in San Francisco on August 9, 1892, and on the following day both sureties verified the undertaking before a commissioner for New York in San Francisco, before whom, on the same day, they also acknowledged the instrument. On September 10, 1892, the undertaking was filed in the superior court of the city of New York, together with a written stipulation between the parties to the action to the effect that the plaintiff would not except to the sureties on said undertaking, and that such undertaking might be filed, and that no exception should be taken to its form, or to the time of its filing, or to the justification of its sureties, and that such undertaking should operate as a stay of proceedings. The parties were permitted to enter into such a stipulation under section 1305 of the Code of Civil Procedure of New York. A demurrer

was interposed to the complaint, on the ground that the cause of action was barred by subdivision 1 of section 339 of the Code of Civil Procedure of California, which provides that an action on a contract, obligation, or liability founded on an instrument of writing out of the state must be commenced within two years after the cause of action has accrued. The circuit court sustained the demurrer, and a judgment was entered dismissing the action. 89 Fed. 168. This ruling is assigned as error.

Abraham C. Freeman, for plaintiff in error.

Edmund Tauszky, Lester H. Jacobs, and W. E. F. Deal, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The controlling question presented in this case is whether the undertaking on appeal was executed without the state of California. No instrument is executed until it is delivered. To constitute a delivery, the obligor must do some act which places the instrument beyond his control and beyond his power of revocation. *Duer v. James*, 42 Md. 492; *Fisher v. Hall*, 41 N. Y. 416; *Younge v. Guilbeau*, 3 Wall. 636. The delivery need not always be made to the obligee personally. It may be made to a third person in his behalf. *Hatch v. Bates*, 54 Me. 136; *Cooper v. Jackson*, 4 Wis. 538; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497. A bond on appeal is not delivered to the opposite party to the suit. It is delivered to the clerk of the court, who files it and holds it on behalf of the obligee for whose benefit it is given. Section 1307, Civ. Code N. Y., provides that an undertaking "must be filed with the clerk with whom the judgment or order appealed from is entered." There can be no doubt that, as a general rule, the filing of an undertaking on appeal is its delivery. The proposition that the place of the delivery of such an instrument will, in the absence of an agreement to the contrary, be deemed to be the place of its execution, irrespective of the place where it was signed, and that a contract is made in that state in which it first takes effect as a binding obligation, is fully sustained by the authorities. In *Bell v. Packard*, 69 Me. 105, it was held that a promissory note written in Maine, but signed in Massachusetts, by citizens living there, and then returned by mail to the payee, living in Maine, is a note made in Maine, and to be construed by the laws thereof. The court said: "For, although it was signed in Cambridge, it was delivered to the payee in Skowhegan, and it was not a completed contract until delivered." In *Lawrence v. Bassett*, 5 Allen, 140, the defendant had put his name on the back of a note in another state while it was in the hands of the original maker, and before it was delivered to the payee. It was subsequently passed to the payee in Massachusetts for a valuable consideration. The court held that it then for the first time became a valid promise to pay the money, and said: "Until such delivery, it was not a binding and operative contract, upon which the defendant could have been held as a party to the note. It was therefore the delivery to the

plaintiff which completed and consummated the contract." In *Milliken v. Pratt*, 125 Mass. 374, the court held that a contract of guaranty signed in Massachusetts, and sent by mail to another state, and assented to and acted on there, for the price of goods sold there, is made in that state. The court said: "If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states." In *Forst v. Leonard* (Ala.) 22 South. 481, it was held that, although a bond may be signed at one time, its execution does not occur until its delivery. Said the court: "The bond * * * speaks from the time of delivery,—from its execution, and not from its signing." So, in *Tilden v. Blair*, 21 Wall. 241, it was said: "It has been settled that the liability of an acceptor does not arise from merely writing his name on a bill, but that it commences with the subsequent delivery." In *State v. Young*, 23 Minn. 551, the court said: "It is almost an elementary principle, laid down in all the books, that a bond is not 'executed' until it is delivered, for delivery is of the essence of a deed."

But it is urged that the undertaking in the present case must be held to have been executed in the state of California, for the reason that there the final assent thereto was given. It is said that the plaintiff in the action had agreed to accept the defendants in error as sureties; that thereafter no further act was required than that they should attach their signatures to the undertaking; and that when they signed the same, and parted with its possession, the transaction was complete. We are unable to assent to this view of the facts or of the law applicable to them. Up to the date of the filing of the undertaking, there was no binding agreement of any kind between the parties. There had been a request on the part of the defendants in the action that the plaintiff accept sureties residing in California, and the request had been assented to. But there was no stipulation in writing, and there was nothing to hold either party to the agreement. It was nudum pactum. The first and only agreement that had binding force was the stipulation that was entered into when the bond was filed in the state of New York. The plaintiff in the action had not bound itself to accept as an undertaking on appeal any instrument that might come from California bearing the signatures of the sureties named. The final act was not the signing of such an instrument by the sureties, but its acceptance by the opposite party and its delivery. This is evidenced by the stipulation which accompanied it when it was filed. Up to that time the sureties on the bond had the right to recall the instrument. They could have revoked it at any time before it left the possession of the defendants in the action. There was no consideration for their liability as sureties before the bond was actually used on the appeal. The stipulation by which it was accepted was made between the parties to an action pending in the state of New York, and with reference to an appeal to a court of that state, and with reference to an undertaking which had been signed, verified, and ac-

knowledge, but not yet delivered. The complaint, after referring to the execution of the stipulation, contains this averment: "That thereafter, on the same day, the said undertaking on appeal was filed by the said Jacobs and Easton in the office of the clerk of said superior court last named, and a copy thereof served upon this plaintiff, and the appeal of said Jacobs and Easton from the said judgment was then perfected, and a stay of the execution thereof effected." The only inference to be drawn from the facts as they are stated in the complaint is that when the stipulation was entered into the undertaking was in the possession of the defendants in the action in the state of New York, and that then they parted with its possession and delivered it to the clerk. We find nothing in the allegations of the complaint, construed, as they must be, in the light of the statutes of New York, so far as the latter are applicable, to indicate that it was the purpose of the parties to the action to regard the bond as an instrument executed in the state of California, or to dispense with any of the requirements of the law of New York with reference to bonds on appeal, except in the one specified particular, that the sureties on appeal might be residents of the state of California.

The case of *Alcalda v. Morales*, 3 Nev. 132, cited by the plaintiff in error, is not authority for its contention. In that case one of two partners doing business in Nevada went to Sacramento, Cal., to borrow money for the firm. He negotiated a loan, signed a promissory note in Sacramento, and obtained the money upon it. The note was then sent to the other partner, who executed it in Nevada, and returned it to the plaintiff, in Sacramento. It was held that the note was executed in Nevada. It was so held for the reason that the form of the paper had been agreed upon in California, and there accepted, and there the money had been obtained thereon, and nothing remained to be done except to obtain the signature of the other partner, and that when his signature was appended, and the note left his possession on its way to the plaintiff, the transaction was closed. The vital points which distinguish that case from the case at bar have already been suggested. When the defendants in error signed the bond in California, the transaction was not closed. Their signature was but the first step. The undertaking had not been accepted. No stipulation had been made, as provided by statute, assenting to the undertaking or waiving the nonresidence of the sureties. There is nothing in the complaint to show that the plaintiff in the action had seen the instrument or knew its terms, or, indeed, to show that it was not drawn in California at the time when it was signed there. The plaintiff was under no obligation to accept the bond, nor to accept the defendants in error as sureties. It had parted with none of its rights. Execution upon its judgment had not been stayed. Payment of the judgment could have been enforced by process at any time before the undertaking and the stipulation were filed. How, then, can it be said that when the sureties signed the undertaking, and parted with its possession, the last act had been done and the transaction was closed?

It is contended that no action could be maintained on the undertaking until the final decision of the case by the court of appeals, and that the statute of limitations began to run only from the date of such final decision. The complaint expressly states that on the appeal from the decision of the general term of the superior court to the court of appeals there was no undertaking to stay the execution. Section 1309 of the New York Code of Civil Procedure provides that where security is given on appeal to the court of appeals to stay the execution of the judgment appealed from "an action shall not be maintained upon the undertaking given upon the preceding appeal until after the final determination of the appeal to the court of appeals." By implication, the statute permits such an action, in the absence of an undertaking to stay the execution, and it accords with the practice prior to the adoption of that provision of the Code. *Burrall v. Vanderbilt*, 6 Abb. Prac. 70; *Heebner v. Townsend*, 8 Abb. Prac. 234. The undertaking in this case was to secure the payment of the judgment that might be rendered in the court to which the appeal was then to be taken. It contemplated no second appeal. The conditions on which the sureties' liability was to attach were met when, on January 15, 1894, the general term of the superior court rendered its decision. On that date the cause of action against the sureties on the undertaking accrued and the statute began to run. The second appeal, taken 11 months later, could not operate to toll the statute.

On the argument of the cause in this court, the point is made that subdivision 1 of section 339 of the California Code of Civil Procedure is opposed to the provisions of the constitution of the United States, and is therefore void. We do not need to enter into a discussion of this proposition. The point was not made in the assignments of error, and is not properly before the court. If it were, we should be compelled to dismiss the appeal. *Hamilton v. Brown*, 3 C. C. A. 639, 53 Fed. 753; *Hastings v. Ames*, 15 C. C. A. 628, 68 Fed. 726; *Pauley Jail Bldg. & Mfg. Co. v. Crawford Co.*, 28 C. C. A. 579, 84 Fed. 942; *Wrightman v. Boone Co.*, 31 C. C. A. 570, 88 Fed. 435.

The judgment will be affirmed.

BOWEN v. NEEDLES NAT. BANK et al.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1899.)

No. 499. }

1. NATIONAL BANKS—POWERS—CONTRACT OF GUARANTY.

A national bank has no power to lend its credit to any person or corporation, or to become guarantor of the obligations of another, except in the case of the transfer of promissory notes discounted, which is in the ordinary course of banking.

2. CORPORATIONS—CONTRACTS ULTRA VIRES—ESTOPPEL.

A contract entered into by a corporation, which is ultra vires of its charter, cannot be ratified or become binding on the ground of estoppel, and the only ground on which the corporation can become liable to the payment of

money on account of such a contract, which has been performed by the other party, is that it has received a benefit or advantage thereby which it cannot justly retain.

3. NATIONAL BANKS—CONTRACT ULTRA VIRES—AGREEMENT TO PAY CHECKS.

A national bank advised plaintiff that it would pay all checks of a third person, although such person had no funds on deposit, as was known to both plaintiff and the bank. In reliance on such promise, plaintiff cashed checks of such person, and transmitted them to the bank for payment. The bank issued and sent to plaintiff its drafts on a correspondent for the amount of the checks, which drafts were refused payment. *Held*, that the contract was one purely of guaranty, and was ultra vires on the part of the bank, and the transaction gave plaintiff no right of action against it on the drafts.

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of California.

Abner T. Bowen sued the Needles National Bank upon four causes of action, the first, second, and third of which were upon bills of exchange for \$8,775, \$8,300, and \$5,364, which it was alleged in the complaint were drawn by the defendant at its place of business in the state of California upon the Chase National Bank, of New York, and payable to the order of the plaintiff under the name of A. T. Bowen & Co., which bills of exchange had been dishonored by the drawee; and for a fourth cause of action the plaintiff alleged further that the defendant was indebted to him upon a check for \$3,500, drawn by Isaac E. Blake upon the defendant bank, and payable to the order of the plaintiff. Upon the issues created by the answer the cause was tried before the court without a jury, and the court found for the defendant. 87 Fed. 430. No bill of exceptions is presented in the record, but it is contended by the plaintiff in error that upon the findings of fact made by the court the judgment should have been for the plaintiff. The findings are, in substance, as follows:

(1) That the defendant executed and delivered to the plaintiff the instruments called "bills of exchange" in the first, second, and third causes of action for the several amounts following, to wit, September 10, 1894, \$8,775; September 12, 1894, \$8,300; September 18, 1894, \$5,364; and that said bills of exchange were drawn upon the Chase National Bank, of New York.

(2) That neither at the time of the drawing of said drafts nor at the time of their receipt by the plaintiff were there funds in the hands of the drawee to pay the same; that said drafts were not presented to the drawee for acceptance or payment.

(3) That the defendant provided for the payment of said drafts by drawing counter drafts at the same time upon Isaac E. Blake, payable at said Chase National Bank; that said counter drafts were not paid, but from the prior course of dealing between plaintiff and defendant and the said Chase National Bank and the said Blake the defendant had reason to believe, and did believe, that they would be paid.

(4) That the said drafts or bills of exchange mentioned in the first finding were made and transmitted by defendant to plaintiff in exchange for checks drawn by said Blake in favor of plaintiff and upon the defendant bank; that said Blake had no funds to his credit in the defendant bank, either at the time of drawing said checks or at the time of their presentation for payment.

(5) That the plaintiff is a citizen and resident of the state of New York doing business under the name and style of A. T. Bowen & Co., and the defendant is a national banking corporation organized under the laws of the United States.

(6) That prior to April 25, 1894, the plaintiff had advanced moneys to the said Blake upon checks drawn by him upon the defendant bank, and, being unwilling to advance further sums without some guaranty from the defendant, the latter, on said April 25, 1894, executed and delivered to the plaintiff the following telegram and letter:

"To A. T. Bowen & Co., 71 Broadway, New York: We will pay checks signed Isaac E. Blake, by W. L. Beardsley. The Needles National Bank."

"A. T. Bowen & Co., New York City—Gentlemen: We hereby beg leave to confirm our telegram to you of even date: 'We will pay checks signed "Isaac E. Blake, by W. L. Beardsley," signed 'Needles National Bank.'

"Yours, truly,

W. S. Greenlee, Cashier."

That on August 22, 1894, the said bank sent the plaintiff the following letter:

"A. T. Bowen & Co., New York City—Gentlemen: I am in receipt of telegraphic communication from Chase National Bank that our draft No. 2,200, for \$7,500, payable to the order of Bowen & Co., has been refused payment until advices received from us guarantying the amount received. I immediately guarantied the amount to be \$7,500.00, and I trust I have put you to no great inconvenience. It is simply a clerical error, which happens to us all some time or other, and in future we will endeavor to be more careful. I have telegraphed you to please pardon our error, and that we wish you to still continue your friendly relations with Mr. Blake and Mr. Beardsley, and that we guaranty absolutely the payment of Mr. Blake's checks as heretofore. I am truly sorry the mistake has occurred, and can venture the assurance that it will not happen again. The Keystone mine has just uncovered a large body of high-grade ore, and, if the vein continues as it is now for the next thirty days, it will make a big showing. Again asking your pardon, I remain, with best wishes,

"Very truly yours,

W. S. Greenlee, Cashier."

(7) That on the 4th, 5th, 10th, and 11th days of September, 1894, respectively, upon checks drawn by the said Blake upon the defendant bank, the plaintiff advanced said Blake the following sums of money: \$8,750, \$8,300, \$5,300, \$3,500, and transmitted the checks to the defendant for payment.

(8) That in exchange for the checks for the first three sums of money the defendant transmitted to the plaintiff the bills of exchange mentioned in the first finding above, and returned to the plaintiff the fourth check, for \$3,500, unpaid.

(9) That at the time of drawing said checks and at the time of their presentation to the defendant bank the said Blake had no funds whatever on deposit with the bank with which to pay the same, nor did he have any funds on deposit with the bank at the time when said letters and telegrams were sent, or at any time thereafter.

(10) That the bills of exchange mentioned in the first finding are in fact checks, and that defendant bank suffered no injury by the failure of the plaintiff to present the same to the said Chase National Bank for payment.

(11) That at the time of the drawing of said checks the plaintiff had constructive notice that the said Blake had no funds on deposit with the defendant bank to meet the same, and knew that the defendant was a national bank.

Upon these findings of fact the court found as conclusions of law that the undertaking of the Needles National Bank to guaranty the checks of Blake was *ultra vires*, and was void; and that the bills of exchange, having been made and executed to plaintiff under such void contract are null and void in the hands of the plaintiff, and that no cause of action can arise thereon.

John D. Works and Bradner W. Lee, for plaintiff in error.

Henry C. Dillon and Eber T. Dunning, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It may be stated in general that no banking corporation has the power to become a guarantor of the obligation of another, or to lend its credit to any person or corporation, unless its charter or governing statute expressly permits it. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Morford v. Bank*, 26 Barb. 568; *Thomp. Corp.* § 5721. Under section 5136 of the Revised Statutes, national banking associations are given the power to "make contracts" and "to exercise by its board of directors, or duly authorized

officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." There is in these provisions no grant of power to guaranty the debt of another, nor can such guaranty be said to be incidental to the business of banking. It has been so held in *Seligman v. Bank*, 3 Hughes, 647, Fed. Cas. No. 12,642, *Norton v. Bank*, 61 N. H. 589, and *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799. An apparent exception is recognized in the case of the discount of promissory notes by national banks which may be transferred with a guaranty, but it rests upon the ground that the guaranty of such paper is but an ordinary incident to its transfer in the course of banking. In *People's Bank v. National Bank*, 101 U. S. 181, the court said: "To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named." There can be no doubt that the guaranty in the present case was ultra vires. It was aside and apart from the business of banking. The case is not that of an officer of a bank exceeding the powers delegated to him, but it is a case where the banking association itself has exercised powers in excess of those which were conferred upon it by statute. The plaintiff, equally with the defendant bank, was bound to take notice of the statute. He had notice also that there were no funds in the bank to meet the checks, and he knew that the contract was one of guaranty pure and simple. The transaction cannot be deemed a certification of checks, as urged by the plaintiff in error. The checks were not certified. They did not bear the acknowledgment of the bank of funds in its possession equal in amount to the checks, and available for their payment. The certification of checks is in the line of banking business, and is not prohibited to national banks. The only prohibition is that the bank shall not certify a check unless the drawer has on deposit at the time sufficient money to meet the same. The penalty for violation of the prohibition is to render the bank liable to the forfeiture of its charter, and to have its affairs wound up. Rev. St. § 5208; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66.

But the present case is complicated by the fact that the plaintiff in error relied upon the guaranty, and cashed the checks on the strength thereof. There is authority for holding that under such circumstances the bank is estopped to deny its liability on the guaranty, notwithstanding that the contract was ultra vires. *Thomp. Corp.* §§ 6017, 6025; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Insurance Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160. "The principle, properly understood and applied, extends to every case where the consideration of the contract has passed to the corporation from the other contracting party, which consideration may, on well-understood principles, consist either of a benefit to the corporation or of a prejudice or disadvantage to the other contracting

party. It is therefore not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage; as where he has expended money on the faith of it." *Thomp. Corp.* § 6017. It is contended that this doctrine finds support in the language of decisions of the supreme court, as in *Hitchcock v. Galveston*, 96 U. S. 341, 351, where it was said:

"But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at furthest, only *ultra vires*; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return."

And the court quoted with approval from the opinion in *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, the following words:

"Although there may be a defect of power in the corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying on the promise, and in execution of the contract, to expend money, and perform his part thereof, the corporation is liable on the contract."

Also, in *Railway Co. v. McCarthy*, 96 U. S. 258, 267, where the court said:

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice, or work a legal wrong."

While the language of these expressions of the court may be said to be sufficiently broad and inclusive to justify the contention of the plaintiff in error, the court, in its adjudications, has limited the application of the principle to cases in which a corporation has, by the plea of *ultra vires*, sought to retain unjustly the fruits of a contract which has been performed by the other party thereto. In all such cases the action has been maintained, not upon the contract, nor to enforce its terms, but upon an implied obligation resting upon the defendant resulting from the fact that it has received money or property which it ought either to return or make compensation for.

In *Salt Lake City v. Hollister*, 118 U. S. 263, 6 Sup. Ct. 1059, it was said:

"The courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use."

In *Louisiana v. Wood*, 102 U. S. 294, where a city had received money for bonds issued by it without authority, the court said:

"The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake."

In *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, in a similar case, the court said:

"The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act."

These citations sufficiently illustrate the ground, and the only ground, on which the supreme court has held that corporations may be liable to the payment of money on account of contracts which they have entered into ultra vires of their charter, and which have been performed by the other party to the contract. The right to relief in such cases rests upon the fact that the defendant corporation has obtained an advantage which it cannot justly retain. The general doctrine by which the present case may be ruled is thus stated in the language of the court in *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 59, 11 Sup. Ct. 478, 488:

"A contract of a corporation, which is ultra vires in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the same case it was said (139 U. S. 54, 11 Sup. Ct. 486).

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court."

Later decisions of the supreme court have emphasized the views expressed in the foregoing quotations. *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433; *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831.

In *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, Mr. Chief Justice Fuller said:

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

In *McCormick v. Bank*, Mr. Justice Gray, speaking for the court, said:

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

In *Bank v. Kennedy* it was said:

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

In the case at bar the defendant bank is not in the position of having received the fruits of the unlawful contract. The plaintiff's money was paid, not to the bank, but to Blake. It is not shown that the bank received any benefit whatever from the payment. There is no ground, therefore, upon which it can be adjudged that the bank shall make restitution. The judgment will be affirmed.

ROSS, Circuit Judge (dissenting). I agree, and so held in the case of *Flannagan v. Bank*, 56 Fed. 959, that a national bank has not the power to guaranty the debt or obligation of a third party; but, in my opinion, the findings of fact of the court below, upon which the present writ of error must be determined, do not present any such case. The complaint in the case counts upon four separate causes of action, each of the first three of which is upon a certain draft drawn by the defendant Needles Bank on the Chase National Bank, of New York, in favor of the plaintiff, doing business under the name of Bowen & Co., and delivered to the plaintiff, according to the findings, in exchange for a check of Blake drawn on the defendant bank, and discounted by Bowen & Co. The checks of Blake on the defendant Needles Bank in favor of Bowen & Co. were thus honored by the defendant bank, and the amounts thereof necessarily entered upon its books on the debit side of Blake's account. When the plaintiff presented and delivered those checks of Blake to the defendant Needles Bank, and received from the latter, in exchange therefor, its own drafts in the plaintiff's favor on the Chase National Bank, of New York, the plaintiff manifestly parted with all of its interest in those checks of Blake, holding in exchange therefor the obligations of the defendant bank. In respect to the first three causes of action, therefore, I am unable to see how, in view of the findings of fact, it can be properly held that the action is upon any guaranty of the debt or obligation of Blake. On the contrary, in respect to each of these three causes of action the defendant bank honored the checks of Blake drawn upon it, and in exchange for them issued its own obligations, upon which the first three causes of action rest. There is nothing in the findings of fact to the effect or tending to show—what seems to be assumed in the prevailing opinion—that Bowen & Co. knew that the drafts drawn in its favor by the defendant bank, and issued in exchange for Blake's checks upon the defendant bank, were only to be paid by means of drafts drawn by the defendant bank on Blake and in favor of the Chase National Bank, of New York. It seems to me that the effect of the decision here is to attach a condition to the drafts of the defendant bank sued upon, which is altogether unauthorized by any fact made to appear in the findings of the court below. According to the complaint as it appears in the record, the fourth cause of action is upon a check drawn by Blake "upon the plaintiff, A. T. Bowen & Co.," which, it is alleged, the defendant bank guaran-

tied. If the complaint in respect to this cause of action be so taken and considered, it is plain that in respect to it the action is upon a guaranty which the defendant bank was not empowered to make. But the word "upon" was probably inserted in the record by mistake in place of the words "in favor of," since the findings of fact are that this check was drawn upon the defendant bank and in favor of the plaintiff, Bowen & Co., and it is so treated in the opinion of the court below, as also in the opinion of this court. Thus considered, I am of opinion, in view of the findings of fact made by the court below, that in respect to this cause of action, also, the action is not upon any guaranty, but upon the direct promise of the defendant bank to pay the check so drawn by Blake upon it, upon the faith of which promise the plaintiff parted with his money. What I have said is based upon the findings of the court below, which, as I understand it, are to control the judgment of this court. In the opinion of the learned judge of the court below, however, reference is made to certain testimony given in the trial court tending to show that the plaintiff, Bowen & Co., did know that the drafts sued upon were to be paid by other drafts drawn by the defendant bank upon Blake in favor of the Chase National Bank, of New York, and were only to be paid in the event of Blake's paying those drafts, and that, in truth, all of the transactions in question constituted but the guaranty by the defendant bank of Blake's obligations, of which the plaintiff, Bowen & Co., had actual knowledge. The testimony thus alluded to in the opinion of the trial judge finds some support in the agreement executed by Blake on the 12th of September, 1894, which is set out in the findings of fact that were made by the court below. The evidence in the case may have been amply sufficient to justify findings to the effect that all of the transactions sued upon in reality constituted but the guaranty on the part of the defendant bank of the obligations of Blake, and that the plaintiff, Bowen & Co., had knowledge thereof. The difficulty is that the findings do not show this state of facts, and therefore I am of opinion that the judgment should be reversed, and the cause remanded for a new trial.

NORTHERN PAC. RY. CO. v. McCORMICK.

(Circuit Court of Appeals, Ninth Circuit. May 22, 1899.)

No. 496.

1. PUBLIC LANDS—NORTHERN PACIFIC RAILROAD GRANT—PRE-EMPTION RIGHTS.

The provision of section 6 of the Northern Pacific Railroad grant, that "the odd sections of land hereby granted" should not be liable to sale, or entry or pre-emption before or after their survey, except by the company, must be construed in connection with section 3, containing the grant, and which limited the same to lands to which the United States should "have full title * * * free from pre-emption or other claims or rights at the time the lien of said road is definitely fixed and the plat thereof filed." Hence lands to which pre-emption rights had attached at any time prior to the filing of the map of definite location, being reserved from the grant, were not within the provisions of section 6, and up to that time the right of pre-emption was not affected by anything in the act, or by the filing of the map of general route thereunder.

2. SAME—PRE-EMPTION RIGHTS—SETTLER ON UNSURVEYED LAND.

A qualified settler, who enters upon and improves unsurveyed public land, with the intention of obtaining title thereto under the pre-emption laws, has a claim thereon, which is a right of pre-emption, and which continues until three months after the map of survey of the land has been filed in the land office, unless his entry is sooner made; and where a settler was so occupying and residing upon a tract of unsurveyed land at the time of the filing of the map of definite location of the line of the Northern Pacific Railroad, which brought the land within the boundaries of its grant, although the settler had made no application for entry, such land was at that time subject to a "pre-emption claim or right," within the meaning of the reservation clause of the act making such grant, and the company acquired no title thereto.

Gilbert, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

This is an action of ejectment brought in the circuit court of the United States for the district of Montana by the plaintiff in error against the defendant in error to recover possession of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 21, township 13 N., range 18 W., principal meridian of Montana. It is alleged in the complaint that the plaintiff is a corporation created by, and organized and existing under, the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and acts and resolutions amendatory thereof; that by the terms of said act plaintiff was authorized and empowered to lay out, locate, construct, furnish, and maintain a continuous railroad and telegraph line, with the appurtenances, from a point on Lake Superior to a point on Puget Sound; that there was granted to plaintiff by congress every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as plaintiff might adopt, through the territories of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passed through any state, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; that it was provided in section 6 of the said act that the president of the United States should cause the lands to be surveyed for 40 miles in width on both sides of the entire line of the road after the general route thereof was fixed, and as fast as should be required by the construction of said railroad, and that the odd sections of land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed, except by plaintiff, as provided in said act; that plaintiff duly accepted the terms, conditions, and impositions of the act, and signified such acceptance in writing to the president of the United States; that the general route of said railroad extending through the territory of Montana was duly fixed February 21, 1872, and that the land in controversy was on and within 40 miles of the general route of said railroad so fixed as aforesaid; that on July 6, 1882, plaintiff definitely fixed the line of said road, extending opposite to and past said lands, and filed a plat thereof in the office of the commissioner of the general land office; that thereafter plaintiff duly constructed and completed that portion of said railroad and telegraph line extending on, over, and along the line of definite location of said railroad, so fixed as aforesaid, and the same was accepted by the president of the United States. It is further alleged that at the date of the definite location of said road, and of the filing of a plat thereof in the office of the commissioner of the general land office on July 6, 1882, the land was public land, to which the United States had full title, not reserved, sold, or granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The material part of the amended answer is the denial of this last allegation, and the averment that on or about

the — day of January, 1864, one W. B. S. Higgins, being at that time a citizen of the United States over the age of 21 years, and duly qualified under the laws of the United States to make a pre-emption or homestead filing, entered into and upon the land in question, which was at that time unsurveyed, and a part of the unoccupied and unappropriated public domain of the United States; that Higgins entered upon the land for the purpose of making a home for himself, and proceeded to erect improvements upon the land, and to inclose a portion thereof with a fence; that thereafter he continued to occupy, hold, and possess the same until he sold, transferred, and assigned his interests to other parties; that through mesne conveyances the defendant herein on or about the 6th day of January, 1881, became the owner and possessor of said tract of land; that between the 1st day of July, 1862, and the date of the commencement of this action, the said land was owned, held, possessed, and occupied continuously by persons who, under the laws of the United States, were entitled to enter the same either as a homestead or pre-emption entry; that on or about the 23d day of March, 1885, the land was surveyed by the surveyor general of the state of Montana, and the survey accepted by the officers of the land department of the United States; that on or about the 25th day of March, 1885, defendant filed his declaratory statement; that on or about the 6th day of January, 1881, he settled upon said tract of land, having become the possessor thereof by purchase from the prior occupant; that thereafter he applied to the officers of the land office at Helena, Mont., to file his pre-emption on said tract of land; that the plaintiff appeared by its attorneys and agents, and contested the right of the defendant to enter the land; that the register and receiver, after hearing proof, decided that the defendant was entitled to enter the land, and that the plaintiff had no right, title, or interest therein; that thereupon the plaintiff appealed from such decision to the commissioner of the general land office, who approved the decision, and thereafter the plaintiff appealed to the secretary of the interior, who affirmed the decision of the commissioner of the land office, and decided that the defendant was entitled to hold and possess said land under the laws of the United States, and that the plaintiff had no right, title, interest, claim, or demand whatsoever in or to said lands, or any part or parcel thereof; that on the 1st day of May, 1889, the defendant filed his second declaratory statement in the land office at Helena, Mont., for the land in controversy; that this declaratory statement was accepted by the officers of the land office, and thereafter he changed it to a homestead entry, and paid the register and receiver the necessary fees therefor; that about January 1, 1891, he made application to the land office to make final proof, and, after advertisement and notice published in a newspaper, he appeared with his witnesses before the clerk of the district court for the Fourth judicial district of Montana, and proved his title to the land, and, upon presenting such proof to the register and receiver of the land office, it was accepted by them, and they issued to him a certificate showing that he was entitled to the land; that at the time of making final proof the plaintiff made no objection thereto, but allowed it to be made without protest or objection; that the proof was accepted by the commissioner of the general land office, and on the 16th day of November, 1891, the president of the United States issued to him a patent for the land, and by reason of said patent, and compliance with the laws of the United States, he is the owner and entitled to the possession of said land. To this answer the plaintiff filed a replication placing in issue substantially all the foregoing averments, except such as relate to the proceedings in the land office and the issuance of the patent. The defendant thereupon moved for a judgment upon the pleadings, upon the theory that the uncontroverted averments of the answer as to the issuance of the patent were sufficient to entitle him to a judgment. The court granted the motion. Plaintiff thereupon brought the case to this court by a writ of error. *Railroad Co. v. McCormick*, 19 C. C. A. 165, 72 Fed. 736. This court held that the allegations of the answer denied by the replication must be excluded from consideration in determining the issues presented by the pleadings at the time the judgment was entered in the court below, and that, as the pleadings thus stood, all the facts essential to the establishment of the plaintiff's title were alleged and were undis-

puted, save only as they were affected by the proceedings in the land office which resulted in the issuance of the patent to the defendant, and, as these proceedings were based upon an entry by the defendant made long after the title passed to the railroad company, the allegations of the answer were insufficient to sustain the judgment. The cause was accordingly remanded to the circuit court for trial upon the undetermined issues contained in the pleadings. Pursuant to this order the parties agreed upon the facts in the case, and upon such agreed facts the case was submitted to the circuit court, and a judgment was again entered in favor of the defendant. The facts agreed upon are all the facts set forth in the complaint, except the allegations "that said land was on said February 21, 1872, public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or right," unless the other facts agreed upon established the same, and also except the formal conclusions as to plaintiff's ownership of the land.

The material facts, as agreed upon and not previously admitted by the pleadings, are the allegations of the answer excluded from consideration at the former hearing of the case by reason of the denials in the replication. They are that at the time of the grant to the said plaintiff, and for some time prior thereto, said Higgins settled upon and occupied said land, placed improvements thereon to the amount of about \$2,000, fenced a considerable portion thereof, and had raised crops of grain, oats, and wheat, and also vegetables, thereon, and was at the date of said grant a settler thereon, and an occupant duly qualified to enter said land and obtain a patent therefor; that said Higgins continued so to occupy and possess said land under his settlement thereon until some time in the year 1875, when he died, and the administrator of his estate duly sold all the right he could sell to the same and improvements thereon to one William S. Gullett, who, under his conveyance, at once took possession and occupancy of the same, and cultivated and improved the same up to May 1, 1880; that in May, 1880, said William S. Gullett sold and conveyed to defendant all the claim, right, title, and interest in said land had and held by him, and the improvements thereon, and the said defendant entered into the immediate possession and occupation thereof, settled upon and continuously farmed and improved the same, with the intention of entering and obtaining a title thereto, if so entitled under the laws of the United States; that said land was unsurveyed during all the time aforesaid, and the official survey thereof was not made until the year 1885, and the township plats were not filed until March 23, 1885; that defendant made his application to enter said land and file the necessary papers for that purpose on the 25th day of March, 1885, for the purpose of acquiring title thereto, and filed his declaratory statement in due form of law on the said 25th day of March, 1885; that a hearing of the said application to enter the same was duly ordered by the officers of the land office at Helena, Mont., and due notice of said hearing and the taking of testimony therein given to plaintiff; that plaintiff failed and neglected to appear at the taking of said testimony, and the officers of the land office at said city of Helena found in favor of the defendant; that thereupon plaintiff appealed to the commissioner of the general land office; that said commissioner decided adversely to plaintiff, and the decision of the Helena land office was thereupon affirmed; that plaintiff thereafter appealed from the decision of the said commissioner to the secretary of the interior, who confirmed the said decision; that defendant paid for said land, received a receiver's certificate therefor, and a patent was thereupon issued to him, and the same now remains in full force and effect, subject to whatever legal title plaintiff may have on account of its grant and the facts herein agreed upon; that all of the said persons, and said Higgins, the said Gullett, and the defendant, McCormick, were citizens of the United States, and duly qualified to enter said lands under the laws of the United States, and to receive a United States patent therefor; and that said McCormick was in the occupation and possession of said premises at the time of the location of the definite line of plaintiff's railroad, and the filing of the plat thereof in pursuance of the statutes of the United States in such case provided, and said facts were presented and passed upon by the officers of the land department.

C. W. Bunn, James B. Kerr, E. W. Beattie, Jr., William Wallace, Jr., William Singer, Jr., and H. G. McIntire, for plaintiff in error.

E. W. Toole and Thomas C. Bach, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after the foregoing statements of facts, delivered the opinion of the court.

The assignments of error upon which the case is now here are ten in number, but they may all be reduced to two general propositions: (1) That the court erred in holding that the land described in the complaint was subject to homestead and pre-emption entry after the general route of the Northern Pacific Railroad was fixed on February 21, 1872; (2) that the court erred in holding that the land in controversy was subject to any claim or right on the part of the defendant on and after July 6, 1882, when the line of definite location of the road was fixed, and a plat thereof filed in the office of the commissioner of the general land office.

The act of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route" (13 Stat. 365), provided in section 3:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The sixth section directed the lands to be surveyed for 40 miles in width on both sides of the entire line of the road after the general route was fixed, and as fast as was required by the construction of the railroad, and provided that:

"The odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The plaintiff in error contends that when the general route of the railroad was fixed on February 21, 1872, the land in dispute,

being part of an odd-numbered section within the exterior limits of the grant, as determined by such general route, was withdrawn from sale, homestead, and pre-emption entry, under the provisions of section 6 of the granting act. It is perhaps immaterial that there is no evidence in this record that the land department at any time withdrew from sale or location, pre-emption or homestead entry, any of the public lands falling within the limits of the grant, or that a map of the lands withdrawn was ever filed with the commissioner of the general land office. Whatever withdrawal or reservation was made could only have been made under the provisions of the statute. We must therefore look to the terms of the act itself to ascertain what lands were granted to the railroad company, and declared not to be liable to sale or entry, pre-emption or homestead entry. In section 6 of the act it is provided that they are the "odd sections of land hereby granted." This clearly does not mean all sections of land designated by odd numbers within the limits of the grant, but only such sections as are granted by the act to the railroad company. Besides, this section is not to be construed without reference to other sections of the act. "It must be taken in connection with section 3, which manifestly contemplated that rights of pre-emption, or other claims or rights, might accrue or become attached to the lands granted after the general route of the road was fixed, and before the line of definite location was established." *Railroad Co. v. Sanders*, 166 U. S. 620, 636, 17 Sup. Ct. 676. The terms of the grant are contained in section 3, where it is provided that the land granted is every alternate section of public land, not mineral, designated by odd numbers, within the limits of the grant, "whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office." It needs no argument to show that the lands here described as excepted from the operation of the grant at the time the line of the road should be definitely fixed were never at any time granted to the railroad company, and, being expressly withheld, were as free from the terms of the grant when the general route of the road was fixed on February 21, 1872, as though they had never been within its limits. Like mineral lands, they were expressly excluded from the operation of the act.

It follows, that the first, and, indeed, the only, question to be determined is this: Was the land in controversy free from pre-emption or other claim or right on the 6th day of July, 1882? If it was, it was part of the grant to the railroad company. If it was not, the company never had title to the land, and cannot prevail in this action. In an action of ejectment, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the title claimed by his adversary. *Fussell v. Gregg*, 113 U. S. 550, 565, 5 Sup. Ct. 639.

It appears that the defendant entered upon this land in May, 1880, as a purchaser of the possession and improvements from the previous owner, and thereafter continuously farmed and improved

the same with the intention of entering and obtaining a title thereto, if so entitled under the laws of the United States. He was therefore a settler upon this land at the time the line of the road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, on July 6, 1882. Was this settlement, under the circumstances, a "claim or right" excluding the land from the grant to the railroad? The land was at that time unsurveyed, and was not surveyed until the year 1885, and the official plat was not filed in the land office until March 23, 1885. Two days thereafter, namely, on March 25, 1885, the defendant made his application to enter the land as a pre-emptor, and thereupon filed the necessary papers for that purpose. Section 6 of the act of July 6, 1864, after providing for the survey of the lands on both sides of the Northern Pacific Railroad, provided that the odd sections granted should not be liable to sale or entry or pre-emption before or after they were surveyed, except by said company, as provided in the act. It was further provided that:

"The provisions of the act of September fourth, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

This provision of the act extending the pre-emption and homestead laws to all other lands on the line of the road not granted to the company is significant, in view of the fact that these laws had already been extended to all lands belonging to the United States to which the Indian title had been, or might thereafter be, extinguished. Act June 2, 1862 (12 Stat. 413), and Act May 20, 1862 (12 Stat. 392). The only inference to be drawn from this provision is that these laws were to be continued in full force and effect, notwithstanding the grant, and to be applicable to all lands not specifically therein described as having been granted to the company. In the case of *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733, 748, the supreme court, in speaking of a grant of land made in 1863 to the state of Kansas, declared the policy of congress at that date to have been to preserve pre-emption and homestead rights until the line of the aided road should be definitely fixed. The court said:

"Formerly, lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed, and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the secretary of the interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those granted, and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, congress expressly declared what the act had already implied,—that lands otherwise appropriated when it was passed were not subject to it."

These observations of the court are peculiarly applicable to the grant to the Northern Pacific Company, and in the case of *Northern Pac. R. Co. v. Musser-Sauntry, L. L. & Mfg. Co.*, 168 U. S. 604, 610, 18 Sup. Ct. 207, this feature of the law is given as a reason why promptness on the part of the company in building its road would result to its advantage, in finding nearly all its grant within place limits. The court said:

"At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively (section 8), contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road's traversing a comparative wilderness, it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers, and few, if any, land grants. It knew, therefore, that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant."

What, then, was the effect of the settlement by the defendant upon the land in question, under the pre-emption laws? In *Whitney v. Taylor*, 158 U. S. 85, 94, 15 Sup. Ct. 800, the supreme court held that the act of September 4, 1841, "gave the right of pre-emption to one making a settlement in person, and who inhabits and improves the land, and erects a dwelling thereon." The various provisions of the pre-emption act are now embraced in the Revised Statutes, and that part of section 10 which declares who are competent pre-emptors on the public lands, and what constitutes a pre-emption claim, is found in section 2259, as follows:

"Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land-office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

Then follow sections in the Revised Statutes limiting the right of pre-emption, and providing the proof and the method of procedure in the land office by which that right may be established. And, where a settlement is made on unsurveyed land, the time after the survey within which the declaratory statement must be filed is prescribed in section 2266, as follows:

"In regard to settlements which are authorized upon unsurveyed lands, the pre-emptions claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land-office of the approved plat of the township embracing such pre-emption settlement."

These provisions of the statute distinctly recognize that the qualified settler who enters upon and improves a tract of public land with the intention of obtaining a title thereto under the pre-emption laws is a claimant, that he has a claim to the land, and that this claim is a right of pre-emption. This being so, it would

seem that this was one of the "claims" congress had in view when it provided that the odd-numbered sections granted to the railroad company should be free from "other claims or rights" when the definite line of the road should be fixed. Had the defendant perfected his entry of record and filed his declaratory statement in the land office prior to that time, he could then have had a pre-emption claim, and the land would not have been free from such claim. But congress went further, and limited the grant to lands "free from claims." As said by the supreme court in *Northern Pac. R. Co. v. Musser-Sauntry L. L. & Mfg. Co.*, supra:

"No one can read this entire description without being impressed with the fact that congress meant that only such lands should pass to the Northern Pacific as were public lands, in the fullest sense of the term, and free from all reservations and appropriations, and all rights or claims in behalf of any individual or corporation, at the time of the definite location of its road."

But we are not without direct authority upon this question. In *Railroad Co. v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, this same grant was before the court. After the general route of the road was fixed, February 21, 1872, and prior to the establishment of its line of definite location, July 6, 1882, certain persons, qualified to enter mineral lands under the laws of the United States, entered upon the possession of lands within the exterior lines of both the general and definite routes of the railroad, and made claim to such lands. These claims were pending when the definite line of the road was fixed. The defendants, who subsequently entered into the possession of the land, did not assert title in themselves, but resisted the claim of the railroad company upon the ground that the land was excluded from its grant by reason of the fact that there were claims to the land at the time of the location of the road. The claims consisted, as stated, in the application of certain parties to purchase the land as mineral land. The land was not in fact mineral land, and it does not appear what became of the applications. They were presented merely as claims, without any other fact or circumstance tending to establish their connection with any right of title, and did not in any way relate to the defendants' right of possession of the land. The court, in commenting upon this feature of the case, said:

"But it is said that no account is to be taken of those applications, for the reason that the present defendants, who had nothing to do with them, and had no interest in them, confess in their answer that the lands in question 'did not contain gold or other precious metals in paying quantities, or in such quantity as to make the same, or any part thereof, commercially valuable therefor'; that the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872, and by their withdrawal in that year by the general land office 'from sale or location, pre-emption or homestead entry.' This view overlooks the fact that the express declaration of congress was that no public lands should pass to the company, to which, at the time of the definite location of the road, the United States did not have title free from pre-emption 'or other claims or rights.' If the applications made in 1880 and 1881 to purchase different parts of the section in question, and which were pending and undisposed of in 1882, when the company filed its map of definite location, constituted 'claims,' within the meaning of the act of 1864, then it was not competent for the defendants, by any admission they might make, for what-

ever purpose made, as to the quality of these lands,—whether mineral or not,—to eliminate from the case the essential fact that these 'claims' existed of record when the line of the road was definitely located. Indeed, if it now appeared that the land office finally adjudged, after the definite location of the road, that the lands embraced by those applications were not mineral, they could not be held to have passed to the railroad company under the act of 1864, for the reason that they were not, at the time of such definite location, free from pre-emption or 'other claims or rights.'"

In another part of the opinion the court says:

"As the lands in question were not free from those claims at the time the plaintiff definitely located its line of road, it is of no consequence what disposition was or has been made of the claims subsequent to that date."

The court accordingly held that the lands did not pass to the railroad company by the terms of its grant, for the reason that claims to the land were pending at the time of the definite location of the road.

The only distinction to be drawn between this case and the one at bar is the fact that, in the case referred to, the applications to purchase the land as mineral land were on file in the land office when the line of definite location of the road was fixed, while in the present case, although the defendant had settled upon the land, he had not at that time filed his declaratory statement; but, as we have seen, this was not necessary under the statute, for the reason that the land was unsurveyed public land. As soon as it had been surveyed, and the plat of the township embracing the settlement was received at the district land office, the defendant filed his declaratory statement, as required by section 2266 of the Revised Statutes. What more could he do? He had not only settled upon the land before the line of the railroad was definitely fixed, but he continued to occupy, cultivate, and improve the land until his claim was established by law, and a patent issued to him thereon, on the 16th day of November, 1891. The action of the land department in issuing a patent to the defendant may be of itself immaterial in this case, but, in the proceedings in the land office resulting in the patent being issued, the fact of settlement upon the land by the defendant as a qualified settler under the law was found, and found by competent authority. It was also found that whatever right or claim the defendant had was based upon this settlement. In other words, the pivotal fact was established that a claim to this land, whatever that claim might be in law, existed on July 6, 1882. *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 166, 15 Sup. Ct. 779.

In *Railroad Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, the court declared the law to be that no pre-emption or homestead claim attaches to a tract of land until an entry in the local land office, and the plaintiff in error relies upon this case as excluding defendant's claim. But the facts in that case did not require the court to determine the effect of a settlement upon public land by a qualified settler, followed by a pre-emption entry within the time prescribed by law; and the court expressly stated that it deemed it unwise to make any observations concerning matters not considered by the supreme court of the state from which the case had been taken upon

a writ of error. The case of *Railroad Co. v. Groeck*, 31 C. C. A. 334, 87 Fed. 970, recently decided by this court, is also relied upon by the plaintiff in error as establishing the doctrine that the lands in question were withdrawn by the operation of section 6 when the general route of the road was fixed, February 21, 1872, and were thereafter excepted from homestead and pre-emption entry. The act involved in that case was the act of July 27, 1866, granting lands to aid in the construction of the Atlantic & Pacific and the Southern Pacific Railroads. 14 Stat. 292. Section 6 of that act is identical with section 6 of the act granting lands to the Northern Pacific, but section 3 of the former act differs very materially from the latter act, in fixing the time when the grant of specific lands should attach. It provides that there is granted every alternate section of public land, not mineral, designated by odd numbers, wherever on the line of the road the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, "at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office." This plat was filed January 3, 1867, and under the terms of the act the grant at that time attached to the odd-numbered sections not subject to the reservations, claims, and rights mentioned in the act. The defendant, Groeck, did not settle upon the land claimed by him until September 2, 1885, or more than 17 years after the right of the railroad to specific sections had been fixed by law. His pre-emption entry was, however, accepted by the land department, and a patent for the land issued to him, because the withdrawal of the land from settlement by the secretary of the interior for the benefit of the railroad had been revoked on August 15, 1887. This court held that the granting act itself operated to withdraw from settlement the lands lying within the limits of the grant from the date of the filing of the map of the general route, and this determination was in accordance with the express terms of the act. Manifestly, the law of that case has no bearing upon the case now before the court. The sections of the act we have had under consideration differ very materially from the provisions of other acts granting lands in aid of public improvements, and decisions in cases based upon such different provisions cannot be followed as authority in this case, without noticing the distinction; and, as the views here expressed are believed to be entirely in accord with the latest decisions of the supreme court upon the questions involved, it is not deemed necessary to discuss the other cases cited in the briefs.

It follows from what has been said that we are of the opinion the land in controversy was subject to homestead and pre-emption entry after the general route of the Northern Pacific Railroad was fixed, on February 21, 1872, and that it was not free from the claim of the defendant when the line of the road was definitely fixed, on July 6, 1882. The latter determination necessarily disposes of the case. The judgment of the court below will be affirmed.

GILBERT, Circuit Judge (dissenting). I am unable to concur in the view that the supreme court has by its decisions in *Railroad Co.*

v. Sanders, 166 U. S. 620, 17 Sup. Ct. 671, and Northern Pac. R. Co. v. Musser-Sauntry L. L. & Mfg. Co., 168 U. S. 604, 18 Sup. Ct. 205, overruled a series of prior decisions in which it was uniformly held that the withdrawal of lands within the grant to the Northern Pacific Railroad Company upon the filing of its map of the general route of its road operated to exclude the withdrawn lands from subsequent settlement by individuals under the homestead and pre-emption laws. That such was the effect of the withdrawal has been distinctly and repeatedly announced. In *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, referring to the grant to the Northern Pacific Railroad Company, the court said:

"But it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side, until the definite location is made.
* * * When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: It is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

In that case a settler had upon October 5, 1871, entered upon land, with the intention of securing a pre-emption claim. The land was then within the limits of an Indian reservation, the Indian title to which was not extinguished until June 19, 1873. On August 11, 1873, and within three months after the government survey of the land, the pre-emptor presented his declaratory statement. On February 21, 1872, the map of the general route of the road had been filed, and on March 30, 1872, the withdrawal was made. Speaking of notice of the withdrawal, the court said:

"This notification did not add to the force of the act itself, but it gave notice to all parties seeking to make a pre-emption settlement that lands within certain defined limits might be appropriated for the road. At that time the lands were subject to the Indian title. The defendant could not, therefore, as already stated, have then initiated any pre-emption right by his settlement, and the law cut him off from any subsequent pre-emption. The withdrawal of the odd sections mentioned from sale or pre-emption, by the sixth section of the act, after the general route of the road was fixed, in the manner stated, was never annulled. It follows that the defendant could never afterwards acquire any rights against the company by his settlement."

In *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389, concerning the withdrawal of lands by the secretary of the interior, the court said:

"His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road.
* * * After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

In *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 599, 13 Sup. Ct. 152, the court expressly approved the language above quoted from the opinion in *Buttz v. Railroad Co.* In *Hamblin v. Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, it was held that a withdrawal of lands as

coming within the limits of a railroad grant operates to withdraw the lands from homestead entries, even if found afterwards not to come within such limits. In *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, it was held that the mere occupation of public land for the purpose of subsequently entering the same for a homestead, but without making such entry until after a withdrawal had been ordered by the secretary of the interior, gave the occupant no right thereafter to obtain title under the homestead laws.

The case of *Railroad Co. v. Sanders*, it is said, declares a doctrine at variance with the former decisions of the court. What was actually decided by the court in that case was that the withdrawal of lands consequent upon fixing the general route of the road did not operate to withdraw mineral land, and that if at the time of fixing the definite location of the road there was pending an application to purchase any of the granted lands, upon the ground that it was mineral land, such application constituted a "claim" against the land which excluded it from the grant, notwithstanding the fact that it was subsequently proven that the land was not in fact mineral land. That decision rests upon grounds which have no application in the present case. All mineral lands were withheld from the grant to the railroad company. The withdrawal could not affect lands not within the grant. Such lands, after withdrawal, as before, were open to claim and purchase as mineral lands. The difference between an application to purchase mineral lands, and a pre-emption entry after a withdrawal, is that in the one case the law authorized and invited the application to purchase, while in the other it strictly prohibited all steps towards obtaining title, and declared that such unauthorized settlement could not become the basis of a claim. It is true that in the course of the opinion in the *Sanders Case* the court remarked that section 3 of the grant to the railroad company "manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed, and before the line of definite location was established," but the case presented no question of pre-emption right. It is not conceivable that the court intended by the use of those words in the opinion to deliberately overrule the plain doctrine of its decisions in the cases above referred to. I think that the language so quoted must be considered only in its connection with the question which was then before the court for decision. In *Northern Pac. R. Co. v. Musser-Sauntry L. L. & Mfg. Co.*, the court, in concluding its opinion, declared that the only point intended to be decided was "that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant,—the latter having such words of exception and limitation as are found in the grant to the plaintiff,—it operates to except the withdrawn lands from the scope of such later grant." The court ruled in that case, as it had ruled before, that the grant of lands to the Northern Pacific Railroad Company under the third section of the

grant conveyed, so far as the United States were concerned, only the lands within the grant to which the United States should have "full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office," and that the United States retained the right at any time prior to the date of fixing such definite line to make a legislative grant of the lands in aid of another railroad, or for any other purpose; but the court, in its opinion in that case, again defined the office and function of a withdrawal, and said:

"The withdrawal by the secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the secretary was, in effect, a reservation."

Conceding that the decision in that case reaffirms the doctrine that congress might by legislation retract from the grant any of the odd-numbered sections within the limits thereof, and might, even after the general route was fixed and the lands were withdrawn, have offered the same to settlers under the pre-emption and homestead laws, the fact remains that no such action has been had, and no such legislation has been enacted. In section 6 of the granting act to the Northern Pacific Railroad Company, after granting the odd-numbered sections, it is expressly declared that the pre-emption and homestead laws shall be extended to the other lands. No subsequent legislation has indicated the purpose of congress to extend those laws to lands within the grant, other than those so indicated. In *Menotti v. Dillon*, 167 U. S. 703, 17 Sup. Ct. 945, the court made a similar ruling in reference to the grant to the Central Pacific Railroad Company. The court said:

"The right it acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were not sold, reserved, or disposed of, or to which no pre-emption or homestead claim had attached, at the time of the definite location of its road."

And, in speaking of the order of withdrawal, said:

"That order took these lands out of the public domain, as between the railroad company and individuals; but they remained public lands, under the full control of congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road."

The purpose of the withdrawal, as has been often declared by the supreme court, was to protect the grant. What protection would be afforded by a withdrawal which left the withdrawn lands in the same position as other lands of the public domain? The construction which is adopted by the majority of the court in this case renders the withdrawal an idle and meaningless act. If it is the true construction, the grant to the railroad company might have been entirely defeated by entries in the land office prior to the date of definite location of the road. It is true that in the case of *Northern Pac. R. Co. v. Musser-Sauntry L. L. & Mfg. Co.*

the court, while maintaining the right of congress at any time prior to the definite location to withdraw the granted lands and bestow them in aid of another road, answered the argument that such a construction might operate to defeat the entire grant by referring to the presumption that congress "acted and would act in good faith," and without intent to deplete the grant by subsequent legislation, or, in other words, declared that, while congress had the power to deplete the grant, it might be relied upon not to exercise the power. But can any such presumption arise in favor of the protection of a land grant as against the entry of individual settlers under the homestead and pre-emption laws? May they be relied upon to act in good faith, and with due regard for the rights of the railroad company and the intention of congress? In the sentence above quoted from the opinion in *Menotti v. Dillon*, "That order took these lands out of the public domain, as between the railroad company and individuals," is contained, in brief, the rule of law which is established by the decisions, and by which the present question should be governed. Lands so withdrawn are reserved from settlement by pre-emptors. So far as the settler is concerned, they are no longer within the public domain, or, as was said in *Northern Pac. R. Co. v. Musser-Sauntry L. L. & Mfg. Co.*, "The act of the secretary was, in effect, a reservation." These utterances of the supreme court, which are subsequent in time to the decision in the *Sanders Case*, manifest the purpose of the court to adhere to its settled definition of the office and effect of a withdrawal,—a definition which can have but one meaning. If such is the true construction of the grant, a pre-emption entry, the initial step of which was taken subsequent to the withdrawal, cannot avail to except the land from the grant.

GRAND TRUNK RY. CO. OF CANADA v. BAIRD.

(Circuit Court of Appeals, Second Circuit. March 1, 1890.)

No. 16.

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Plaintiff had been for years foreman of track repairs on the tracks in the yards of the defendant railroad company, and was familiar with the course of business in switching in the yards. He knew that when an engine of the defendant went westward beyond a certain point on a certain track it must return on another track. He knew that an engine had gone upon the first-named track; and must shortly return upon the other. He glanced at the switches, and thought he saw that the track was closed, and walked between the tracks, and turned to cross on the return track, when he was struck by the engine. He did not look, on the assumption that the engine was not coming, because he had heard no signal of its approach. *Held*, that he was guilty of contributory negligence.

In Error to the Circuit Court of the United States for the Northern District of New York.

The defendant in error, hereinafter called the "plaintiff," brought an action at law, subsequently removed to the United States circuit court for the North-

ern district of New York, against the Grand Trunk Railway Company of Canada, hereinafter called the "defendant," to obtain damages for an injury alleged to have been suffered by its negligence. A verdict for \$14,500 was rendered for the plaintiff, upon which judgment was entered, and this writ of error was brought to review the judgment.

George F. Brownell, for plaintiff in error.

George Raines, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The injury occurred about half past 11 o'clock in the forenoon of May 4, 1892, upon a clear day, at the railroad yards of the New York Central Railroad Company, at Suspension Bridge, N. Y. The plaintiff was then about 36 years old, began railroad work in December, 1875, had been continuously in the employment of the New York Central Company, with the exception of a year and four months, and was a foreman of track repairs upon its tracks at Suspension Bridge, from May 8, 1890, until the accident. The main tracks of the New York Central are south of the Suspension Bridge station. Tracks Nos. 1 and 2 are north of the station, and extend thence easterly to the New York Central freight yard. Track No. 3 is a stub track, ending at the northerly end of the station. These three tracks run westerly, converge at a point where there are two switches, about 600 feet west of the station, known in the case as "A," and become one track which continues westerly towards the Suspension Bridge. Tracks 1 and 2 are used by the defendant for carrying its freight and passengers into Canada. No. 3 is used by the New York Central road generally. Loaded freight cars destined for the Grand Trunk road are placed in the freight yard east of the station, are brought down by the switching engines of that road, and usually placed upon No. 1, and the train, when made up, is hauled upon that track beyond the switches to the defendant's Suspension Bridge connections. The engine returns, is switched at A to No. 2, comes back to a point east of the station, and a switch is turned to enable it to pass upon No. 1 again. When the switching engine is about to return from the bridge, the switchman opens the switch at A to permit it to pass as a matter of course, and without previous notice, upon No. 2, or, if the switchman is not at that point, a signal of two whistles is given from the engine to recall him. This yard and these tracks are constantly being used for switching purposes, and the plaintiff was familiar with the course of business, and knew, when he saw a switching engine going westward on track No. 1 beyond the switches, that it would soon return on track No. 2. On the morning in question the conductor of engine 449 found among his freight in the New York Central yards two cars for the Erie road. They were placed next the engine, and the train was pulled to the depot, and stopped on track No. 1. The two Erie cars were cut out, sent down on track No. 1, and delivered to the Erie yard by engine 449. The engine came back as usual to the switch, was switched to No. 2, and continued upon that track until the accident happened, 193 feet east of the switch points. The switch was opened by the switch tender

from his own knowledge of the necessity for doing so, and without a call by whistle.

The plaintiff testifies that he saw engine 449 when it pulled the train from the freight yard upon track No. 1, that it was cut off, moved away from the train, and was at the switch, A, and was moving westward beyond the switch. He thought that no cars were attached to it. He was, at that time, overseeing the unloading of some ties at a point on the main tracks about 60 feet south of the Diamond crossing, which is about 40 feet west of A. He testifies that he then went over to the frogs near A, and examined those on No. 2, to see whether they were in good order; saw what one of his workmen, named Stahl, was doing, who was working a few feet east of the crossing at the switches A, and who was about opposite the plaintiff on the other side of the track. He then walked down between tracks 1 and 2 a space of about $7\frac{1}{2}$ feet wide, and spoke to a workman named Smith; then walked beyond him about 50 or 60 feet, to speak to his men, who were loading iron on track 3; was going to step across track 2, and had just placed one foot over the rail, when he was struck by engine 449. He says that he was listening for a signal, heard no bell, had not looked back to see whether the engine was returning, paid no attention to it after he saw it move westerly, that when he was looking at Stahl he noticed the condition of the switches, and saw that the switch for No. 1 was open and for No. 2 was closed. He says that the accident might have been six or seven minutes, or a little more than that, after he noticed the condition of the switch. He received very severe injuries. His leg was crushed; was necessarily amputated. The result of his other injuries is probably permanent. His earning capacity is pretty much destroyed, and, if he was entitled to a judgment in his favor, the injury justified the amount of the verdict.

It was apparent that the defendant was not in fault for not seeing and attempting to avoid him when he was upon the track, for he had only placed one foot over the rail when he was struck. When the evidence was closed, the two points upon which the plaintiff relied in order to establish the negligence of the defendant, were an unusual rate of speed of the engine after it passed upon track No. 2, or that it proceeded without ringing the bell. The state of the evidence required that the question of negligence should be submitted to the jury, which the trial judge did substantially as follows:

"The testimony is so clear that the engine came, and, track No. 2 being open, proceeded, as it customarily did, that it seems to me the only matter which requires your serious consideration upon this branch of the case is whether the engine, after it passed upon track No. 2, proceeded at an undue rate of speed, or proceeded without ringing the bell. In the first place, what was the customary rate of speed, and what was the practice in respect to ringing the bell? I shall not dwell upon the evidence. It has been suggested—and the suggestion is entitled to consideration—that all the men in charge of this engine testify that the bell was being rung, and that the engine was moving at a very moderate rate of speed, and it is competent for you to infer from their conduct of the engine as they would have us believe it was upon this occasion, and the other testimony in the case, what the ordinary practice was. If you find that their testimony is not reliable, that they were not in observance of the ordinary practice, that they were running the engine at an unusual rate

of speed, and were not ringing the bell, then you can find the plaintiff has established his case, so far as it rests upon the negligence of the defendant. If, on the other hand, you find that on this occasion the defendant, through its employés, observed the precautions which were usually adopted, running the engine at the usual rate of speed, ringing the bell, as they testify they did, then the plaintiff must fail, because he will not have succeeded in establishing that the defendant was guilty of negligence."

The verdict of the jury establishes the fact that they found the issue for the plaintiff.

The remaining vital question in the case is whether the conduct of the plaintiff so palpably showed contributory negligence that the judge should, in accordance with the request of the defendant, have taken the case from the jury. He did submit it to them under a charge manifestly in favor of the defendant, but permitting a verdict in favor of the plaintiff. His charge upon that subject was, in substance, as follows:

"Then we pass to the question of contributory negligence. And you are to bring the judgment and observation of intelligent men to the consideration of the particular circumstances of the case. If it is true that the plaintiff supposed that the switch on No. 2 was not open; if it is true that, going only the distance that he did,—190 or 200 feet,—he would have heard a signal made by the approaching engine to the switchman; if it is true that, not hearing this signal, believing the switch to be closed, and not hearing the ringing of the engine bell, because none was rung, he stepped upon the track,—you may find that that was not an act of negligence on his part, but that under the same circumstances a man of ordinary care and prudence would have done the same thing. Yet you are not to lose sight of the consideration which has often been enforced by the courts, and is the law, that it is the duty of every person, when crossing a railroad track, or when approaching any perilous place, to exercise the faculties which his Creator has given him for his preservation and protection; to exercise all his faculties, including his eyes and ears. Were the circumstances in this case such as to justify a man, in the exercise of ordinary prudence, in not turning about to see whether the train was approaching? Were the circumstances such that he could rely upon hearing the approach of an engine?"

He also said that, if the plaintiff had turned about, and looked behind him, before stepping upon the track, he could have seen the approaching locomotive. If contributory negligence was established beyond question, it was so established by the testimony of the plaintiff in connection with the uncontroverted facts, and the case could not have been taken from the jury except upon the ground that, regarding his entire testimony as true, the facts as admitted by him permitted no escape from contributory negligence on his part. The uncontroverted facts were that the scene of the accident was a railroad yard, in which switching engines were constantly in operation; that the course of business for such engines upon tracks 1 and 2 was uniform, and well known by the plaintiff, who was in an important position, and thoroughly trained in the work of the yard, and who knew that when an engine went westward beyond the switches at A it must return upon track 2. His conduct was based, according to his testimony, upon the facts that he had seen that track No. 2 was closed, that until it was open no engine could reappear upon it, that he should hear a signal by bell telling that the engine had reappeared, and that he listened, as he walked, for that purpose. It is admitted that he did not otherwise watch for the

return of the engine, or look to see whether it was coming. The question, then, is, can a jury be permitted to say that his attempt to cross No. 2 was, in view of this state of facts, not an act of negligence, but justifiable as an act of ordinary prudence? The question of negligence is ordinarily one of fact, and, being such, is to be submitted to the jury for their ultimate determination. "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619; and authorities there cited.

While there is no supremacy in the rights of owners of railroads operated by steam over the rights of individuals who are also lawfully using the same roadway, yet the dangers from this means of transportation are manifest, while its use has become a necessity, and it is therefore simply prudent for the passer-by to exercise the caution which experience has shown to be needful. An ordinary and almost instinctive exercise of that caution is an endeavor to determine by eyesight, rather than by surmise, whether danger is at hand. It has, therefore, become a requirement, as a general rule, that a person of mature years, and in the possession of his faculties, who is about to cross a railroad track over which steam engines are known to be in constant use, must necessarily use the precautions against danger which his eyes and ears and powers of observation provide. This is not a statutory rule, and there are probably cases in which such a compulsory regulation is not applicable, and in which other circumstances exist which control its reasonableness; as, for instance when the injured person, confused by the negligence of the railroad officers, has made a mistake in his means of remedy. *Elliott v. Railway Co.*, *supra*. It is, however, in ordinary cases, a command of common prudence recognized by reasonable men, is reiterated by courts, and should not be frittered away by juries. The language of the supreme court, especially when directed to the duty of railroad employes to avoid carelessness in the crossing of tracks, has been clear and definite. Upon the general subject of carelessness by a foot passenger when called upon to cross a railroad track, Mr. Justice Field said in *Railroad Co. v. Houston*, 95 U. S. 697,—a case of injury which resulted in death,—as follows:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train; and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

To the same effect is *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125. The duty of a railroad employé in a railroad yard to be attentive to the probable or usual movements of switching engines which are in constant use is commented upon in *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835. That a railroad employé in railroad service is not to assume that the train is not approaching, or that a thing which he wants to do can be done in safety, is sharply considered in the *Elliott Case*, *supra*. It is true that, if there are degrees of negligence, the injured man in that case was guilty of more inexplicable negligence than the plaintiff, but it was negligence of the same kind, and the suggestions of Mr. Justice Brewer in delivering the opinion of the court are, therefore, of value:

"It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his vision, starts along and across a railroad track, with which he was entirely familiar, with cars approaching, and only 25 or 30 feet away, and, before he gets across that track, is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But, whatever his motive, the fact remains that he stepped on the track in front of an approaching train without looking, or taking any precautions for his own safety. This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes, perhaps, a mistake in choice as to the way of escape, and is caught in an accident; for here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger."

These cases, and others in the federal courts (*Railway Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921), emphasize the point that the belief on the part of the injured person that an accident is not going to occur because he does not suppose that a train is at hand, is not an adequate reason for neglect to take the natural means at his command to determine whether an accident is imminent, for the "track is a warning and a place of danger." In this case the accident happened on a fine, clear day, when there were no unusual circumstances to distract the attention of an experienced man, like the plaintiff. He knew the important fact that engine 449 must shortly return on track 2. He had glanced at the switches, and saw, or thought he saw, that the track was closed, walked eastward between the tracks Nos. 2 and 3, and turned to cross No. 2 in the belief or assumption that the engine was not coming, because he had heard no signal of its approach. He crossed when, if he had turned about and looked, he could have seen the approaching engine; and the cause of the injury was his violation of the duty of protecting himself against an obvious danger. The judgment is reversed, with costs, and the cause is remanded to the circuit court for a new trial.

MEDBERRY v. TROUTMAN.

(Circuit Court, D. Kansas, Second Division. June 20, 1899.)

ACTION—LEGAL OR EQUITABLE—SUIT TO CHARGE STOCKHOLDER.

An action brought by a creditor of a corporation, to charge a stockholder with statutory liability for a debt of the corporation, is one at law; and it does not become cognizable in equity by the statement in the complaint of an additional ground for recovery, based on an allegation that defendant received certain property from the corporation, the proceeds of a sale of its property, where it is not alleged that plaintiff has reduced his claim to judgment against either the corporation or the defendant, and the corporation is not made a party, nor shown to have been legally dissolved, without one of which allegations a creditors' bill cannot be maintained in a federal court.¹

This was a cause removed from the state court, and the question before the court was as to whether it was cognizable in the federal court, as a suit at law or in equity.

J. V. Daugherty and Earl W. Evans, for plaintiff.
T. B. Wall and C. H. Brooks, for defendant.

HOOK, District Judge. This case was removed by the defendant from the district court of Cowley county, Kan., and the question now presented is whether it is an action at law, or whether it falls within the equity jurisdiction of this court. The petition sets forth the following facts: The plaintiff is the owner of certain notes given to the Lombard Investment Company, a corporation organized under the laws of the state of Kansas, and which were secured by mortgages upon real property. The investment company negotiated the securities, and they became the property of the plaintiff. The indorsement upon the notes which was executed by the investment company contained a guaranty of the payment of the interest at maturity, and of the payment of the principal within two years from the time the same became due. The mortgages were foreclosed, the mortgaged property sold, and the proceeds applied towards the payment of the indebtedness, leaving an unpaid balance, for which the plaintiff sues. The defendant was the holder of \$4,500 of the capital stock of the investment company, which became insolvent and suspended business for more than one year prior to the institution of the suit. It is further alleged that about August 1, 1890, the investment company, then engaged in the usual and ordinary transaction of its business, determined to wind up its affairs and sell and dispose of all of its property and assets, amounting to \$1,250,000, and, pursuant to resolutions adopted at a meeting of the stockholders at which the defendant was present or represented, the company sold, transferred, and turned over to another company, known as the Lombard Investment Company of Missouri, all of the said property and assets, and that as the result of said transaction the defendant received as his part

¹ For liability of stockholders to creditors of corporation, see note to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315, and note to *Scott v. Latimer*, 33 C. C. A. 23.

of the consideration certain property, to the amount and value of \$4,500, the same being represented by stock to that amount in the Missouri company. At the time of this transfer the original company was indebted upon its guaranty of the notes held by the plaintiff, and the balances due thereon, as above stated, have never been paid.

The constitution of the state of Kansas provides (article 12, § 2) that dues from corporations, excepting railroad corporations and corporations for religious or charitable purposes, shall be secured by the individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder. The statutes of Kansas provide that where an execution has been issued against the property or effects of a corporation not within the excepted classes, and there cannot be found any property whereon to levy, execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock owned by him, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment. In this case, however, no judgment was obtained against the corporation upon the notes, or its guaranty indorsed thereon, and consequently no execution issued against it. The statutes of Kansas provide further (Gen. St. 1889, pars. 1200, 1204) that if any such corporation be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the corporation in such suit, and, further, that any such corporation shall be deemed to be dissolved for the purpose of enabling creditors thereof to prosecute suits against the stockholders to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year. The plaintiff has framed his petition so as to avail himself of these statutory provisions, and he also counts upon the fact that the defendant, a stockholder of the Kansas company, participated in the disposition of all of its assets, and the transfer of the same to a corporation of another state, without making provision for the payment of the first company's obligations, and that the defendant received a part of the consideration of such sale and transfer.

The plaintiff appears, from his petition, to be a simple-contract creditor; his demands not having been reduced to judgment against either the defendant, or the corporation in which defendant is alleged to hold stock. The proceedings resulting in the foreclosure of the mortgages operated, not as a judgment against the corporation upon its guaranty, or against the defendant as a stockholder, but only to secure a judgment against the makers of the notes and mortgages, and the application of the proceeds of the mortgaged property towards the payment or reduction of the indebtedness. Therefore the petition of the plaintiff is not, in effect, a creditors' bill, nor does it seek an accounting. It contains simple and direct allegations seeking to charge the defendant upon two grounds: First, as a stockholder of the Kansas company upon his statutory liability; and, second, because of his participation in the sale of the assets of that company, and his receipt of a part of the proceeds thereof. Consideration will be given to these in their order.

As to the first: It has frequently been held that an ordinary action for the enforcement of the liability of stockholders in corporations is not of equitable cognizance, in the absence of special grounds therefor aside from the necessary averments in such an action. Even where the statute of a state provides for the filing of bills in equity for the enforcement of such liability, a federal court will not be authorized to entertain such a bill where no special ground of equitable cognizance exists. *Alderson v. Dole*, 20 C. C. A. 280, 74 Fed. 29; *Auer v. Lombard*, 19 C. C. A. 72, 72 Fed. 209. In the latter case a bill in equity was filed by certain creditors of a savings bank organized under the laws of the state of Colorado, against a part of the shareholders of the corporation, to recover under the provisions of a statute of Colorado providing that shareholders in banks shall be held individually responsible for debts of such associations in double the amount of the par value of the stock owned by them, respectively. It was held that the remedy of the creditors under the statute was at law only, unless in exceptional cases requiring an accounting.

As to the second: It may be claimed that, although the plaintiff's petition presents an action at law to enforce the ordinary liability of a stockholder, yet that it presents a claim of equitable cognizance, in so far as it seeks to recover from the defendant the portion of the proceeds of the sale of the assets of the Kansas corporation which came into his hands and was retained by him. This might be so under certain circumstances, and if certain prerequisite conditions were complied with, and there were proper parties defendant in the suit. If the Kansas corporation had been dissolved, or the plaintiff's demands reduced to judgment, such a suit might be maintained against the proper parties. It will be noticed that under the Kansas statute a cessation in the transaction of business by a corporation does not operate to dissolve it for all purposes, but its dissolution for that reason is only to enable creditors to enforce the individual liability of the stockholders. The claim against the defendant, as shown in the petition, on account of his having received a portion of the proceeds of the sale of the company's assets, is not one to enforce his liability as a stockholder, but is based upon other conditions and considerations. In order that plaintiff might maintain a suit in equity against defendant upon the second ground mentioned, he should have reduced his claim to judgment against the corporation, and the corporation should also have been made a party defendant in this action. Until plaintiff's claim is reduced to judgment at law, it cannot be made the basis of relief in equity. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397; *Tube-Works Co. v. Ballou*, 146 U. S. 517, 523, 13 Sup. Ct. 165; *Scott v. Neely*, 140 U. S. 106, 115, 11 Sup. Ct. 712. Some cases will be found holding that, when the corporation is dissolved, the necessity of making it a party in a suit of this character is dispensed with. It should be remembered, however, that in this case the allegations in the petition only go to the extent of showing that it is dissolved for the purpose of enabling plaintiff to sue for the individual liability of the defendant as a stockholder. The case of *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, is quite

similar to this feature of the case under consideration. There a bill in equity was filed by the cattle company against some stockholders in corporations which had sold to the complainant certain herds of cattle. The bill alleged that there were fraud and deceit practiced in the sale upon the complainant, and that the number of cattle actually turned over to it under the agreement between the parties fell far short of the number represented by the vendors, whereby the complainant suffered loss and damage in a large sum. It was further set forth that the three vendor companies, after the sale to the complainant and the receipt of the purchase price, paid their outstanding liabilities, excepting the liability to the complainant, and distributed the remainder of the proceeds and all of their other assets among their shareholders, and that since that time the three vendor corporations made no further use of their franchises, but abandoned the same, and that neither of them had any officer or agent upon whom process could be served, and that they had not any assets of any kind out of which any judgment at common law could be satisfied. It was further alleged that the assets of the vendor corporations were a trust fund held by them in trust to satisfy complainant's claim before the shareholders were entitled to receive any portion of the same, and that the shareholders, in receiving said assets, took and held the same as trustees in place of the corporations, and subject to the lien of complainant's claim, and that the defendant shareholders should account for and apply the same, so far as necessary, to the satisfaction thereof. It was held, however, that the corporations in which the defendants were shareholders were necessary parties to such a suit, and their presence could not be dispensed with. It was contended that the bill disclosed such a practical abandonment of their franchises as to amount to a dissolution of the vendor corporations. Touching this claim, the court said:

"We cannot so construe the bill. The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means. No such dissolution is alleged in the bill."

As to the contention of complainant in that case that there was no agent or officer of the vendor corporations upon whom process could be served, and no assets out of which any judgment against them could be satisfied, the court said that it did not help the matter that complainant was unable to secure service, and that fact in no way affected the question of there being necessary parties, in whose absence a decree could not be rendered against the shareholders. It was further said:

"We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned,—that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity."

While the expression is frequently used that the assets of a corporation and the liability of its stockholders are a trust fund for the

benefit of creditors, it is not meant thereby that there is a direct and express trust attached to such assets. As was said in *Hollins v. Iron Co.*, 150 U. S. 383, 14 Sup. Ct. 130:

"It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

Also:

"Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust. * * * As between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

To the same effect are *Graham v. Railroad Co.*, 102 U. S. 148; *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081; *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338.

Since the plaintiff's cause of action, in one aspect thereof, is simply to enforce the individual liability of a stockholder, and as to the other his petition contains no averment that his claim was either reduced to judgment against the corporation or the defendant, or that the corporation was ever legally dissolved, there is nothing presented requiring the exercise of equitable jurisdiction. Under the seventh amendment to the constitution, reserving the right to trial by a jury in suits at common law, where the value in controversy exceeds \$20, the defendant would be entitled to a trial by jury. The right to such a trial cannot be dispensed with without the assent of the parties; nor can it be disregarded or impaired by a blending of a cause of action at law with a demand for equitable relief in aid of the legal action, or during its pendency. While it is true that new equitable rights may be created by state statutes, and be administered as such in the federal courts, the jurisdiction thereof is subject to the limitation prescribed by the constitutional provision mentioned; and the equitable rights thus created by state legislation must be such as in their nature and character are of equitable cognizance, according to the old and well-established principles of equity jurisprudence. It is therefore ordered that the cause remain upon the law side of the docket.

TOMPKINS v. KNUT.

(Circuit Court, D. Kentucky. June 6, 1899.)

1. TRIAL—DIRECTION OF VERDICT ON PLAINTIFF'S TESTIMONY.

Where a plaintiff has testified in his own behalf, and fully stated the facts on which he relies to recover, the court may properly, on a motion based on such testimony, direct a verdict for defendant, where the facts testified to would not support a recovery by plaintiff.

2. ASSAULT AND BATTERY—JUSTIFICATION—DEFENSE OF ANOTHER.

Plaintiff in an action for assault and battery, by his own testimony, was in a house, engaged in a struggle with defendant's wife, when defendant, who had not been in the house during the controversy, entered. Plaintiff was armed with a repeating rifle, which he had threatened to use,

and was apparently attempting to use, while the woman was attempting to prevent him, and it had once been discharged during the struggle. Plaintiff also had a revolver. Neither defendant nor his wife were armed. On entering the room, defendant, with the assistance of others present, none of whom were armed, overpowered plaintiff, disarmed him, and bound him, afterwards surrendering him to an officer. Both parties were lawfully in the house, and it did not appear that defendant used any more force than was necessary to disarm plaintiff. *Held* that, regardless of the circumstances leading up to the trouble, defendant was justified in his action, and the facts as shown by plaintiff's own testimony did not warrant the submission of the case to the jury.

On Motion of Defendant for Direction of Verdict.

Geo. W. Jolly, Miller & Todd, and W. W. Clark, for plaintiff.
Powers & Atchison, for defendant.

EVANS, District Judge. In the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, the trial court, after hearing the opening statement by plaintiff's counsel to the jury as to what facts were expected to be proved to support the plaintiff's case, and after verifying the accuracy of the statement, sustained a motion on behalf of defendant on that presentation of the case alone to instruct the jury to find a verdict against the plaintiff upon the ground that, if those statements were true, the contract sued upon was against public policy, and void. Upon a writ of error to the supreme court the proceeding was approved, and the judgment was affirmed. The plaintiff in this action for assault and battery and trespass has testified under oath, and stated the facts upon which he relies in support of his action, and the court is called upon to determine whether, assuming all the plaintiff says to be true, he is entitled to a verdict against the only defendant now remaining in the case, since the death of his wife, the former co-defendant, has abated the action as to her. As the plaintiff was a participant in the entire transaction out of which his action arose, and completely states his case, it is admissible and proper, I think, to bring this question up now, because it would not be competent for him by other witnesses to contradict what he says; and while, on this motion, his statements must be accepted as true in his behalf, they may also, for the reason indicated, be taken as true against him. It appears from his testimony that, having been employed by the defendant and his wife and her brother, the owners of the farms described in the pleadings, up to January 1, 1898, as a manager and overseer, his contract was soon afterwards renewed for the year 1898; that part of the agreement was that the plaintiff, besides his monthly wages, was to have the use of the house on the premises for occupation by himself and family, and also provisions for the support of them all; that on the 24th of January, 1898 (the defendant and wife having come to the farm on invitation of the plaintiff in the preceding December, and having remained there, and all parties having been entirely friendly, up to January 24th), there was some dispute as to whether plaintiff was any longer wanted, or would be permitted to remain, as the employé of defendant and his wife; that on the succeeding day (January 25th), while the defendant was

outside the house to the plaintiff's knowledge, who was also outside, the plaintiff was hastily informed that Mrs. Knut, or some one in the inside of the house, was removing the furniture, and putting his family out, whereupon the plaintiff hurriedly ran into the house, seized a Winchester repeating rifle, and, upon going into the room where the others were, among other things, said, "If they touch any more of my furniture I will kill every son of bitch who does it;" that the rifle was then cocked, and leveled, in the hands of the plaintiff, who also had upon him a revolver, and probably a dirk; that Mrs. Knut, while appealing to him to desist, took hold of the rifle, and while she had hold of it it was discharged; that the defendant also went into the room soon after plaintiff did, and there found his wife struggling with plaintiff, who was armed as indicated, and endeavoring in some way to control the direction of the pointing of the gun; that under these circumstances the defendant, with some persons present (none of whom except the plaintiff appear in any way to have been armed), overpowered plaintiff, bound his hands behind him, took from him his gun and pistol, removed him to the stable lot, and soon afterwards delivered him to a peace officer (a deputy sheriff) who happened to be at the house on other business, and that the plaintiff was then unbound and removed by the officer, accompanied by the defendant and one other person, to Owensboro, the county seat. It is claimed that a kodak picture was taken of some part of the scene, but it does not appear that defendant was concerned with that phase of the case, but that, if it was done by anybody, it was by his wife, now dead. It seems to the court that all parties were lawfully on the premises at the time, and that the whole case must turn, not upon the provisions of the contract, nor anybody's rights thereunder, but upon the facts immediately connected with the affray on January 25th. If this be correct, then the court, upon the plaintiff's own showing, is clearly of opinion that the defendant had reasonable grounds for believing, when he appeared upon the scene, that his wife was apparently in great jeopardy and danger of her life in her struggle with a man so thoroughly armed as was the plaintiff; that if the defendant had then been armed, and had taken the plaintiff's life, the law would have excused him; that if he might, in the then apparently necessary defense of his wife, have taken plaintiff's life, he was certainly excusable in doing for her protection, and probably his own, the lesser things of binding and disarming the plaintiff, so as to prevent further mischief until he could deliver plaintiff to a peace officer, precisely as he might be justified in binding a madman or a dangerous beast, who had as ample power to do mischief as this heavily-armed man had upon this occasion; and that it does not appear that defendant used more force than was apparently necessary to prevent great bodily harm to his wife, and probably others. Whether plaintiff had any right to enforce his claims to the possession of defendant's premises by force of arms may well admit of doubt, as he was only defendant's employé, and not his tenant in the ordinary sense; and, if plaintiff had not such right, then he was a gross violator of the law in seeking to remedy

his supposed wrongs in so violent a manner, and should take the consequences without complaint. Indeed, all things considered, the court is inclined to think that the plaintiff got off quite as well as he could have reasonably expected. Upon the facts stated under oath by the plaintiff, if the jury were to find a verdict in his favor the court would not permit it to stand. For the reasons thus briefly stated, the court will sustain the motion, and instruct the jury to find for the defendant.

IRVINE v. ANGUS et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1899.)

No. 488.

On Petition for Rehearing. For former opinion, see 93 Fed. 629.

George W. Towle, Jr., for plaintiff in error.

Pierson & Mitchell and Garrett W. McEnerney, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. We are satisfied with the general views announced in our former opinion, and with the conclusion there reached, except in one particular, and that relates to the amount of the judgment which the circuit court should be directed to enter in favor of the plaintiff in error. The bill of exceptions recites that:

"It was admitted by defendants that the assessments mentioned in the complaint were, each and all, duly levied upon the shares of stock therein mentioned by said corporation, the Morgan Mining Company; * * * that each of said assessments was paid by Irvine from his own funds at the last moment that the same could be paid before the said shares would otherwise have been lawfully offered for sale."

In our former opinion we inadvertently assumed that the aggregate amount of the assessments so paid by Irvine was \$15,190.06; that being the amount named in the prayer of the complaint, and for which judgment was demanded against the defendants in error. In the petition for rehearing our attention has been called to the fact that this amount is in excess of the aggregate of the sums alleged in the body of the complaint to have been paid by Irvine on account of such assessments, and therefore in excess of the amount admitted by the defendants in error to have been paid by him. This error, however, can be corrected by a modification of our former judgment, without granting the petition for a rehearing. The petition for a rehearing will therefore be denied, and our former judgment will be modified so as to read as follows: The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of \$11,527.80, with legal interest thereon from May 21, 1884, and costs.

ROSS, Circuit Judge (dissenting). I am unable to agree to the disposition of this case now made by the court. In the opinion heretofore delivered, we have treated the case as an action at law. In such a case there must be, as a basis for a judgment, a verdict of a jury, or, in the event a jury be waived by the parties, findings of fact by the court, unless there be an agreed statement of facts entered into by the parties in lieu of such findings. In the present case the court below made findings of fact, which this court held erroneous in an essential particular. The logical and necessary result of such holding is, in my opinion, the reversal of the judgment, and the remanding of the case to the court below for a new trial. I do not think this court is justified in looking to admissions made during the progress of the trial, embodied in the bill of exceptions, as a basis upon which to order judgment,—especially where, as here, those admissions are contradicted by the findings of fact made by the court below. I am therefore of opinion that the judgment should be reversed, and the cause remanded to the court below for a new trial.

HANSON v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 471.

1. PLEADING—VARIANCE.

Where plaintiff in an action for damages counts on the loss of profit on a sale of property which he alleges he had made, but was prevented from consummating by reason of defendants' breach of a contract to sell him the property, and in compliance with an order of court files a bill of particulars, setting out the name of the person to whom he had made the sale, and its terms, he is not entitled to introduce evidence of a different sale to another person.

2. CONTRACTS—BREACH—FORFEITURE OF OPTION.

Plaintiff, who had secured from defendants an option to purchase from them an interest in certain mining claims at the expiration of nine months, agreeing to prosecute development work on the claims meantime, expending a certain sum, and that, if work ceased thereon for 30 days, the option should be forfeited, hired two of the defendants to work on the claims. Shortly after they had commenced work, and while he was indebted to them for wages, he left them with a small amount of supplies, promising to return in three weeks. He did not return, or send them either money or supplies, and they heard nothing from him for about three months. A month after he left, they suspended work, and, after the expiration of 30 days, declared the option forfeited. *Held*, that their action was justified.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

The plaintiff in error brought an action against the defendants in error for damages for breach of an option to purchase certain mining property. The complaint alleged: That on August 24, 1895, the defendants in the action, in consideration of the sum of \$1, gave to the plaintiff therein, under their hands and seals, a written option to purchase a three-fourths interest in the Shylock and the Hamlet mineral claims, situate near Mark creek, in British Columbia, for the sum of \$12,000, to be paid on June 1, 1896. The instrument contained the stipulation that: "The party of the second part [the plaintiff] take possession of and commence developing said mining claims, and continue work thereon during the life of this agreement, which said work is to be paid for by

the party of the second part or his agent, and, further, that this agreement is made for the period of nine months, if not suffered to lapse through noncompliance with its conditions, or surrendered voluntarily, before its expiration. Suspension of work on or about the mining claims for more than one month at any time during the life of this bond, unless agreed to by the parties of the first part, shall be deemed a forfeiture of this agreement or bond." That on the same day the plaintiff entered into an agreement with two of the defendants, Smith and Cleaver, whereby he employed them to enter upon the work of developing and mining as required in the first agreement, and promised to pay them therefor \$3 per day while so employed. That in pursuance of said contract the plaintiff furnished said defendants the necessary tools to carry on said work, and advanced them provisions of the value of \$25, and that about the middle of the month of September, 1895, he returned to his home, in Colorado, intending to be absent about three weeks. That he was unable to return within that time, and so advised Smith and Cleaver by a letter written from the city of Spokane. That on November 26, 1895, he again wrote them, requesting an immediate report of their expenditures upon the mine. To this letter he received an answer dated December 31, 1895, advising him that Smith and Cleaver had quit their work on the mine October 18, 1895, and on November 19, 1895, had filed a notice declaring that the agreement had lapsed. That prior to the receipt of notice of the said forfeiture the plaintiff had contracted and arranged for the sale of said mining property upon terms which would have resulted in a profit to him of \$50,000, and that by declaring the contract forfeited a cloud was cast upon his right to sell the property, and he was unable to effect a sale thereof, to his damage in the sum of \$50,000. The defendants in the action moved on May 17, 1897, that the plaintiff be required to furnish a bill of particulars showing to whom he made the sale of the mining property, and the terms thereof, and on the same day the motion was allowed by the court. On February 10, 1898, the defendants moved for an order to dismiss the action for the failure of the plaintiff to file the bill of particulars. On February 28, 1898, a bill of particulars was filed, in which it was stated that the sale was to be made to E. A. Pennington, and was agreed upon in February, 1896, and that the price to be paid was \$12,000, in addition to which the plaintiff was to receive \$2,000 in cash, and a one-fourth interest in the property. On the trial of the cause, upon the close of the evidence the jury were instructed by the court to return a verdict for the defendants. Among other evidence offered by the plaintiff was a proffer of proof of a contract of sale, not in writing, made to one Schlesinger, which, upon objection, was excluded by the court; the court ruling that the plaintiff must confine his proof to the one sale which he had pleaded, and that he could not have been damaged by the failure of any other sale. The court also ruled that "if the plaintiff, at the time he bargained for the property, had in mind some one to whom he could go and sell the property for a big price, and the defendants knew nothing about it, and were entirely ignorant of his opportunities for realizing on the property, that the plaintiff would not have a right to recover from the defendants the amount of such profits, which were known to him and unknown to the defendants." These rulings are the principal assignments of error.

C. S. Thomas, W. B. Heyburn, E. M. Heyburn, and L. A. Doherty, for plaintiff in error.

Blake & Post, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The question of the admissibility of the offered proof of the oral contract of sale to Schlesinger was one which rested in the sound discretion of the trial court, and we discover no ground for holding that discretion was abused. The plaintiff had filed a complaint in

which it was stated that the wrongful conduct of the defendants in declaring the option forfeited was the cause of his failure to make an advantageous sale of the property. The defendants had the right to require that he specify the purchaser, and the date and the terms of the sale, and the court so ordered. After many months of delay, this information was finally furnished, and on the issues so tendered the parties went to trial. The plaintiff failed to prove a contract of sale to Pennington. He then offered proof of a verbal contract to sell to Schlesinger. If he had such a contract, he knew it at the time when his complaint was filed and the issues were formed, and it was his duty then to have disclosed his intention to rely upon it. There could be damages but for the loss of one sale. The plaintiff had pleaded such a loss, and he had specified it as the loss of the sale to Pennington. The offer of evidence of another sale came too late, and the court properly excluded it.

From the view which we take of the issues, and of the evidence which is contained in the bill of exceptions, we do not deem it necessary to discuss further the assignments of error. The option which the plaintiff obtained from the defendants contained the stipulation that his failure to perform work upon the mine for the period of one month during the life of the option should operate to forfeit the same. The agreement which accompanied the option provided that the plaintiff should expend upon the mining property during the nine months of the option \$1,500, which is an average of \$166.66 per month. Smith and Cleaver were employed to begin the work under this agreement, and began it in the latter part of August, 1895. The plaintiff fitted them out with tools and provisions to the extent of \$70. About the middle of September he left them, promising to return in three weeks. He never did return. He testified that he wrote them a letter from Spokane, at a date not stated, inquiring about the progress of the work, but did not state that he wrote anything about furnishing them supplies, or that he asked them for a bill of what was due them. On November 26th he wrote, informing them that he had been ill, and asking what amount was due them for labor, and what supplies they had had to purchase. This letter was received some two or three weeks later. In the meantime Smith and Cleaver had, on October 18th, quit work, and a month later had declared the option forfeited, according to the stipulation which it contained. The plaintiff did not testify that he had any contract or understanding with them whereby they were to work for him while he was away, or that they were to work for him longer than during the three weeks of his proposed absence. Up to the date of their receipt of the letter of November 26th, they had received no information from him to indicate that he intended to pay their wages or to furnish them supplies. At the time when the plaintiff left them, he already owed them \$15 or \$20 for work; and when they quit work they had been engaged nearly two months, during which they had received nothing except the first outfit of tools and provisions. Under the circumstances, we think the option was forfeited, and that the defendants had the legal right to so declare, and that on November 19, 1895, if not before, that instru-

ment became canceled. The sale which was claimed to have been made to Pennington was not made, according to the evidence, until March, 1896, which was some time after the plaintiff had received notice that the option was forfeited. Up to that date the plaintiff had still made no tender of payment of any sum to Smith and Cleaver for work, nor had he employed any one in their place to keep up the work which the option called for. At that date he had no interest in the option upon which damages could be predicated, and upon that ground alone the court would have been justified in directing the jury to return a verdict for the defendants. The judgment will be affirmed.

LORSBACH v. LINCOLN COUNTY, NEV.

(Circuit Court, D. Nevada. June 10, 1899.)

No. 656.

MUNICIPAL CORPORATIONS — ACTIONS ON BONDS — NECESSITY OF PRESENTING CLAIMS.

The statute of Nevada requiring claims against counties to be presented to the proper officers for allowance and approval before suit brought thereon does not apply to bonds and coupons issued by the county, such claims being for all practical purposes audited when the bonds were issued; nor to judgments rendered on such bonds and coupons.

This was an action on a judgment recovered against the defendant county, based on its bonds and coupons.

Henry Mayenbaum, for plaintiff.

T. R. McNamee and A. J. McGowan, for defendant.

HAWLEY, District Judge (orally). This action was brought March 16, 1898, upon a judgment obtained in this court on March 21, 1892, in favor of plaintiff against defendant for \$17,100, the principal of certain bonds, and \$24,320 interest,—making a total of \$41,420,—with interest on the principal sum at the rate of 10 per cent. per annum, and costs of suit, taxed at \$652.70. This judgment was obtained and based upon certain bonds and coupons issued under and pursuant to an act of the legislature of the state of Nevada entitled "An act to consolidate and fund the indebtedness of Lincoln county," approved February 17, 1873. St. Nev. 1873, p. 54. The complaint avers that the plaintiff presented his verified claim and demand against defendant for the allowance, auditing, and payment of the amount due on said judgment, and, among other things, alleges that no part of said judgment has been paid, and that said judgment is final, valid, subsisting, and remains in full force. The answer only "denies that prior to the commencement of this action, to wit, on or about the first Monday in March, 1898, or at any other time, the said plaintiff filed with or presented to this defendant, or the board of county commissioners of said defendant, or the county auditor of said defendant, or either or any of them, his verified claim and demand against said defendant for the allowance, auditing, and payment of the amount set forth in plaintiff's complaint, to wit, \$52,-

047.70, or any other amount or sum whatsoever, or at all"; thus admitting the truth of all other averments in the complaint. Conceding that this denial is true, it does not constitute any defense to this action. The averment in the complaint upon this point was wholly immaterial. In *Vincent v. Lincoln Co.*, 62 Fed. 705, which is "on all fours" with this case, following the principles announced in *Lincoln Co. v. Luning*, 133 U. S. 529, 532, 10 Sup. Ct. 363, it was expressly held that the statutes of Nevada requiring presentation of claims and accounts to the county commissioners and county auditor for allowance and approval only applied to unliquidated claims and accounts, and did not have any application to bonds and coupons, because the claim was, to all intents and purposes, audited by the proper officers when the bonds and coupons were issued, and that this principle is as applicable to an action on the judgment as to the original action upon the bonds and coupons. It necessarily follows that the answer of the defendant in the present case presents no issue for trial, because, if true, it constitutes no defense to the action. The plaintiff, upon the pleadings, is entitled to a judgment as prayed for in the complaint. Let such judgment be entered.

ROBINSON v. SOUTHERN NAT. BANK OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 148.

NATIONAL BANKS—ASSESSMENTS AGAINST SHAREHOLDERS—LIABILITY OF UN-REGISTERED OWNER.

A pledgee of stock of a national bank, who sells it in accordance with the terms of the pledge, and becomes the purchaser, but never has it transferred on the books of the bank, is not liable for an assessment made under Rev. St. § 5151, on the bank's insolvency.¹

In Error to the Circuit Court of the United States for the Southern District of New York.

Edward W. Paige, for plaintiff in error.

Wm. B. Hornblower, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant, entered upon a verdict by the direction of the court. The plaintiff was the receiver of the State National Bank of Vernon, Tex., which became insolvent in August, 1894, and brought this action to recover an assessment upon the stockholders of the bank made by the controller of the currency. The action was brought upon the theory that the defendant was a shareholder and liable for the assessment,

¹ For liability of stockholders to creditors, see note to *Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co.*, 23 C. C. A. 315, and note to *Scott v. Latimer*, 33 C. C. A. 23.

pursuant to the provisions of section 5151 of the Revised Statutes of the United States. It appeared upon the trial that in January, 1893, one Curtis was the owner of 180 shares of the capital stock of the bank, which stood in his name on the books of the bank, and for which he held the usual certificates; that on that day he pledged the shares with the defendant as collateral security for the payment of certain liabilities, including a note for \$15,000, payable four months after date; that, by the terms of the pledge, the defendant was authorized, upon nonpayment of the note at maturity, to sell the shares at any time, without advertisement or notice to the pledgor, and to become the purchaser at the sale, discharged from any equity of redemption by the pledgor; that the note was not paid at maturity, and in August, 1893, the defendant advertised the stock to be sold at auction at the public exchange in New York City, and gave eight days' notice by telegraph to the pledgor; that at the time thus advertised the defendant bought the stock, paying for it \$20 to the auctioneer, and thereupon credited the proceeds of the sale upon the note by an indorsement thereon; and that the certificates for the stock remained in the possession of the defendant from the time of the purchase until after the making of the assessment by the comptroller of the currency, but the stock was never transferred to the defendant upon the books of the bank. The facts certainly would have justified a finding by the jury that the relation of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank, and remained in the name of the original owner, the defendant was not a shareholder, within the meaning of section 5151. By section 5139 of the Revised Statutes, the capital stock of national banks is made "transferable on the books of the association, in such manner as may be prescribed by the by-laws or articles of association." The section then declares:

"Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares."

It is the generally accepted doctrine of the courts that, notwithstanding a provision of this kind in the organic law of a corporation, the legal title to its shares of stock passes, as between vendor and vendee, upon a transfer of the certificates, accompanied by a power of attorney for their transfer upon the books, without an actual transfer upon the books. Until registration, however, the purchaser does not acquire the privileges of a stockholder of the corporation. He can compel the corporation to recognize him as a stockholder; but, until he has been registered as such, he has no right to vote, and dividends are payable to the stockholder of record. Is such a purchaser a shareholder, within the meaning of section 5151 of the Revised Statutes, which declares that "shareholders of every national banking association" shall be individually responsible to the extent

of the amount of their stock for the debts of their association? It is somewhat remarkable that, in all the litigations which have been presented to the supreme court involving the liability of shareholders of national banks upon assessments made by the comptroller of the currency, the question which is thus presented has never been distinctly decided.

In *Pauly v. Trust Co.*, 165 U. S. 619, 17 Sup. Ct. 470, the court had before it a case in which a pledgee who had received from his debtor a transfer of shares as collateral security for a debt surrendered the certificates to the bank, and took out new ones in which he was described as pledgee, but never was registered otherwise upon the books of the bank. In deciding, as the court did, that the pledgee was not liable to an assessment as a stockholder, the cases previously adjudged by the court were elaborately reviewed, and in the opinion several rules were stated as deducible therefrom, and among them was the following:

"That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder, within the meaning of section 5151."

On the other hand, in *Richmond v. Irons*, 121 U. S. 58, 7 Sup. Ct. 788, in considering the question of the liability of the stockholders to an assessment under the section, the court used this language:

"By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association; the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer. Until such transfer, the prior holder is the stockholder for all the purposes of the law."

The proposition which has been quoted from the *Pauly Case* was not necessary to the decision of the cause; nor was the proposition quoted from *Richmond v. Irons* necessary to the decision of that cause. An examination of the cases cited by the supreme court fails to disclose one in which the owner of the shares has been held liable, under the section, who has never been the owner upon the books of the bank; and the cases in which the "real owner" has been held liable were those in which, being the registered owner, he had transferred his shares to another for the purpose of escaping the liability of a stockholder, or caused them to be registered in the name of an irresponsible transferee. Such was the case in *Bank v. Case*, 99 U. S. 628, where the registered owner caused the stock to be transferred to one of its clerks, who acquired no beneficial interest in it, and upon the understanding that he would transfer it at request. In *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, the registered shareholder, in apprehension of the bank's failure, had transferred his stock to an irresponsible person. It is well settled that one to whom stock has been pledged as collateral security, and who has caused it to be registered upon the books of the bank in his name as owner, is liable as a stockholder for the benefit of creditors as though he were the real owner. The courts have placed his liability upon three grounds: That he is estopped from denying his liability, because he has voluntarily held himself out to the public

as the owner of the stock; that, by taking the legal title, he has released the former owner from liability; and that, after having taken the apparent ownership, and become entitled to the privileges of a stockholder, it would be unreasonable to release him from the responsibilities of a stockholder. None of these reasons apply in the case of one who, like the defendant, has never been a stockholder upon the books of the bank, has never held himself out as such a stockholder, has not defeated the liability as a stockholder of the pledgor, and has not enjoyed the privileges of a stockholder.

In *Bank v. Harmon*, 79 Fed. 891, the defendant became pledgee of 40 shares of stock, of the par value of \$100 each, in a national bank, as collateral security for a demand loan made in November, 1891. In July, 1892, the loan not having been paid, the pledgee procured a transfer of the shares on the books of the bank to one of its employes who was irresponsible and had no interest in the transaction, in order that the latter should remain the registered owner of the shares. The bank failed in April, 1894, the shares at the time standing in the name of the pledgee's employé. This court held, upon the authority of the *Pauly Case*, that the pledgee was not liable as a shareholder of the bank. Obviously he was the substantial owner of the shares, though technically the relation of pledgor and pledgee had not been terminated. The amount of the loan was nearly double the value of the shares, and the time which had elapsed denoted that the pledgor would never seek to redeem. The pledgee, by causing the transfer to be made upon the books of the bank, had discharged the liability of the pledgor as a stockholder to the creditors of the bank. If there was no moral duty on the part of the pledgee in that case to subject himself to liability as a shareholder, there was not on the part of the defendant in the present case; and, if no legal liability was incurred by the pledgee in that case, there is no reason why any should attach to the defendant in this case, unless it is found in the letter of the statute. Our decision in that case was affirmed by the supreme court. 172 U. S. 644, 19 Sup. Ct. 877. The question presented is an interesting one, and we should certify it to the supreme court, if there were any necessity for adopting that course. But, as our decision is reviewable by that court, and will be reviewed, however we may dispose of the case, it seems proper to decide the cause according to our convictions, and without attempting an elaborate discussion of the question. Our conclusion is that the defendant, never having been a registered shareholder of the bank, is not liable to the assessment. The judgment is accordingly affirmed.

PACIFIC MILL & MINING CO. v. LEETE.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1899.)

No. 500.

1. ESTOPPEL IN PAIS—ACQUIESCENCE IN CLAIM OF ANOTHER.

Where, at the time of the sale of property situated on public land, it was understood between the parties, though not stated in the contract, that the purchaser claimed the right to collect and receive a sum due from the United States on account of the cancellation of an entry made of the land, on which the purchase money had been paid, and thereafter, at the request of the purchaser, the seller, with knowledge of the facts, executed a power of attorney to enable the purchaser to collect the money in its name, which he took steps to do, the seller was estopped to subsequently revoke such power of attorney and collect the money and retain it for its own use, which prevented the purchaser from itself afterwards collecting and retaining the money.

2. ESTOPPEL.

The acquiescence by a seller of property in a claim of the purchaser to a sum to be refunded by the government on account of the cancellation of an entry of land on which the property was situated created an estoppel, which prevented the seller from itself collecting and retaining the money.

In Error to the Circuit Court of the United States for the District of Nevada.

This was an action brought in the district court of Nevada for Washoe county by B. F. Leete against the Pacific Mill & Mining Company, a California corporation, to recover the sum of \$3,200 received by the mining company from the United States. The complaint alleged that this money was received for the use and benefit of the plaintiff. The mining company admitted the collection of \$3,200 from the government, but denied that any part of it was received to or for the use or benefit of Leete, or that any portion of it was due to him. The case was transferred to the circuit court of the United States for the district of Nevada, and there decided in favor of the plaintiff (88 Fed. 957). The defendant (Pacific Mill & Mining Company) has brought the case here upon a writ of error. The action is based upon negotiations between the respective parties in connection with the sale and purchase of 1,280 acres of land in Churchill county, Nev., and the personal property and improvements thereon, known as the "Eagle Salt Works."

The statement of facts in this case, as contained in the opinion delivered by his honor, Judge Hawley, in the court below, is conceded by the plaintiff in error to be full and correct, and is the following:

"In 1877 the plaintiff and C. H. Van Gorder, having previously acquired the possessory right to the land in question, applied through the proper land office for a patent thereto from the United States, and paid to the proper officers the sum of \$3,200 for said land. Thereafter, in January, 1878, the property in the meantime having been placed in the possession of a receiver, the plaintiff conveyed his undivided one-half interest therein to W. N. Leete. The deed contained this reservation: 'But it is not intended hereby to convey or transfer any interest which party of the first part has or may have to any moneys or accounts in the hands of such receiver, as receiver.' On the same day W. N. Leete conveyed the property to the defendant herein with the same reservation. In March, 1880, the defendant acquired, by deed, the interest in the property of the estate of C. H. Van Gorder, deceased. The application for a patent to the land was canceled by the land department in 1890. In the fall of 1894 negotiations were commenced between the parties hereto with reference to the plaintiff purchasing the property. All of the negotiations were by correspondence. The first was a letter from plaintiff to John W. Mackay, the president of the defendant corporation. D. B. Lyman was at the time of the correspondence the superintendent and managing agent of defendant in the state of Nevada. In February, 1895, plaintiff addressed a letter to Mr. Lyman, saying: 'In December my son * * * wrote me that you wished to sell your Eagle

Salt Works for cash; also that you wished to engage salt for your own mills. Kindly please state your price.' On the same day Mr. Lyman sent a reply, stating: 'Whilst I am not prepared to give you a positive answer, as the matter must be submitted to Mr. Mackay for his approval, I think you can purchase the property, with all salt on hand, etc., and all personal property at the works for \$6,000, we reserving the right and you guarantying to furnish us with salt for our use f. o. b. cars at works for \$4 per ton. We could not agree to take any stated number of tons, as our present consumption amounts to very little; but we do want reserved rights for mill salt at the stated price. We have on hand mill salt, 803 tons; table, 96; stock, 46 tons.' On February 21, 1895, the plaintiff wrote to Mr. Lyman, stating that he did not consider the property a desirable investment at the price of \$6,000, but said: 'If we can agree on a price, I will buy.' On February 23d Mr. Lyman answered: 'I would suggest that you write me, or address Mr. Mackay through me, stating the price you are willing to give for the Eagle Salt Works property. I will forward your paper to him and await his decision. I have advised Messrs. Mackay and Flood to sell the property for \$6,000, knowing the money paid the government for the land can be recovered, and assuming that the Eagle Salt Works property, with its supplies, salt on hand, et cetera, is worth at least \$3,000.' On February 26th the plaintiff wrote to Mr. Lyman as follows: 'Replying to yours of the twenty-first as to the value of the Eagle Salt Works property depending on the recovery of the purchase money from the government, who recovers from the government must deed to the government and abandon all claim to the land, and surrender the receiver's receipt. It is not likely that any person desirous of claiming and holding title to land would solemnly file and record an abandonment; besides, when I deeded to W. N. Leete, I reserved all moneys of account. If I ever owned one-half of that money, I own it now. As you suggest, I will address Mr. Mackay through you.' On March 28th plaintiff wrote to Mr. Mackay, reciting the substance of the former letters between himself and Lyman, and then made the following offer: 'For a bargain and sale deed and possession of your Eagle Salt Works property, as it stands, I will give you in gold coin \$3,500; also, at my expense and charge, furnish and load, to your order, at any time within five years, without charge to you, f. o. b. cars in car-load lots, in bulk, at Eagle Salt Works, nine hundred and forty-five tons of mining salt, of like quality to that now on hand. This agreement to bind myself, heirs, and assigns. You put deed in escrow, Bank of Nevada, and I will meet it with \$3,500 and agreement to load as above. You put me in possession of the property.' This letter was sent to Mr. Lyman, and plaintiff received a reply stating that he had forwarded the letter to Mr. J. L. Flood, San Francisco, and he will then forward the letter 'to Mr. Mackay, or make known to him by wire the contents of your letter. When I know whether they accept or decline your offer, I will advise you further in the matter.' On April 4th Mr. Lyman addressed the following letter to the plaintiff: 'Your letter to Mr. Mackay, dated 28th of March, has been received, and its contents have been fully noted and considered. Your proposition is fully understood and satisfactory, with the exception of one point, which is open to doubt, and liable to be construed in more than one way, viz. the matter of your furnishing salt to us after sale of the property. I will condense the terms of the proposition, as we understand them, in this way: In consideration of the sum of \$3,500 gold coin we will give you a bargain and sale deed of the land as described in the deed from Mr. W. N. Leete to the Pacific Mill & Mining Company, together with all the improvements thereon, including all the salt and other personal property of whatever character upon and connected with the Eagle Salt Works. There is now, by estimate, eight hundred and seventy-five tons of salt on the premises, more or less; provided that you will furnish and load at your own expense and charge, to the order of the Pacific Mill & Mining Company, or the Comstock Mill & Mining Company, in car-load lots in bulk at Eagle Salt Works, mill salt of like quality of that now on hand from time to time not to exceed eight hundred and seventy-five tons in all, within five years from date, at four dollars per ton. We do not obligate ourselves to order or to take any stated quantity of such salt. If these terms are satisfactory to you, please let me know, and immediate steps will be taken to have the deed and agreement made out, and to complete the transaction.' On April 5th Mr. Leete addressed a letter to Mr.

Lyman, accepting his offer in words as follows: 'Replying to yours of the 4th instant, the terms as stated in your letter are entirely satisfactory and accepted by me. I am ready. As soon as you have your deed and agreement ready, advise me, and I will come up and complete the transaction.' This ended the negotiations between the parties as to the sale. The deed from the corporation to Leete was executed April 9th, in pursuance of a resolution of the board of directors. It recites a consideration of \$3,500, which was paid, and the further consideration as to the delivery of the salt as specified in the letter of Mr. Lyman. The deed is a quitclaim, instead of a bargain and sale, deed; but in all other respects it complies in terms with the result of the negotiations above expressed.

"The plaintiff offered evidence to show what action had been taken by him to recover the money from the government that had been paid into the land office upon the application for a patent, and what steps were taken by the corporation, and the transactions and correspondence between the parties in that regard. The defendant admitted that it had applied to the government for the sum of \$3,200, and had received the money; that plaintiff had demanded the money from it, and payment had been refused; but interposed objections to all this class of testimony upon the grounds that it was irrelevant and immaterial, unless some new consideration was shown; the contention on the part of defendant being that the rights of the parties were fixed by the correspondence with reference to the sale. The plaintiff admitted that there was no new consideration, but contended that the subsequent transactions corroborated and made clear the fact that the parties dealt with each other on the basis that the money in the United States treasury was an element of consideration in the sale of the Eagle Salt Works to the plaintiff by the defendant. The court declined to pass upon the admissibility of this evidence, but admitted it subject to the objections, which would be considered and disposed of in the determination of the case. Mr. Leete employed Britton & Gray, at Washington, to collect this money from the government, and was informed by them that there was a law which prohibited the assignment of an account against the United States treasury, and that it would be necessary for him to proceed in the name of the corporation defendant, as the title to the property was in it at the time of the cancellation of the entry, in 1890, and requested him to get a power of attorney from the corporation authorizing them to act for it in obtaining the money for him. There was considerable correspondence and several interviews between the parties on this subject. The first was a letter from Mr. Leete to Mr. Lyman, dated July 31, 1895, as follows: 'I want to try and collect from the government the money I paid on application to enter the Eagle Salt Mine claim in February, 1877. To that end I have employed Britton & Gray, attorneys, who did my business in 1877. They advise me that, under the law and usages of the land department, it is desirable to have a power of attorney from the Pacific Mill & Mining Company, also our joint application from them for repayment of the Van Gorder interest, as they held that interest from about 1879 to cancellation of the entry (1890), and until conveyed to me. I inclose you the papers that Messrs. Britton & Gray have sent me to be executed by the Pacific Mill & Mining Company. Kindly please have them executed, and return to me: I will file with the papers a correct abstract of title from the county recorder of Churchill county.' Some time after this Mr. Leete discussed the matter with Mr. Lyman in San Francisco. From their conversation Mr. Leete understood that Mr. George R. Wells was the attorney for the corporation; but, as a matter of fact, he was only the vice president of the corporation. Lyman accompanied Mr. Leete to Wells' office, and introduced him, and then retired. Mr. Leete testified that Mr. Wells then said to him: 'Our company has not a cent's interest in this matter, and, if we execute a power of attorney to Britton & Gray to proceed in our name, they will presume that we are involved in an obligation to pay their attorney's fees. If you will get Britton & Gray to address us a letter disavowing any claim on us for their services as attorneys, we will execute the power of attorney asked for.' Mr. Wells testified that this statement was substantially correct, except it leaves out the word 'if,' that what he said was, 'If our company has not a cent's interest,' etc. Mr. Leete wrote to Britton & Gray, and they returned a letter to the secretary of the defendant that 'we have no present or prospective claim upon the Pacific

Mu & Mining Company for payment for our services in this matter.' Upon receipt of this communication, Mr. Leete forwarded the same to George R. Wells in a letter dated August 27, 1895: 'I am this day in receipt of the inclosure from Britton & Gray addressed to L. C. Fraser, secretary of the Pacific Mill & Mining Company, disclaiming any claim on you for services in the case. I send it to you, as I have never met Mr. Fraser. Please have the two papers executed properly and sent to me, to wit, the power of attorney, also the application for repayment of purchase money. Under the statutes of the United States in such cases as this, we have to proceed in this manner. * * * P. S. If you pay out any money for notary services, I will refund it.' Thereafter the corporation, at a meeting of the board of directors, regularly authorized the power of attorney, as prepared by Britton & Gray, to be executed, and it was duly executed and sent to Mr. Leete, who forwarded the same to Britton & Gray; also the application for repayment of the money. On August 29, 1895, the secretary, in reply, wrote Mr. Leete as follows: 'Inclosed please find power of attorney, signed and acknowledged, Pacific Mill & Mining Company to Britton & Gray; also an application, et cetera, signed by the company. Please send me your check for \$5, expenses incurred notary's fees and recopying power of attorney, et cetera.' The plaintiff paid the bill for expenses. The following letter from Leete to Britton & Gray, dated September 5, 1895, shows the steps that were taken by Mr. Leete: 'In the matter of the application for repayment of purchase money paid on entry of Eagle Salt Mine, also called "Eagle Salt Works," certificate No. 170, Carson City, Nevada, bearing date 26th February, 1877, I have this day filed with the register, United States land office, Carson City, Nevada, the following papers, to wit: Abstract title Eagle Salt Works; certificate certified by recorder Churchill county, Nevada; affidavit of B. F. Leete; loss of the receiver's duplicate receipt; power of attorney Pacific Mill & Mining Company to Britton & Gray; power of attorney Benjamin F. Leete to Britton & Gray; application for repayment of the purchase money by Pacific Mill & Mining Company; application for repayment of the purchase money by Benjamin F. Leete.' In connection with this matter, Mr. Leete, on February 6, 1896, addressed the following letter to 'Pacific Mill & Mining Company, John W. Mackay, President': 'Nineteen years ago I applied to enter the Eagle Salt Works land and paid for the land. The Pacific Mill & Mining Company owned the property in 1890. The land department canceled the entry. Last April I purchased the property from the Pacific Mill & Mining Company. There is a law of the United States prohibiting the assignment of a claim against the treasury. It is therefore necessary to present a claim for the repayment of this land money in the name of Pacific Mill & Mining Company. The department wants a quitclaim deed to the government, and the warrant on the treasury will issue in the name of Pacific Mill & Mining Company. I want the warrant indorsed to me by the Pacific Mill & Mining Company. Please order these papers executed and sent to me.' No reply to this letter was ever received. Thereafter the power of attorney executed by the defendant to Britton & Gray was revoked by the order of the board of directors, and an order passed for the execution of power of attorney to H. C. King, and under that power King collected the money from the government, and paid it over to the defendant. The following letters from the commissioner of the general land office to the register and receiver at Carson City were offered in evidence by the defendant, the first dated September 17, 1895: 'Referring to your letter of the 5th instant, transmitting the application of B. F. Leete for repayment of purchase money paid on mineral entry No. 170 for the Eagle Salt Works, * * * I have to inform you that this entry was canceled by office letter "M," November 7, 1890. The abstract of title submitted with said application shows that at date of cancellation the title to this land, under mineral entry No. 170, was in the Pacific Mill & Mining Company, and hence Mr. Leete was not the proper party to make application for repayment. 14 L. D. 140. The application is accordingly denied.' The second letter, dated December 7, 1895, reads as follows: 'Referring to letter "N," September 17, 1895, denying the application of B. F. Leete for repayment of purchase money paid on mineral entry No. 170, you are advised that, as no appeal was taken from said decision within the period allowed, the case has this day been closed.'

"Testimony was offered on behalf of defendant that Mr. Wells, the vice presi-

dent, Mr. Fraser, the secretary, and Mr. Walsh, a director, of the defendant, did not have knowledge of all the facts at the time defendant gave the power of attorney to Britton & Gray. The general character of this testimony is to the effect the board of directors did not have before them at the time they authorized the power of attorney to be executed to Britton & Gray any of the correspondence between Mr. Lyman and Mr. Leete that led to the sale of the property, and acted upon the representation made by the vice president. The vice president, Mr. Wells, with reference to the conversation between himself and the plaintiff and as to what was considered at the time the power of attorney to Britton & Gray was authorized, testified that Mr. Lyman brought Mr. Leete to him, and introduced him, and, as addressing me in the absence of Mr. Mackay, he said: "You are the vice president of this company, and Mr. Leete wants to get some money," or "Mr. Leete will explain to you what he wants." He only stayed a minute, * * * and left Mr. Leete and I together. * * * Mr. Leete said there was some amount of money (\$3,200)—I did not burden my mind with the amount—that was coming to him, because he had paid it on some land for which the application had been canceled, and he would like to have the company assist him to get what belonged to him. I said I would be glad to do anything I could. He explained what his claim was,—by reason of a purchase made some years ago. It was money coming from the United States. Q. Did you at that time, or had you ever before at any time, seen a correspondence between Mr. Lyman and Mr. Leete with reference to this? A. I never had. * * * It was a California corporation, held property in the state of Nevada, and most all the business was transacted through its officers. I knew very little about the affairs of the company. Q. Were you present at the meeting of the board of directors in which those resolutions were passed making a power of attorney to Britton & Gray? A. Yes. Q. Upon whose representation, if any one's, was that action taken? A. I acted principally in the matter, because I took it for granted what Mr. Leete told was true. That was a corporation that had been a big corporation years and years ago, but done very little lately,—a sort of winding it up, and I had lost most all interest in it. Q. Did Mr. Leete present to you any papers at all in connection with the negotiations he had with Mr. Lyman? A. No. The only thing that I was emphatic about was this: He said he wanted to get a power of attorney, and produced a letter (from Britton & Gray) * * * in which they said, in order to act, it would be necessary to get a power of attorney from the Pacific Mill & Mining Company, because at the time the entry was canceled the owner must receive the money. That was the ground upon which he explained it to me, and was the ground upon which action was called for by the Pacific Mill & Mining Company. The only thing I recall, * * * and which I heard Mr. Leete use my words (and he used almost the words I used), * * * I said, "If we have no interest in this property, and are going to help you, it must be distinctly understood we will incur no obligation by reason of their work as attorneys," and he said, "Well, I will see to that, and get a letter from them." I did not say, "We have no interest," because I did not know it. I was taking his statement to me as true. We must be protected from any claim, because I did not want the company to pay a bill for Mr. Leete's work. Upon cross-examination he stated that he knew the transaction between Mr. Leete and the Pacific Mill & Mining Company had resulted in the purchase of the Eagle Salt Works property by Mr. Leete, and knew that that transaction had been negotiated between Mr. Lyman and Mr. Leete; that Mr. Lyman was the executive officer in the state of Nevada, and attended to that business, and he always accepted what Mr. Lyman said as conclusive in regard to it; that when Mr. Lyman brought Mr. Leete into the office he thought it was perfectly satisfactory that he should carry out Mr. Leete's desire; that he supposed that Mr. Leete was the owner of the money and entitled to get it; that he was perfectly willing to help him get it, provided the company would not incur indebtedness; that Mr. Leete told him he had paid the money in a transaction long ago, and since then had bought the property, and was entitled to the same."

W. E. F. Deal and Edmund Tauszky, for plaintiff in error.

J. D. Goodwin, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The question to be determined is, which of the parties is entitled to the money repaid by the government? It appears that the defendant in error (plaintiff in the court below) was an original locator of the land, and paid the government its price for the same. He thereafter sold his interest, and his grantee in turn sold to the plaintiff in error. While the land was in its possession, the government canceled the patent previously issued therefor, but no attempt was made to obtain a return of the purchase price by the plaintiff in error. A few years later the defendant in error bargained for the property and purchased it. He then attempted to recover from the government the original purchase price, and found it necessary to collect it through the plaintiff in error, his grantor, as it was the owner of the property at the date of cancellation of the patent. He asked its assistance, and it was at first given, but later revoked, and the money collected by plaintiff in error for its own use and benefit. To enable the plaintiff in the court below to recover this money from the defendant, it was necessary for him to show that there was an agreement or understanding between them, at the date of the deed from defendant to plaintiff in 1895, that plaintiff should have the money upon its collection from the government, and that the right to the recovery of this money was an element of consideration in his purchase of the land. There was no specific agreement in writing in regard to the transaction, and the language of the correspondence must be the guide in determining the nature of the understanding of the respective parties. The oral evidence related principally to the acts and conduct of the parties subsequent to the execution of the deed, and, as tending to show the understanding of the parties at the time the deed was executed and delivered, it was admissible. The correspondence shows that early in the negotiations the defendant in error claimed to be the owner and entitled to one-half of the money in the hands of the government, whether he purchased the property of plaintiff in error or not. It is also shown that the plaintiff in error knew that this money could be recovered from the government, and, when defendant in error asserted his right to one-half of it, no denial was made by plaintiff in error of this right. In the further negotiations, resulting in an offer by defendant in error and its acceptance by plaintiff in error, no mention was made of this money. Plaintiff in error did not assert any claim to this money for itself at this time, and, in fact, after the transaction was closed and title had passed to the defendant in error, the plaintiff in error regularly executed a power of attorney to the attorneys of defendant in error for the express purpose of assisting the defendant in error to collect the amount for himself. It was only upon being advised that the land department required a quitclaim deed from it, and that the warrant on the United States treasury would issue in the plaintiff's name, that it revoked this power of attorney, and proceeded to the collection of the money independent of the claims or rights of defendant in error.

Plaintiff in error claims that it was induced to make the power

of attorney by the representations of defendant in error as to his ownership of the money, and was then in ignorance of its legal rights. It is true that parties acting in ignorance of their rights are protected by the law from imposition and deceit; but the facts show that defendant in error did not deceive or impose upon plaintiff, as, at the very outset of the negotiations, he stated his claim of an interest in the money held by the government, and immediately, upon receiving a deed to the interest of plaintiff in error, proceeded to the collection of the entire amount. The presumption is warrantable that, had the statutes permitted an assignment of an account against the United States treasury, the defendant in error would have recovered the money from the government without objection from the plaintiff in error. "The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake." 2 Pom. Eq. Jur. § 842. A leading case under this rule, and illustrating its reasons, is *Bilbie v. Lumley*, 2 East, 469. In this case an insurer, with knowledge of all the facts which relieved him of his liability on a policy of insurance which he had signed, but in ignorance of the legal rights resulting from those facts, paid the amount he had insured, and afterwards he brought an action to recover back the money as paid under a mistake. The court held that the action could not be maintained. Lord Ellenborough said:

"Every man must be taken to be cognizant of the law; otherwise, there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case."

Had the defendant in error been able, under the laws of the United States, to collect the money in controversy from the government upon the power of attorney executed by the plaintiff in error, the latter would not, under the doctrine of this case, have been able to recover it from the defendant in error. This being so, it is not perceived how a statute of the United States relating to the assignment of claims against the government, and designed only for the protection of the latter, can so change the rights of the parties as to give the plaintiff in error a right to the fund which it did not otherwise possess or have a legal right to enforce. Under the facts as disclosed by the testimony, the plaintiff in error should undoubtedly be considered as having acquiesced in the claim of defendant in error to the money at the time the deed was executed by plaintiff in error, and also when it executed and gave to him the power of attorney to collect for himself the money from the government. The minds of the parties met in the fulfillment of their agreement or contract on these two occasions, and the plaintiff in error is estopped from denying that understanding later, upon the discovery that it had possessed certain legal rights of which it had not availed itself. Having allowed the defendant in error to act upon the understand-

ing had by both parties, the plaintiff in error cannot now deny that understanding, to the loss or injury of the defendant in error. *Storrs v. Barker*, 6 Johns. Ch. 166; *Mississippi Coal & Ice Co. v. The Ottumwa Belle*, 78 Fed. 643; *Illinois Trust & Savings Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, and 76 Fed. 271; *Smiley v. Barker*, 55 U. S. App. 125, 28 C. C. A. 9, and 83 Fed. 684; *Markham v. O'Connor*, 52 Ga. 183; *Cunningham v. Patrick*, 136 Mo. 621, 37 S. W. 817. "The vital principle [of estoppel in pais] is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson v. Colgrove*, 100 U. S. 578; *Fetter*, Eq. §§ 21, 22. "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience." 2 Pom. Eq. Jur. § 802. "The doctrine seems to be established by authority that the conduct and admissions of a party operate against him in the nature of an estoppel, wherever, in good conscience and honest dealing, he ought not to be permitted to gainsay them. Thus negligence becomes constructive fraud, although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and negligence may be deemed compatible. In such cases the maxim is justly applied to him that, when one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss." *Stevens v. Dennett*, 51 N. H. 324. In view of these established principles of law, which appear to be applicable to the conduct of the plaintiff in error in this transaction, we are of the opinion that the money refunded by the government and collected by the plaintiff in error belonged of right to the defendant in error. The judgment of the lower court is therefore affirmed.

BANCROFT v. HAMBLY.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1899.)

No. 492.

1. **VARIANCE—ACTION ON CONTRACT OF EMPLOYMENT.**

In an action on a contract of employment to recover salary for services rendered thereunder, in which the complaint alleges performance on the part of the employé, proof of such performance is essential, and the plaintiff cannot recover on evidence that the employé was prevented from performing the contract by defendant, it being shown that he did not in fact render any services thereunder.

2. **FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF CONTRACTS.**

A federal court is not at liberty to accept as conclusive the construction of a contract by the supreme court of a state, where such construction in no manner depends on any state law, and is not pleaded as creating an estoppel between the parties; but is required to exercise its independent judgment, giving to the state decision, however, due weight as a precedent.

3. PARTNERSHIP—CONTRACT CREATING—CONSTRUCTION.

B., who was the owner of a publishing company, entered into a contract with S., by which he sold and assigned to him an interest in the business, reciting that it was shortly to be incorporated, in consideration of past services, and that S. should devote his services to the company for 10 years. The contract provided that the interest of S. should be forfeited and revert to B. if S. should fail to perform his part of the contract, and that one-half of it should revert in case of his death within five years. It further provided that the salary of S. should be a certain sum per month. *Held*, that the contract created a partnership, and contemplated the payment of the salary of S. by the firm, or by the corporation when formed, and that an action to recover such salary could not be maintained against B. individually.

In Error to the Circuit Court of the United States for the Northern District of California.

Page, McCutcheon & Eells, for plaintiff in error.

Reddy, Campbell & Metson, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is one of a series of actions brought against the plaintiff in error to recover salary at the rate of \$350 per month, alleged to be due one N. J. Stone under and by virtue of a contract entered into on the 20th day of August, 1886, between him and the plaintiff in error. All of the actions were brought in the superior court of the state of California. In the first, final judgment passed for the plaintiff, and was affirmed by the supreme court of the state in 112 Cal. 653, 44 Pac. 1069. In the second, judgment was rendered for the plaintiff in the trial court, from which no appeal appears to have been taken. The third is the present action, and was brought in the superior court of the city and county of San Francisco, state of California, by the defendant in error, as the assignee of Stone, who, the complaint alleges, assigned to the defendant in error on June 13, 1896, all his right, title, and interest in and to any money then due or to become due under the contract. On the petition of the defendant the case was transferred to the court below for trial. The contract, which is set forth in *hæc verba* in the complaint, is as follows:

"This agreement, made in San Francisco, California, by H. H. Bancroft and N. J. Stone, witnesseth: That in consideration of the valuable services done by the said Stone in conducting the publication and sale of the historical works of the said Bancroft, the business formerly being conducted as the Bancroft's Works Department of A. L. Bancroft & Co., but now being done and shortly to be incorporated under the laws of the state of California as the History Company, the said Bancroft hereby sells and assigns to the said Stone a one-tenth interest in the said History Company, plates, paper, stock, money, outstanding accounts, or other property of said company, upon the following conditions: The said N. J. Stone is to devote his whole time and best energies, so far as his health and strength shall permit, for a period of not less than ten years from the date of this agreement, to the publication and sale of the historical works of H. H. Bancroft, and of such other works, and conduct such other business as may be from time to time taken up and entered into by said History Company; and the said Stone agrees not to enter into or engage in, directly or indirectly, any other mercantile or manufacturing business, or in any other business or occupation, which shall in any wise absorb his mind and strength, or interfere with his interest or efforts on behalf of the said History

Company, during the said term of ten years. Upon the incorporation of the History Company, one-tenth of the whole number of shares shall be issued and delivered to the said N. J. Stone, but, should the said Stone fail in any wise to carry out this agreement, or any part thereof, in its full letter and spirit, then the said one-tenth interest in the said History Company shall be forfeited, and revert to the said H. H. Bancroft: provided, and it is distinctly understood and agreed, that, in case of the death of the said N. J. Stone before the expiration of five years from the date of this agreement, the said Stone having fulfilled all the conditions of this agreement up to that time, then one-half of the said one-tenth interest of the said Stone in the History Company shall go to his heirs, and be their property unconditionally; and, in the event of the death of the said Stone at any time after the expiration of five years from the date of this agreement, the terms hereof having been fully complied with, then the whole of the said one-tenth interest shall belong to his heirs unconditionally. The salary of the said Stone shall be \$350 a month. The copyright of the said historical works belongs exclusively to the said Bancroft, and shall be fifty cents a volume for the History and Diaz, and twenty cents on the Little History of Mexico.

"Signed at San Francisco, the twentieth day of August, 1886.

"H. H. Bancroft.

"N. J. Stone.

"Witness: W. N. Hartwell."

The present action is for salary at the rate of \$350 a month, alleged to be due to the plaintiff, as assignee of Stone, for a period extending from April 1, 1894, to August 20, 1896, the complaint alleging performance by Stone of all the terms and conditions of the contract during that period of time, and the refusal of the defendant to pay therefor. To the complaint the defendant interposed a demurrer on the ground that it does not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court below. 83 Fed. 444. An answer was then filed by the defendant to the action, in which the defendant denied that during the period covered by the complaint Stone performed any of the terms or conditions prescribed by the contract sued on, and also averred that during that period he had been engaged in a business prohibited by the terms of the agreement. At the trial, Stone admitted, among other things, that he did not perform any service whatever for either the defendant, Bancroft, or the History Company, from April 1, 1894, to August 20, 1896, but testified that on April 2, 1894, he served Bancroft with a written notice, wherein he notified the latter that he was still willing and ready, as theretofore, to comply with the terms and conditions of the agreement, a copy of which was annexed to the notice; and that he would at all times thereafter be willing to perform all of the acts required of him by its terms. At the time Stone served this notice, he asked for a reply. Bancroft answered that he would look it over at his leisure, but never did, in fact, make any reply to the notice, nor did Stone see him, or have any further communication with him, either orally or in writing, during the time covered by the present action. Stone further testified, in substance, that he held himself in readiness to perform his duties under the contract; that he never was discharged by Bancroft or the History Company; that he never withdrew from the agreement, and that he was not permitted to do any work thereunder during the time covered by the present action; that during this period he went to the office of the History Company from time to time, sometimes as often as

once a week. Stone further testified that in the month of June, 1894, he undertook the San Francisco agency of a compound called the "Fitz Alcohol Cure," which was manufactured in the East, and consigned to him for sale, the conduct of which business he has continued in San Francisco ever since.

This being substantially the evidence in the case, we are of opinion that the court below should have granted the defendant's motion for an instruction to the jury to render a verdict in favor of the defendant; for, conceding the sufficiency of the complaint to constitute a cause of action in favor of the plaintiff, one of its constituent elements was the alleged performance by Stone of all of the terms and conditions of the agreement from April 1, 1894, to August 20, 1896,—the period of time covered by the action. Such performance by Stone being one of the essential elements of the alleged cause of action, proof thereof was, of course, equally essential. *Saunders v. Short*, 30 C. C. A. 462, 86 Fed. 225, 229; *Vinegar Co. v. Burns*, 44 Neb. 21, 62 N. W. 301. That Stone did not perform any service under the contract from April 1, 1894, to August 20, 1896, was distinctly testified by himself, and there is nothing in the evidence to the contrary. Why he did not do so need not be inquired, in view of the pleadings in the case. The complaint does not count upon prevention by Bancroft of performance on Stone's part of his obligations under the contract; nor is it an action for damages sustained by the plaintiff by reason of any such prevention, or of any other breach of the contract by Bancroft. On the contrary, it is, as has been shown, an action on the contract to recover the amount of salary, for a certain period, therein provided for, based entirely on the alleged performance by Stone of all of his obligations thereunder, but which allegation of performance the proof wholly fails to sustain. But, above and beyond this, we are of opinion that the contract upon which the action is based, rightly construed, did not confer upon Stone the right to hold Bancroft primarily and individually liable for the monthly salary thereby provided for. We are aware that department 1 of the supreme court of California held to the contrary in the case already cited, but that the opinion in that case did not have the unanimous approval of that court is shown by the dissent of the chief justice from the order denying the hearing of the case by the court in bank. 112 Cal. 660, 44 Pac. 1069. In construing the contract in question, Mr. Justice Garoutte, in delivering the opinion in that case, said:

"We think the only fair interpretation to be given to this contract is that Bancroft was to pay Stone three hundred and fifty dollars per month for his services. There is but a single theory that can be advanced looking to a contrary construction, and that is to the effect that this contract between Bancroft and Stone constituted them partners (Stone possessing a one-tenth interest in the partnership), and that, consequently, the salary of said Stone was to be paid by the partnership. Upon a mere cursory examination of the contract, it is plainly evident that it does not, and was never intended to, create a partnership between these two parties. This is patent from the fact that it was contemplated in the writing itself that in the near future the History Company was to be incorporated. It is doubly apparent when we consider that the one-tenth interest in the property given by Bancroft to Stone failed to vest any absolute title in him, but was dependent upon conditions, and liable to be

forfeited, and revert to Bancroft, at any moment. That Stone had no such interest in this business as to constitute him a partner is further made plain when we look at the provision of the contract wherein it is expressly stipulated that, if Stone should die within five years from its date, then only one-half of the one-tenth interest should pass to his heirs. To hold these parties partners under the agreement would make Stone's salary dependent upon the profits of the business. There is nothing contained therein to indicate any such intention, and it is certainly not so provided. We conclude that the contract should be construed as a contract of hiring of Stone by Bancroft at an agreed price of three hundred and fifty dollars per month. There are no other matters of law raised by the demurrer of sufficient importance to demand our attention. Within a few months after the aforesaid agreement was entered into, the History Company was incorporated with a capital stock of one hundred shares, ten of which were issued to Stone, in pursuance of the agreement, and he was thereupon elected vice president of the corporation. Prior to the agreement with Stone and the subsequent incorporation, Bancroft was the sole owner of the business, conducting it under the name of the History Company. For several years after incorporation the business progressed amicably and prosperously, and then differences arose. No salary was forthcoming, and this litigation resulted. It is now insisted by appellant that during the fourteen months covered by this litigation respondent is not entitled to any salary, for the reason that he performed no service. It must be borne in mind that this action is not one for damages based upon the breach of a contract of hiring, but is an action based upon the contract itself, upon an express promise to pay, and in this regard the complaint was advisedly framed; for the evidence of both the plaintiff and defendant expressly shows that he (Stone) was never discharged from his employment, and, if he was hired for a term of ten years at a monthly salary, until he was discharged by his employer, or voluntarily gave up the employment, we know of no legal reason why his employer's promise to pay is not binding and enforceable in an action at law."

We are precluded from treating either the judgment in the case just referred to or the judgment of the trial court in the second action, above referred to, as an estoppel, for the reason that neither judgment is in any manner pleaded as such, and both were admitted in evidence for the express and only purpose of showing performance by Stone of his part of the contract up to the time of the commencement of the present action. But, as a precedent, the opinion of the supreme court of the state in the case cited is entitled, as are all of its opinions, to great respect. The present case, however, involves the interpretation of a contract not in any way dependent upon the construction of any state law, and, that being so, we are not at liberty to follow the decision of that court construing the contract if such construction does not meet with our approval, but are bound to exercise our independent judgment. *Lane v. Vick*, 3 How. 464; *Watson v. Tarpley*, 18 How. 517; *Carpenter v. Insurance Co.*, 16 Pet. 495; *Amis v. Smith*, Id. 303; *Butz v. City of Muscatine*, 8 Wall. 575; *Oates v. Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469. The contract in question shows upon its face that the business and property constituting the subject of it, and which was then owned and conducted by Bancroft, was then carried on by him under the name of the History Company. In that business and property Bancroft, by the contract, conveyed to Stone an undivided one-tenth interest; the language being: "The said Bancroft hereby sells and assigns to the said Stone a one-tenth interest in the said History Company, plates, paper, stock, money, out-

standing accounts, or other property of said company." Then follow the conditions upon which the transfer of that interest is made. The contract expressly recites that the business which had formerly been conducted as the "Bancroft's Works Department of A. L. Bancroft & Co." and then being conducted as the "History Company," and in the conducting of which Stone had rendered valuable services, was shortly to be incorporated under the latter name, pursuant to the laws of the state of California. The consideration for the conveyance of the one-tenth interest was, as shown by the contract, not only the "valuable services" theretofore rendered by Stone "in conducting the publication and sale of the historical works of the said Bancroft," but also his services for at least the next succeeding 10 years; not only in the publication and sale of the historical works of Bancroft, but also in conducting such other business as should from time to time be taken up and entered into by the History Company; for the conveyance of the one-tenth interest to Stone was by the contract expressly declared to be made upon the conditions that "the said N. J. Stone is to devote his whole time and best energies, so far as his health and strength shall permit, for a period of not less than 10 years from the date of this agreement, to the publication and sale of the historical works of H. H. Bancroft, and of such other works, and conduct such other business, as may be from time to time taken up and entered into by said History Company; and the said Stone agrees not to enter into or engage in, directly or indirectly, any other mercantile or manufacturing business, or in any other business or occupation, which shall in any wise absorb his mind and strength, or interfere with his interest or efforts on behalf of the said History Company, during the said term of ten years. Upon the incorporation of the History Company one-tenth of the whole number of shares shall be issued and delivered to the said N. J. Stone, but, should the said Stone fail in any wise to carry out this agreement, or any part thereof, in its full letter and spirit, then the said one-tenth interest in the said History Company shall be forfeited, and revert to the said H. H. Bancroft: provided, and it is distinctly understood and agreed, that, in case of the death of the said N. J. Stone before the expiration of five years from the date of this agreement, the said Stone having fulfilled all the conditions of this agreement up to that time, then one-half of the said one-tenth interest of the said Stone in the History Company shall go to his heirs, and be their property unconditionally; and, in the event of the death of the said Stone at any time after the expiration of five years from the date of this agreement, the terms hereof having been fully complied with, then the whole of the said one-tenth interest shall belong to his heirs unconditionally." Can there be any doubt that when this contract was executed Stone thereby became the owner of an undivided one-tenth of the business and property of the History Company, subject only to the conditions therein stated, and that Bancroft remained the owner of the other nine-tenths? We think not. From that time until the incorporation of the company, was not Stone entitled, by virtue of the contract, to one-tenth of the profits, if any, of the business? Undoubtedly so. And when the company

was incorporated, and Stone's proportion of its stock issued to him, did he not continue to be entitled to his share of the profits of the business? Undoubtedly so. The 10-years services that Stone, by the contract, agreed to render were not to be rendered to Bancroft individually, but, as is expressly declared in the contract itself, in the publication and sale of the historical works of Bancroft, and of such other works and of such other business "as may be from time to time entered into by said History Company." The obligation imposed by the contract on Stone not to engage in any other business or occupation was limited to such other business or occupation as would "interfere with his interest or efforts on behalf of the said History Company." The services thus required by the contract to be performed by Stone were, therefore, confined entirely to the business of the History Company, in which he had an undivided one-ninth interest, subject to the conditions accompanying its conveyance to him. His joint interest in the business entitled him to his proportionate share of the profits, the ascertainment of which necessarily depended upon the previous ascertainment and payment of the expenses of conducting the business. There is certainly nothing in the contract indicating any intention on the part of either of the parties thereto that Stone should be exempt from any part of the expenses incurred in conducting the business in the profits of which he was legally and justly entitled to share. It would be extraordinary if there had been. By a statute of California partnership is defined to be "the association of two or more persons for purposes of carrying on business together and dividing the profits between them." Civ. Code Cal. § 2395. No express stipulation for dividing the profit and loss is necessary, as that is an incident to the prosecution of the joint business. *Pars. Cont.* p. 57; *Bloomfield v. Buchanan*, 13 Or. 108, 8 Pac. 912; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. 668. It seems to us impossible to successfully deny that from the time of the execution of the contract in question to the time of the incorporation of the History Company the respective parties to the contract were entitled and bound to share in the profit and loss of the business of the company in proportion to their respective interests, for, beyond question, they owned the property and business jointly, and were conducting it jointly. They were therefore partners therein. The fact that the respective parties contemplated a speedy incorporation of the company, which intention was expressly stated in the contract, in no way altered the character that the law attached to the agreement under which they meanwhile conducted the business. Nor did the conditions specified in the contract, upon the happening of which there would be a forfeiture on the part of Stone of the whole or a part of his interest in the business of the company, affect the relationship of the parties while it existed. *Hills v. Bailey*, 27 Vt. 548; *Petrakion v. Arbeeley* (Com. Pl.) 26 N. Y. Supp. 731; *Campbell v. Sherman*, 55 Hun, 609, 8 N. Y. Supp. 630. As by the execution of the contract Stone became a partner in the business, he would not, under the well-settled law of partnership, have been entitled to any salary for services rendered the firm, unless expressly provided for. In the present case, as by the

articles of agreement Stone was made the manager of the business, and was required to devote his entire time to it, and was prohibited from engaging in any other business or occupation that would interfere with his efforts on behalf of the History Company, it was provided that he should receive a salary of \$350 a month for his services. Such a provision is not at all uncommon in partnerships. A similar provision appears in the case of *Weaver v. Upton*, 29 N. C. 458, which case is, in principle, exactly similar to the present one. There, Weaver and Upton had leased of one McKensie a tract of land for three years, in which to mine for gold, and the lessees had entered into possession. Upton was to work 20, and Weaver 4, hands, "bearing a proportionable part of the expense attached thereto." The agreement between them further provided that "the said Upton, of the first part, bargains and agrees to give me, the said Weaver, of the second part, four hundred and fifty dollars to manage the business, which I agree to manage according to the best of my judgment." The court said:

"It seems to us that the agreement was one of partnership; and, the law being well settled that the acting and business partner is never entitled to claim any pay of the firm for his services, unless he stipulates for it in the articles of co-partnership or otherwise, the parties therefore agreed that Weaver should manage the business, and Upton, the other partner, agreed to give him \$450 'to manage the business.' Weaver was to bear his proportion of the expense of managing and working the mine. The salary of the superintendent was a part of the expense of the firm. And the firm ought, according to the true construction of the articles, to bear this expense in proportion to the number of hands each partner worked in the mine. The words, 'the said Upton bargains and agrees to give me, the said Weaver, four hundred and fifty dollars to manage the business,' only denote the assent of Upton that Weaver, although a partner, should be paid for his services \$450.00. The parties were stipulating concerning the partnership business and the terms on which it was to be carried on; and, among others, that Upton bargained and agreed to let Weaver have \$450.00 for his services that year. It seems to us that it would be against justice and right to construe the covenant to be an agreement by Upton that he would pay that sum out of his own pocket. We think that it was an item in the expense account of the firm, and that the firm should pay it."

It will be noticed that in the case just cited the contract recited that Upton agreed to give Weaver \$450 to manage the business, but the court held—and, we think, very properly held—that, as the salary of the superintendent was a part of the expense of the firm, the firm ought, according to the true construction of the articles of agreement, to be required to pay it. In the contract here in question there is no statement that Bancroft agrees to pay Stone a salary of \$350 a month for the services he is thereby required to render in conducting the business of the History Company, but the provision is, as has been seen, that "the salary of the said Stone shall be \$350 a month,"—manifestly to be paid out of the business, to which both parties interested should contribute in proportion to their respective interests, and for which both of the parties interested in the business would be liable in like proportions, if the services provided for were rendered, and the business was unable to pay it; and this, not only while the business was conducted as a partnership, but also after it was conducted as a corporation of the state of California, for, as stockholders therein, each of the parties in interest was not only

entitled to his proportion of the profits of the corporate property and business, but liable as well for his proportion of the corporate obligations. We entertain no doubt that, if Bancroft prevented, directly or indirectly, Stone from performing the services in and about the business of the History Company provided for on his part by the contract, or committed any other breach thereof to Stone's injury, the latter would have his action against Bancroft for such damages as he sustained. But such, as has been shown, is not the present action. The judgment is reversed, and cause remanded to the court below, with directions to dismiss the action at the plaintiff's cost.

GARRARD v. SILVER PEAK MINES et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1899.)

No. 439.

1. PUBLIC LANDS—MINERAL CHARACTER—SALINE LANDS.

Saline lands are mineral, within the meaning of a provision of an act of congress reserving mineral lands from a grant.

2. SAME—GRANT TO STATE—EFFECT OF RESERVATION OF MINERAL LANDS.

By Act Cong. June 16, 1880 (21 Stat. 287), congress granted to the state of Nevada 2,000,000 acres of land, to be selected by the state from "un-appropriated, nonmineral, public lands." By an act of the state legislature of March 3, 1887 (St. 1887, p. 102), the state expressly disclaimed on behalf of itself and its grantees any rights in any mineral lands which had been or might be selected under such grant, and further provided that its conveyances should give no rights as against persons in actual adverse possession. *Held*, that the state acquired no rights in land selected under the grant which was in fact known mineral land, containing both salt and the precious metals, which had been appropriated in 1865 under an act for the location of land containing salt, surveyed, and the location recorded, and which had ever since been in the actual possession of the locator and his grantees, who had erected a quartz mill thereon at a cost of over \$50,000, and that a patent executed by the state therefor to an applicant to purchase who had actual knowledge of all such facts was void.

3. SAME—PATENTS BY STATE—COLLATERAL ATTACK.

Such patent, being without authority of law, and prohibited by the law of the state which issued it, is subject to collateral attack in an action at law.

In Error to the Circuit Court of the United States for the District of Nevada.

Reddy, Campbell & Metson, for plaintiff in error.

M. A. Murphy, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action of ejectment, in which the defendants prevailed in the court below. 82 Fed. 578. The plaintiff has brought the case here by writ of error. The subject of the action is a certain 40-acre tract of land situate in Esmeralda county, Nev., described in the complaint as the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, township 2 S., range 39 E., Mt. Diablo base and meridian, together with a lot of mill tailings and slimes containing gold and silver, which the plaintiff in his complaint alleges was upon

the land, and was removed therefrom and converted by the defendants to the plaintiff's damage. The plaintiff's claim to the land has its foundation in the act of congress approved June 16, 1880 (21 Stat. 287), and in certain legislation of the state of Nevada passed pursuant thereto. By the act of June 16, 1880, congress granted to the state of Nevada 2,000,000 acres of land, which lands, the act declared, were to be selected by the state authorities from "unappropriated, nonmineral, public lands," and "in quantities not less than the smallest legal subdivision." On the 12th day of March, 1885, the legislature of the state of Nevada passed an act entitled "An act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the state of Nevada," by which act a state land office was created, of which the surveyor general of the state was made ex officio land register, and to whom all applications to purchase such lands as congress had granted or should grant to the state were required to be made. The act prescribes the course of proceedings in the matter of such applications, and provides that "all lands selected under the two million acre grant of June sixteenth, eighteen hundred and eighty, may be sold in tracts equal to one section to each applicant," and that "no lands shall be sold in tracts less than the smallest legal subdivision." St. 1885, p. 101. Under and pursuant to the provisions of this state legislation, one Alexander Morrison made application to the land register of the state of Nevada for the 40-acre tract in question, making the required payments therefor in the prescribed way, and the land register thereupon selected and made application therefor to the land department of the United States under and by virtue of the act of congress of June 16, 1880. The list of selected land under that grant, including the piece in controversy, was certified by the commissioner of the general land office on the 7th of August, 1890, and by the acting secretary of the interior on the next day, "subject to any valid interfering rights which may have existed at the date of the selection." The act of congress making the grant to the state of Nevada does not provide for the issuance of a patent to the state for the lands thereby granted. But by an act of congress of August 3, 1854 (10 Stat. 346), and embodied in the Revised Statutes as section 2449, it is declared:

"That in all cases where lands have been or shall hereafter be granted by any law of congress to any one of the several states and territories; and where said law does not convey the fee simple title of such lands or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the commissioner of the general land office under the seal of such office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

The supreme court has decided in a number of cases that a certified list issued under and pursuant to this statute is of the same effect as a patent. *Frasher v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141;

Mower v. Fletcher, 116 U. S. 380, 6 Sup. Ct. 409; *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. 176; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Chandler v. Mining Co.*, 149 U. S. 79, 13 Sup. Ct. 798. The certified list, therefore, embracing the 40-acre tract in question, is to be regarded as a patent from the United States to the state of Nevada,—made, however, as is expressly recited on its face, “subject to any valid interfering rights which may have existed at the date of selection.” Based upon that conveyance to it, the state of Nevada on the 22d day of May, 1891, by its proper officers, executed to Alexander Morrison its patent for the 40-acre tract in controversy, which patent recites upon its face that it is executed “according to the provisions of an act of the legislature approved March 12, 1885, entitled ‘An act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the state of Nevada,’ and the act amendatory thereof and supplemental thereto.” The supplementary act of the state of Nevada is that of March 5, 1887 (St. 1887, p. 124), entitled “An act defining the rights of applicants for and contractors to purchase land from the state of Nevada, and providing for maintaining certain actions concerning such land,” by the first section of which it is declared that:

“Every person who has applied to the state of Nevada to purchase any land from it, or who has contracted with the state of Nevada for such purchase, or who may hereafter apply to or contract with the state of Nevada, in good faith, for the purchase of any of its public land, and who has paid or shall pay to the proper state officers the amount of money requisite under such application or contract, shall be deemed and held to have the right to the exclusive possession of the land described in such application or contract: provided, no actual adverse possession thereof existed in another at the date of the application.”

The second section of the act excludes, from the right thereby given to every one who has applied or contracted to purchase from the state any such land the right to maintain or defend any action at law or in equity concerning it or its possession, all such land that was in the adverse possession of another at the date of such application to purchase.

Shortly after Morrison received his patent for the 40-acre tract in controversy, to wit, June 29, 1891, he executed a deed therefor to the plaintiff, Garrard.

The answer of the defendant corporation, the Silver Peak Mines, in addition to denying the plaintiff's alleged ownership of the property and his alleged right to its possession, alleges as a defense to the action that in the year 1865, or thereabouts, the predecessors in interest and grantors of the defendant corporation, under and by virtue of an act of the legislature of the state of Nevada entitled “An act to provide for the location of lands containing salt,” located and had surveyed a tract of land and mill site and water right in the Silver Peak and Red Mountain mining district of Esmeralda county, Nev., containing 160 acres, specifically described in the answer; that such tract was located upon the unsurveyed and unappropriated public domain of the United States; that in the years 1865, 1866, and 1867, or thereabouts, the grantors and predecessors in interest of the defendant corporation caused to be erected and con-

structed on the 160-acre tract a quartz mill costing about \$70,000; that after the completion of the mill such proceedings were had and taken as that the government of the United States on the 1st day of May, 1879, pursuant to law, issued to the grantors and predecessors in interest of the defendant corporation a patent for 4.97 acres of the land upon which the quartz mill was then constructed, as a mill site; that ever since the year 1865 the defendant corporation and those from whom it has derived its title have been in the quiet, peaceable, and undisturbed possession of the said 160-acre tract of land, including the patented mill site; that ever since the year 1865 the defendant corporation, through its predecessors in interest and grantors, "has been, and now is, a bona fide settler and occupant of the land and premises described in the plaintiff's complaint on file herein, and the whole thereof"; that the defendant corporation and its grantors have made valuable improvements thereon; that such settlement and improvements were made long prior to any selection of the 40-acre tract by the plaintiff or his grantor, and that the plaintiff and his grantor were well aware at the date of the selection under which the plaintiff claims that the defendant corporation and its grantors "was, and had been for a great number of years, in the open, notorious, and exclusive possession of all of said land, claiming ownership of and to the same as against this plaintiff, his grantors, and the entire world"; that on the 19th day of June, 1888, or thereabouts, and prior to the selection under which the plaintiff claims, one D. M. Brunton discovered, located, and claimed a quartz ledge, under the name of the "Mancer Mining Claim," 1,500 feet in length by 600 feet in width, containing gold, silver, and other precious metals, in and upon the 40-acre tract described in the plaintiff's complaint; and that the said Brunton thereafter, for a valuable consideration, conveyed to the defendant corporation all his right, title, and interest in and to the said ledge, and in and to his said mining claim thereon located, ever since which time the defendant corporation has been in the quiet, peaceable, and undisturbed possession thereof. The answer further alleges that notwithstanding that the plaintiff and his grantor well knew that the defendant corporation was, and had been for a long time prior to the date of the application by Morrison to purchase the 40-acre tract described in the complaint, in the quiet, peaceable, and undisturbed occupancy of the said land, and every part thereof, and well knowing that the defendant corporation and its grantors and predecessors in interest had caused to be erected thereon valuable, prominent, and permanent improvements, at a cost of about \$100,000, and well knowing that the said land was mineral in character, containing gold, silver, and other precious metals, and also salt and saline, and that the said land was not fit for grazing or agricultural purposes, they, and each of them, falsely and fraudulently misrepresented and misstated the facts to the surveyor general and ex officio land register of the state of Nevada, and by such false and fraudulent acts and misrepresentations induced that officer to believe that the said land was unoccupied land, and nonmineral in character, and that he, so believing the said statements of the plaintiff and his

grantor, was induced to select the 40-acre tract described in the complaint as a part of the lands granted to the state of Nevada by the act of congress referred to, when in truth and in fact the said land was not of the class of lands thereby granted, but, on the contrary, was expressly excluded therefrom.

The case, by stipulation of the respective parties, was tried by the court below without a jury, after which the court made, among others, the following findings of fact:

"Third. That none of the land described in the plaintiff's complaint is suitable or fit for agricultural or grazing purposes, but is mineral; the greater portion of it being covered with salines, and a quartz vein, lead, or lode being located and situate thereon. Fourth. That, at the time the grantor of this plaintiff made his application to purchase the land described in the plaintiff's complaint from the state of Nevada, he will [well] knew, and at the date when this plaintiff accepted the deed of the said land this plaintiff well knew, that the said land was appropriated, occupied, and not public land, and in the adverse possession of this defendant. Fifth. That neither the plaintiff nor his grantor, Alexander Morrison, was ever in the possession of the land described in the plaintiff's complaint, or any part thereof." "Seventh. That in the year 1865 the grantors and predecessors in interest of this defendant, Silver Peak Mines, constructed a ten-stamp quartz mill on the unsurveyed and unoccupied public lands of the United States and called it the 'Great Salt Basin Gold & Silver Mining Company's Quartz Mill.' They also located, under the possessory act of the state of Nevada, entitled 'An act to provide for the location of lands containing salt,' approved February 24, 1865, one hundred and sixty acres of land containing salt and other salines. That on the 18th day of November, 1865, they had the said land surveyed by the county surveyor of Esmeralda county, and the boundaries thereof marked by posts and mounds; and on the 18th day of December, 1865, the field notes of said survey were certified to as being correct by the said county surveyor, and on the 20th day of January, 1866, said field notes, together with a diagram of said location and survey, were recorded in the office of the county recorder of Esmeralda county, state of Nevada. That in the spring of 1866 they dug a ditch on three sides of the tract of land so located, surveyed, marked, platted, and recorded, and upon which the aforementioned quartz mill had been constructed; and the forty-acre tract of land, as now claimed by this plaintiff, is situated within the boundaries of said possessory location and survey. That in the fall of the year 1866 the grantors of this defendant, Silver Peak Mines, graded the foundation for a new quartz mill, and during the years 1866, 1867, and 1868 constructed and completed a thirty-stamp quartz mill on the land embraced within their possessory location and survey, and on the land as now claimed by this plaintiff; said mill and improvements costing upwards of fifty thousand dollars. That on the 7th day of November, A. D. 1866, Samuel B. Martin and John W. Harker, being then in the possession of the said lands, and the owners of all the improvements thereon, did, by a good and sufficient deed of conveyance, transfer, sell, and assign all their right, title, and interest in and to the said lands, and every part thereof, together with the improvements thereon, to Silver Peak & Red Mountain Gold & Silver Mining Company, a corporation, which said corporation entered into possession of said land, and every part thereof, and the improvements thereon. That thereafter the said Silver Peak & Red Mountain Gold & Silver Mining Company had a survey made of four and ninety-seven hundredths acres of land for a mill site, upon which the said mill was then constructed, and in the year 1879 the government of the United States, through its land department, issued to this defendant, Silver Peak Mines, as the successor in interest of the said Silver Peak & Red Mountain Gold & Silver Mining Company, a patent for the four and ninety-seven hundredths acres of land upon which the said mill had been constructed, and the said land so patented is within the boundaries of the land now claimed by this plaintiff. That on the 19th day of June, 1888, one D. W. Brunton discovered and located a quartz ledge containing gold, silver, and copper, and other precious metals, in and upon the lands now claimed by this plaintiff, as described in his complaint.

That on the 1st day of June, 1889, the said D. W. Brunton, for a valuable consideration, deeded all his right, title, and interest in and to the said mining claim, and every part thereof, to this defendant, Silver Peak Mines, who has been ever since said date, and now is, the owner and in the quiet and undisturbed possession of the said mining claim, and every part thereof. That on the 5th day of April, 1877, the said Silver Peak & Red Mountain Gold & Silver Mining Company became a bankrupt, and proceedings in bankruptcy were instituted in the United States district court, Southern district of New York, in which state said corporation was organized; and Andrew C. Armstrong was duly appointed, qualified, and acted as the assignee of the bankrupt's estate. That Armstrong, as such assignee, on the 13th day of June, A. D. 1877, conveyed all the property of the said Silver Peak & Red Mountain Gold & Silver Mining Company, including the land in controversy in this action, to Charles E. Vail, who, with his wife, conveyed the said property, including the land in controversy, to the defendant Silver Peak Mines, herein, on the 8th day of January, 1878. That the property of the bankrupt corporation, including the land in controversy in this action, was also sold at sheriff's sale, under an execution issued out of the district court of the Eighth judicial district, state of Nevada, in and for the county of Esmeralda, in a suit wherein one John I. Blair was the plaintiff and the Silver Peak & Red Mountain Gold & Silver Mining Company was the defendant, at which sale John D. Vail was the purchaser; and on the 5th day of February, A. D. 1878, the said sheriff of Esmeralda county made, executed, and delivered to the said John D. Vail a deed to the property so sold under execution, including the land in controversy. That thereafter, to wit, on the 13th day of September, 1879, the said John D. Vail and his wife conveyed the same by deed to this defendant, Silver Peak Mines. That this defendant has been since last-mentioned date, and now is, in the actual, quiet, peaceable, and undisturbed possession of all of said lands; and it and those through whom it claims and derives title have been in the actual, quiet, peaceable, and undisturbed possession of all of the said land described in the plaintiff's complaint ever since the year 1865, and have caused to be constructed on said land and premises prominent and permanent improvements at an expense of over fifty thousand dollars."

These findings are assailed as being unsupported by the evidence. We think, as did the court below, that it is unnecessary to inquire into the validity of the mesne conveyances under which the defendant corporation asserts title. The action being ejectment, the plaintiff must recover, if at all, upon the strength of his own title. A careful examination and consideration of the record makes it clear that the trial court was entirely justified in finding that the land in question is not only mineral in character, and was so known to be by the plaintiff and his grantor at the time, and long prior to the time, when the latter made application to purchase it from the state of Nevada, but also in finding that it was then in the actual and adverse possession of the defendant corporation, or those under whom it claims, and had been so possessed under the claim of right for mining purposes by the Silver Peak Mines and those under whom it claimed ever since the year 1865. For part of the 40-acre tract claimed by the plaintiff as agricultural land the United States issued its certificate of purchase to the Silver Peak & Red Mountain Gold & Silver Mining Company, under the mining mill site act of congress (Rev. St. tit. 32, c. 6), on the 1st day of May, 1879, which was prior to the making by congress of the grant to the state of Nevada under which the plaintiff claims, and on which mill site there had already been erected, and then stood, a quartz mill costing many thousand dollars. Not only so, but the whole of the 40-acre tract

described in the plaintiff's patent is included within the 160-acre tract located by the Great Salt Basin Gold & Silver Mining Company in 1865 under and by virtue of a statute of the state of Nevada entitled "An act to provide for the location of lands containing salt," approved February 24, 1865 (Gen. St. 1885, p. 104), a survey of which was made on the 8th day of November of that year, and recorded in the recorder's office of the county in which the land is situated. That saline lands are mineral is well settled. *Morton v. Nebraska*, 21 Wall. 660; *Milling Co. v. Clay* (Ariz.) 29 Pac. 9. Moreover, in and upon this particular 40-acre tract so applied for by the plaintiff's grantor, and patented to him, was the ledge of quartz discovered, located, and claimed by Brunton, whose interest therein was afterwards conveyed to the defendant corporation. That such land as this, whose true character at the time of and prior to the initiation of the proceedings under which the plaintiff claims was disclosed, not only by the public records, but by costly mining structures and improvements erected thereon, of which the plaintiff, as shown by the evidence and findings, had not only constructive but actual knowledge long prior to the making of the application under which he claims, did not pass under the grant to the state of Nevada, and the patent issued by it to the grantor of the plaintiff, is, we think, very clear.

The list certified by the officers of the land department of the United States to the state of Nevada, and which serves as its patent, in terms declares that it is made "subject to any valid interfering rights which may have existed at the date" of the selection of the land by the state. The grant by congress was made in express terms to apply only to "unappropriated, nonmineral, public lands." The grantee, by act of its legislature of March 3, 1887 (St. 1887, p. 102), in terms declared and recognized the fact that the several grants made by the United States to the state of Nevada reserved the mineral lands, and expressly declared that the sales of such lands made by the state were made subject to such reservation. The statute of Nevada further provided that:

"Any citizen of the United States, or person having declared his intention to become such, may enter upon any mineral lands in this state, notwithstanding the state's selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same in pursuance of the local rules and regulations of the miners and the laws of the United States: provided, that after a person who has purchased land from the state has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use,"—the act declaring, in terms, that "mining for gold, silver, copper, lead, cinnabar and other valuable mineral, is the paramount interest of this state."

Section 2 of the same act declares that:

"Every contract, patent or deed hereafter made by this state, or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar, and other valuable minerals that may exist in such land, and the state for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the state on account

of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the state, must obtain such title from the United States under the laws of congress, notwithstanding such selection."

The facts shown by the record make it clear that the patent under which the plaintiff claimed was not only not authorized, but was prohibited, by the statutes of the very state whose patent it purports to be—First, because it was issued for known mineral land; and, next, because the land for which it was issued then was, and for many years prior to the application therefor had been, in the actual occupation of another under a claim of right. That a patent issued without authority of law may be impeached collaterally in a court of law is thoroughly settled. *Patterson v. Winn*, 11 Wheat. 380; *Smelting Co. v. Kemp*, 104 U. S. 636; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628; *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258. The judgment is affirmed.

McELROY v. BRITISH AMERICA ASSUR. CO. OF TORONTO, CANADA.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1899.)

No. 479.

1. INSURANCE—WAIVER OF CONDITIONS OF POLICY—KNOWLEDGE OF AGENT.

Where the agent of an insurance company, at the time he writes a policy, has knowledge of an incumbrance on the property, or that the insured has procured or arranged to procure concurrent insurance thereon, his knowledge binds the company, in the absence of fraud, and it is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provisions of the policy in that regard.¹

2. SAME—PAROL EVIDENCE TO VARY CONTRACT.

Provisions in an insurance policy that it shall be void in case of concurrent insurance or a mortgage on the property, unless the consent of the company thereto is shown by a written indorsement on the policy, do not prevent the insured from sustaining the validity of the policy by parol evidence showing that it was issued with knowledge of the existence of concurrent insurance or of a mortgage on the property.

3. SAME—AGENCY OF SOLICITOR.

An insurance solicitor, who takes an application for insurance, which is approved and accepted by an insurance company, and on which it issues a policy, and delivers it to the solicitor, who delivers it to the insured, and collects the premium, is, by the ratification of his acts done in its behalf, made the agent of the company in the transaction, and his knowledge binds the company, notwithstanding a provision of the policy that no person, unless duly authorized in writing, shall be deemed its agent; the insured having no knowledge of the actual relations between the solicitor and the company.

4. SAME—FAILURE OF INSURED TO READ POLICY.

An insured has the right to rely on the presumption that the policy he receives is in accordance with his application, and his failure to read it will not relieve the insurer or its agent from the duty of so writing it.

¹ As to waiver of conditions against other insurance, see note to *Insurance Co. v. Thomas*, 27 C. C. A. 46.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

This action was brought by James F. McElroy, plaintiff in error, in the superior court of the state of Washington, to recover \$2,169.30 and interest, alleged to be due upon a policy of fire insurance issued to Mrs. J. C. Powers, plaintiff's assignor, by the defendant in error. Upon the petition of defendant, the case was removed to the circuit court of the United States for the district of Washington, where it was tried before a jury. At the close of the testimony, the court, at the request of the defendant, instructed the jury to return a verdict for the defendant, and the jury found accordingly. Judgment was entered on the 5th day of August, 1898, to reverse which the plaintiff sued out this writ of error.

The policy in question—No. 825,596—was issued on January 23, 1896, insuring the steamer Cricket, her hull, cabins, tackle, furniture, etc., against loss or damage by fire, to the extent of \$3,000. The defense set up in the court below was that the policy was rendered void by the action of the insured in procuring concurrent insurance on the same property in excess of the amount permitted in defendant's policy, and because a chattel mortgage upon the property insured was in existence at the time the policy was issued, of which defendant had no knowledge or notice. It appears that Mrs. J. C. Powers was the owner of the steamer Cricket from the 1st day of January, 1896, up to the time of its loss, on or about February 5, 1896; that during this period Capt. E. M. Barrington, son of Mrs. Powers, was captain and managing agent of the Cricket, and was operating the steamer for the transportation of freight and passengers upon the waters of Puget Sound, between the cities of Seattle and Everett. Some days prior to January 23, 1896, H. C. Ewing, a member of the firm of Calhoun & Co., insurance agents in Seattle for a number of companies, called on Capt. Barrington, requesting the privilege of writing insurance upon the Cricket. No contract was made at this time. Some days later, W. M. Calhoun, of the same firm, saw Capt. Barrington, and conversed with him regarding the insurance. In this conversation Barrington claims to have told Calhoun that he wanted to carry \$10,000 insurance on the steamer, but that he could probably give Calhoun & Co. only \$6,500 of it, because a mortgage on the steamer was held by Capt. MacFarland, who might wish to personally procure the writing of insurance to cover the mortgage. Barrington further testifies that on January 24th he had a conversation with Calhoun by telephone, in which he told Calhoun that the mortgagee had consented to his procuring the insurance, but that he had decided to place that amount (\$3,500) through another agent, J. S. McCormick, and would therefore give Calhoun & Co. the writing of \$6,500, as previously talked of; that Calhoun told him the steamer had been covered to that amount already, and he would bring the policies to Barrington very soon. Calhoun testifies, with reference to these conversations, that Capt. Barrington told him of the mortgage, but that the largest sum mentioned as insurance desired on the steamer was \$6,500; that in the conversation by telephone the captain mentioned his intention of giving \$3,500 of the insurance to McCormick, but before the close of the conversation decided to leave matters as they were, thus giving to Calhoun & Co. the entire amount of \$6,500. He testifies that he did not know of the additional \$3,500 being placed on the steamer, or that it was desired to secure any insurance over \$6,500, until after the fire occurred. Immediately after this telephone conversation, which occurred about noon of January 24th, Barrington ordered \$3,500 insurance from McCormick. This was written by two companies, the Connecticut, of Hartford, and the Providence, of Washington, and was in favor of the mortgagee, covering the risk from noon of January 24, 1896. These policies were delivered to Capt. Barrington on January 25th. The insurance given to Calhoun & Co. was not written by the companies they represented, but was placed by Calhoun with Hanford & Stewart, agents in Seattle of the Palatine Insurance Company, and C. A. McKenzie, agent for the British America Assurance Company, of Toronto, Canada (the defendant in error), in the amounts of \$3,500 and \$3,000, respectively. The policy of the latter company covered the risk from noon of the 23d day of January, 1896, and was delivered to Barrington by Ewing, of Calhoun & Co., on January 24, 1896, together with the policy of the Palatine Company, which was written on January 24th. The premium on the defendant's policy was \$75,

\$50 of which Barrington paid Ewing at this time. On the back of the defendant's policy was pasted a printed slip, reading: "Return for renewal, transfer, or indorsement to Calhoun & Co., Insurance, S. E. Cor. Yesler Ave. and Commercial St., Seattle, Wash." The policies of the Connecticut and Providence Companies in favor of the mortgagee do not limit the amount of concurrent insurance. In the policy written by the Palatine Company, for \$3,500, these words appear: "\$3,000 other concurrent insurance permitted;" and in that issued by defendant in error, for \$3,000, the following: "\$6,500.00 insurance in all permitted, concurrent herewith;" also: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; * * * or if the interest of the insured be other than unconditional and sole ownership; * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage." The steamer was destroyed by fire February 5th following, at Everett, Wash. Before the expiration of the 30-day credit, Mrs. Powers tendered payment of the balance of the premium, but the tender was refused. In due season, to wit, February 21, 1896, the insured furnished proofs of loss to Calhoun & Co., and was notified by them that such proofs had been turned over to the defendant company. This company denied any liability upon its policy, refusing to pay any loss incurred thereon; hence suit was brought for the recovery of the amount apportioned by appraisement to be due from defendant upon its said policy.

Harold Preston, E. M. Carr, and L. C. Gilman, for plaintiff in error.

George Donworth and James B. Howe (S. H. Piles, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

There is but one assignment of error, namely, that the court below erred in granting the motion of the defendant company to give a peremptory instruction to the jury to find a verdict for the defendant, and in giving such peremptory instruction; and the single question presented is whether or not the plaintiff in error had the right to have his case submitted to the jury. It is contended on the part of the defendant, as matter of law, that the policy is void, for the reason that it in express terms provides that, if a chattel mortgage exists on the property, or if insurance shall be obtained to any greater extent than \$6,500 in all, concurrent with the amount covered by the policy, it shall be void, and both of such forbidden acts are established by the evidence on the part of the plaintiff to have been done. The plaintiff asserts, on the other hand, that defendant had notice and knowledge of the existence of the mortgage and of the intention of the insured to apply for insurance to the amount of \$10,000 in all, through Calhoun & Co., its agents. To this the defendant replies that Calhoun & Co. were not its agents, but rather the agents of the insured, and therefore any notice or knowledge that Calhoun & Co. may have had was not the knowledge of the defendant. Several witnesses testify as to the notice given to Calhoun & Co. of the existence of the mortgage. Barrington was asked, with regard to his conversation with Ewing, of the firm of Calhoun & Co., if anything was said in relation to the chattel mortgage upon the steamer, and replied:

"I told him that I had to have \$3,500 of it written up to Captain MacFarland, of Everett; that I could not promise him that insurance; that I did not know whether he wanted me to insure with Seattle firms or not; likely he might want the same men that insured the year before in Everett; and \$6,500 for my mother. Q. What reason, if any, did you give him for the necessity of having insurance written in favor of or payable to Captain MacFarland? A. That he held the mortgage on the steamer for that amount."

And in an interview with Mr. Calhoun a few days later he stated the following language was used:

"He (Calhoun) asked me then how much I wanted to insure for, and I told him the whole amount was \$10,000. \$3,500 of it was to go to Captain MacFarland, of Everett, and \$6,500 to Mrs. Powers. I told him I could not promise him the \$3,500 until I seen Captain MacFarland,—whether he wanted to have it or not,—but the \$6,500 he could have; and he said, 'All right.' He says, 'You try and get the \$3,500 for me from Captain MacFarland, and I will write the whole \$10,000.' I told him, 'All right;' I would see Captain MacFarland, and see what I could do for him. He asked me what I wanted to insure \$3,500 with MacFarland for. I told him he had the mortgage on the boat for that amount. He said he would go ahead and write up the \$10,000 just as soon as I could see Captain MacFarland, whether he would get the \$3,500 or not. If he could get MacFarland, he would write up the \$10,000."

Calhoun testifies:

"Q. Did Captain Barrington say anything to you, at the time the insurance was being negotiated, about having to protect the mortgage by insurance? A. Yes, sir. Q. What mortgage did he state? A. He said the mortgage for the purchase price,—the balance of the purchase price of the boat to Captain MacFarland and others. I do not know the names of the others. * * * Q. You know there was a mortgage? A. Yes, sir. Q. And yet you allowed these policies to be delivered without any permission for a mortgage on them? A. Yes, sir. Q. Had you given any notice to anybody about a mortgage? A. Yes, sir; to Mr. McKenzie. The reason that that indorsement was not on that policy was because Barrington did not know the names of the mortgagees, and I told him that we would explain the matter to the agents, and arrange with them so that the indorsement could be made afterwards. * * * Q. I understand you to say that the reason why you let the policy go out was because you had an agreement with Captain Barrington that later on that chattel-mortgage clause would be indorsed on the policy? A. I had both that with Captain Barrington and the agent. Q. You had that agreement with Captain Barrington and the agents? A. Yes, sir."

Ewing, of Calhoun & Co., testifies that during the negotiations Capt. Barrington spoke about an insurance of \$3,500 for the protection of Capt. MacFarland, and that he at one time told him he contemplated placing more than \$6,500 insurance on the steamer.

With regard to concurrent insurance, McCormick, the agent placing the insurance in favor of the mortgagee, testified that he was present in the drug store of Yorke A. Barrington on the 24th day of January, 1896, when Capt. Barrington had a conversation over the telephone with some person regarding insurance on the steamer Cricket, and heard him say to this party, "I have concluded to have Mr. McCormick write \$3,500 of this insurance," and request the person at the other end of the telephone to deliver the policies for the other insurance; that at the close of this conversation Capt. Barrington placed an order with the witness for \$3,500 insurance, and said he had given orders to Mr. Calhoun for \$6,500,—making a total insurance of \$10,000.

Yorke A. Barrington; a brother of Capt. Barrington, testified, with relation to the same conversation by telephone:

"He asked for Calhoun, and he talked with a gentleman, and he told them that he could go ahead with the \$6,500 insurance, and that he had decided to give McCormick \$3,500, and my brother turned, and asked what company he represented, and McCormick said the Hartford, and he communicated that to the gentleman at the other end of the 'phone; and then, when he got through with the conversation, he turned to McCormick, and told him that he should write up the \$3,500."

From this testimony it appears that there was evidence sufficient to go to the jury tending to establish the fact that at the time the policy of insurance was issued and delivered to Barrington, the agent of the insured, Calhoun & Co., the insurance agents, had notice and knowledge of the existence of the mortgage and of the additional concurrent insurance. There was also evidence tending to establish the fact that McKenzie, the agent of the defendant, had notice of the mortgage, and that the name of the mortgagee was to be inserted in the policy afterwards.

Under the weight of authority, the defendant is estopped from asserting the invalidity of its policy for violation of the conditions of the policy, if such alleged violation was known by the defendant at the time of its issue. *Mesterman v. Insurance Co.*, 5 Wash. 524, 32 Pac. 458. "If the agent knew of the other insurance when the contract was entered into, it is not only a waiver of notice, but also of a forfeiture on that ground." *Wood, Ins.* § 406. In *Beebe v. Insurance Co.*, 93 Mich. 514, 53 N. W. 818, it was held that where the agent of the insurance company, with knowledge as to the amount of incumbrance upon property insured, misstated such amount in an application for insurance made out by him, and which plaintiff, without reading, signed, and the agent assured plaintiff that the application was all right, and that she was fully protected, the defendant company could not deny its liability under a provision of the policy that the application was a warranty as to the material facts, and that a misstatement would void it; the company being presumed to have the knowledge of its agent. The same doctrine is upheld in *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, where the court of appeals say:

"The restrictions inserted in the contract upon the power of the agent to waive any condition unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party."

In *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159, the policy of insurance upon certain personal property contained a condition that the entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, should be void if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. It also contained the other provisions usually contained in the standard fire insurance policy, among which was a

provision making the policy subject to the stipulations and conditions contained in it, and also a provision to the effect that no officer, agent, or other representative of the company should have power to waive any condition or provision of the policy, except such as might, by the terms of the policy, be subject to the terms indorsed thereon or added thereto, and that as to those provisions and conditions no officer, agent, or representative should be deemed or held to have waived any of them, unless the waiver was written upon the policy. When the policy was issued there was a chattel mortgage upon the property insured, but there was no indorsement upon the policy with respect to it. The soliciting agent who procured the insurance was, however, informed as to the mortgage. When the testimony was closed, the defendant's counsel asked the court to direct the jury to return a verdict for the defendant, on the ground that at the time of the issuing of the policy the property insured thereby was incumbered by a chattel mortgage, and that there was no agreement indorsed upon the policy, or added thereto, in reference to such chattel mortgage. The motion was denied, and a verdict and judgment entered in favor of the plaintiff. On appeal to the court of appeals that court determined that it would be presumed, if anything had been omitted which it was necessary to do to make the policy valid, it was by mistake, or that the condition was waived, or that the defendant company held itself estopped from setting it up. It was accordingly held that the company was barred from claiming that the policy was invalid because of the existence of the chattel mortgage.

Notwithstanding an insurance policy contains a proviso against additional insurance except upon "the consent of this company written hereon," and provides also that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed upon this policy, shall not be construed as a waiver of any printed or written conditions or restriction therein," yet where an agent with whom all the dealings were had, and whose authority is not shown to have been restricted in any way, has so acted as to have bound himself by way of estoppel not to dispute the validity of certain additional insurance on the point of consent, the company will be likewise bound. *Insurance Co. v. Earle*, 33 Mich. 144. *Insurance Co. v. Spiers*, 8 S. W. 453, was a case where additional insurance had been procured without the assent of the original insurer being indorsed upon the back of the policy, as provided by the terms of the policy. The court of appeals of Kentucky, in passing upon the points involved, say:

"It has been held in some few cases that, where the policy provides for a forfeiture in case of additional insurance without the written consent of the insurer indorsed upon the policy, it can only be waived by a literal compliance with the condition. The decided current of authority, however, is that this waiver may arise from the act or conduct of the insurer; and silence for an unreasonable time upon his part, after notice or knowledge of the breach of the condition, will constitute such conduct. * * * The term 'void,' as used in the policy, is to be regarded as meaning that the insurer may, at his exclusive option, treat it so, and not that the contract becomes an absolute nullity as to either party. The insurer may therefore, by his conduct, waive his right of forfeiture, and estop himself from insisting upon it. *Baer v. Insurance Co.*, 4

Bush, 242. * * * It may now be regarded as settled law that insurance companies may, by conduct or parol agreement, waive it [condition of forfeiture], and become estopped from enforcing what is but a conventional condition of forfeiture. *Insurance Co. v. Shea*, 6 Bush, 174; *Von Borles v. Insurance Co.*, 8 Bush, 133; *Insurance Co. v. McCrea*, 8 Lea, 513."

In the case of *Insurance Co. v. Warttemberg*, 48 U. S. App. 344, 24 C. C. A. 547, and 79 Fed. 245, in this court, a portion of the property insured was incumbered by a mortgage for \$1,000 at the time of the insurance. The insured testified that he stated the facts concerning the incumbrance to the insurance agent, but an answer different from that which he gave was written in the application for the insurance by the agent, and assented to by the insured. This answer did not disclose the mortgage. The application contained the following condition:

"It is expressly understood and agreed that the valuation of all the property herein described is made by the applicant, and, if this blank be filled out by the agent, it is done at dictation of applicant, and every statement herein contained is to be deemed his own. This company will be bound by no statement made to or by the agent, unless embodied in writing herein."

The policy also contained the following:

"This insurance is based upon the representation contained in the assured's application of even number herewith on file in the company's office in San Francisco, each and every statement of which is hereby specifically made a warranty, and a part hereof; and it is agreed that, if any false statements are made in said application, this policy shall be void. * * * No agent or employé of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agents at San Francisco; and any waiver or alteration by them must be in writing."

The property insured was farm property. It appeared from the testimony of the agent that he had authority to write commercial risks for the company, but no authority to write insurance on farm risks. On the submission of the case to the jury the defendant requested the court to instruct the jury to return a verdict for the defendant. The request was denied, and the jury returned a verdict for the plaintiff. The case was brought here on a writ of error, and it was contended by the plaintiff in error that the court erred in not instructing the jury upon the evidence to find a verdict for the defendant. It was held that, as there was nothing to show that the insurance company would have declined the risk if it had been aware of the fact that a portion of the property insured was under a temporary incumbrance, and nothing to show that either the insured or the agent perpetrated any fraud upon the insurance company, the latter could not avoid the policy by the defense that the insured, in his written application, had falsely warranted that the property insured was not incumbered. The doctrine of this case necessarily includes the rule that the information obtained by the agent concerning the risk will be imputed to the company accepting the services and representations of the agent in securing the insurance contract; but, aside from this principle, applicable to both cases, the two cases are to be distinguished in matters favorable to the validity of the policy under consideration. In the case at bar there is not a particle of evidence tending to show that the insured, either by state-

ment or assent, was guilty of any fraud or deception in representing the condition of the property or the concurrent insurance. On the contrary, there is evidence tending to show that the agent of the company at Seattle was notified by the agent who effected the insurance that the property was incumbered by a mortgage; and there was also evidence tending to show that the agent who effected the insurance had knowledge of the concurrent insurance on the mortgagee's interest.

Defendant also raises the question whether a policy of insurance may be varied by parol, despite any provision to the contrary contained in the instrument. A leading case upon this point is *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71. Caldwell, circuit judge, therein declares the early doctrine on this subject, as maintained in the case of *Carpenter v. Insurance Co.*, 16 Pet. 495, has been so generally denied and repudiated by the courts of the country that it has come to be regarded as obsolete. He says:

"It is contended that consent to other insurance cannot be proved by oral evidence—First, because the policy provides that it shall be in writing, indorsed on the policy; and, second, because it would violate the rule against the reception of oral evidence to contradict or vary a written instrument. But it has been authoritatively decided that a contract of insurance is not within the statute of frauds, and may be by parol (*Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318; *Insurance Co. v. Shaw*, 94 U. S. 574; *Henning v. Insurance Co.*, 2 Dill. 26, Fed. Cas. No. 6,366); and if it can be made by parol it may be varied by parol. Parties to contracts cannot disable themselves from making any contracts allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol, and a parol one changed by a writing, despite any provisions in the contract to the contrary."

In *Insurance Co. v. Wilkinson*, 13 Wall. 222, Mr. Justice Miller refers to the great value of the rule of evidence that a written contract cannot be varied by parol testimony, but further says:

"But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the 'Statute of Frauds,' become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common-law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him."

To the same effect is *Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, where the court say:

"We have no disposition to overrule or qualify in any way the general and familiar doctrine enforced by this court in repeated decisions from the case of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, decided in 1823, to that of *Seitz v. Refrigerating Co.* (decided at the present term) 141 U. S. 510, 12 Sup. Ct. 46, that parol testimony is not admissible to vary, contradict, add to, or qualify the terms of a written instrument. The rule, however, is subject to numerous

qualifications, as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed." *Insurance Co. v. Gray*, 43 Kan. 497, 23 Pac. 637; *Haas v. Insurance Co. (Sup.)* 1 N. Y. Supp. 895; *Insurance Co. v. Earle*, supra; *Insurance Co. v. Wilkinson*, supra.

Parol evidence is admissible to show that the statements given by the insured to the agent of an insurance company were different from those he transcribed in the application he sent to the company. *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291.

The case of *Pechner v. Insurance Co.*, 65 N. Y. 195, was somewhat similar to the case at bar. The main question was whether the policy was void because there was other insurance upon the property without the written consent of the defendant. The jury found a verdict for the plaintiff, under an instruction from the court upon parol evidence. Defendant assigned the ruling as error, claiming that parol evidence could have no influence upon the contract. The court of appeals affirmed the ruling of the lower court in these words:

"This claim is, however, a misapplication of that rule, which is a cardinal one in construction, and simply designed to ascertain the true meaning and intent of a contract, which all parties concede to be valid. It has no application where the validity or existence of the contract itself is in question. It is familiar law that a written instrument may be shown to be void by parol evidence. It may be thus attacked and overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the instrument. If it can be so attacked, it can be sustained in the same manner."

Defendant, however, contends that any knowledge Calhoun & Co. may have had cannot be imputed to the defendant, for the reason that Calhoun & Co. were not its agents in effecting the insurance in this case. The policy in question provides: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed an agent of this company." This provision was not carried out literally with regard to Calhoun & Co., but it is a well-settled rule in the law of agency that the acceptance and approval by the company of the acts of another in behalf of the company constitute a recognized agency. No communication, either written or verbal, passed between the defendant and the insured, touching the issuance of the policy, but the company issued the policy upon the representations of Calhoun & Co., and in pursuance of business methods customary between them; thus ratifying the action of Calhoun & Co. in its behalf, and justifying the conclusion that they were the agents of the defendant in error.

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects, as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted under a mistaken conclusion. He is estopped to take refuge in such a defense." *Bronson's Ex'r v. Chappell*, 12 Wall. 681; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. 76; *Abraham v. Insurance Co.*, 40 Fed. 717.

"An agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind

his company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent, under such circumstances, is to be imputed to the company." *Insurance Co. v. Spiers*, supra.

In *Insurance Co. v. Pearce*, supra, the question involved the power of an insurance solicitor to bind the company. Beals was canvassing for business for the insurance company, and induced Pearce to insure with it. When the application was taken, the solicitor wrote down all of the answers, and read over a part of them to Pearce, who signed them, without knowing all the answers that were in the application. Some of the statements written were false, and, upon a loss occurring, the insurance company denied its liability, claiming the policy to be void, in conformity with the following provision of the policy:

"This indemnity contract is based upon the representations contained in the application, of even number herewith, and which the assured has signed, and permitted to be submitted to this company, and which is made a warranty, and a part hereof; and it is stipulated and agreed that, if any false statements are made in said application, * * * this policy shall be null and void."

The company also disclaimed liability for the acts of Beals, stating that he was merely a solicitor, with power only to take and forward applications. In the lower court the jury rendered a verdict for the insured, and the supreme court affirmed the judgment of that court, saying:

"The company did make him [Beals] its solicitor, and it must be presumed that he was given full power to take applications and give such information to the company as he might obtain either from the applicant or from other sources. For this purpose, at least, he was the agent of the company, with full power; and if he wrote down false statements after he had been truthfully informed by the applicant, and after a personal inspection of the premises, the assured should not suffer for his misrepresentations. * * * We are of the opinion that after the defendant had received the premium of the plaintiff, and issued him a policy, that it was estopped from denying the truth of the statement filled in by its own agent in the application of plaintiff. The knowledge that Beals possessed was, for the purposes of this action, the knowledge of the company. He was acting as its agent, and it was his especial duty to ascertain the actual facts about the risk, as the company made him its agent for that purpose. * * * The current of the later authorities seems to be that the agent who takes the application and obtains the policy must be regarded for those purposes as having full power to act for and bind the company; and, after having received money from the insured, it cannot be heard to say that the statements in the application were false, when there was no fraud or attempt to deceive and misrepresent on the part of the assured."

It is a well-known custom now for insurance companies to accept applications for insurance through the medium and agency of insurance agents or solicitors, who procure the applications, and place the insurance with such companies as they may determine. These solicitors are furnished by the insurance company with printed arguments in favor of the special advantages offered, and stimulating the solicitors or agents to activity by the payment of large commissions on premiums obtained. The party who is thus induced to take out a policy knows little or nothing about the company or its officers, but relies upon the agent who has persuaded him to effect the insurance as the representative of the company

for all purposes of the contract, and certainly has the right to so regard him. The companies have endeavored to establish the doctrine that they can limit the responsibility for the acts of these agents to the receipt of the premium and delivery of the policy, and as to all other acts of the agent he is the agent of the assured. Some of the earlier decisions have supported this doctrine, but the tendency of modern decisions is steadily against it. The testimony shows that both Calhoun & Co. and McKenzie were engaged in business in the city of Seattle as insurance agents; that it was customary among the various insurance agents of Seattle to place business with each other at times; that in accordance with that custom Calhoun & Co. dictated and made the terms of the contract in controversy; that upon receipt of the order for insurance from Barrington, Calhoun & Co. placed \$3,000 thereof with McKenzie, who at once issued the policy of the defendant for that amount in favor of plaintiff's assignor, and returned the policy to Calhoun & Co.; that Calhoun & Co. then pasted on the back of the policy a printed slip containing their business card, and delivered the policy, together with that of the Palatine Company, to Barrington, collecting a portion of the premium at that time. Such acts tended to establish the fact that Calhoun & Co. were the agents of the defendant in this transaction, and the evidence should have been submitted to the jury under proper instructions. *Fidelity & Casualty Co. v. Egbert*, 55 U. S. App. 200, 28 C. C. A. 281, and 84 Fed. 644; *Insurance Co. v. Wilkinson*, supra; *Pitney v. Insurance Co.*, 65 N. Y. 6; *Giddings v. Insurance Co.*, 90 Mo. 272, 2 S. W. 139. It may be said that the insured should have ascertained the correctness of the policy upon receiving it. Barrington, who acted for the insured in the matter, testified that he did open the policy, and note the company insuring, and the amount of insurance, but nothing more. It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides. *Insurance Co. v. Norwood*, supra. In *Kister v. Insurance Co.*, 128 Pa. St. 553, 18 Atl. 447, a policy was issued upon an application in which the agent had written down answers other than those given him by the applicant, and the insured signed the application in ignorance of this fact. The supreme court said:

"A copy of the application accompanied the policy, and it is argued that Kister [insured] could and ought to have read it, and, if he had done so, he would have seen the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. [Citing cases.] One thing is certain, how-

ever: the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

"Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application." *Gristock v. Insurance Co.*, 87 Mich. 428, 49 N. W. 634; *Bennett v. Insurance Co.*, 106 N. Y. 243, 12 N. E. 609.

Upon the law as stated, and a review of the evidence, it is clear that questions of fact were presented which should have been submitted to the jury. The judgment of the circuit court is therefore reversed, and the cause remanded, with instructions to grant a new trial.

In re ARNOLD.

(District Court, D. Kentucky. June 8, 1899.)

BANKRUPTCY—DISSOLUTION OF LIENS—"PERMITTING" ATTACHMENT.

Under Bankruptcy Act 1898, § 67c, providing that an attachment in a suit begun within four months before the filing of a petition in bankruptcy against the defendant shall be dissolved by the adjudication in bankruptcy "if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," the defendant "permits" the creditor to obtain such lien if he suffers grounds for an attachment to arise, and does not in good faith prevent or resist the creditor's proceedings; and it is not necessary that there should have been, on the part of the defendant, any positive act of consent or assistance in its procurement.

In Bankruptcy. On review of ruling of referee in bankruptcy.

William Marble, for claimant.

Ward Headly, for bankrupt.

EVANS, District Judge. In this case the voluntary petition was filed on the 24th day of February, 1899, and the petitioner was adjudicated a bankrupt on the 4th day of March thereafter. At the first meeting of creditors, on the 16th day of March, Phil. Foerg filed a claim for \$766.66, which he had proved as a preferred claim, upon the ground that it was made such by a lien which had been created by the levy of an attachment from the state court, obtained on the 17th of February, 1899. This being within four months before the adjudication in bankruptcy, other creditors resisted Foerg's claim to priority; and, the matter coming up before the referee, he decided against Foerg's claim of preference based upon the lien under his attachment, and held that he was entitled only to participate in the assets of the bankrupt as an ordinary creditor. From this ruling of the referee, Foerg has prosecuted a petition for a review. The facts do not fully appear from the report of the referee, but in the brief filed in the behalf of Foerg this statement is made, namely:

"It is admitted by Foerg, the creditor, that his suit in the state court was commenced, and his attachment was obtained by him and levied, within four months before the filing of the petition in bankruptcy, and also that the attachment was obtained while the defendant was insolvent, and that its existence and enforcement will work a preference."

Clause c of section 67 of the bankrupt act, so far as the same need be considered on this hearing, is as follows:

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference."

The attachment having been levied within four months next preceding the adjudication in bankruptcy, the lien claimed by the creditor as having been thereby secured was dissolved, unless a proper construction of the clause of the bankruptcy law just quoted otherwise requires. As shown, it is admitted that the bankrupt was insolvent when the lien was obtained, and that its existence will work a preference; but it is contended on behalf of the creditor that the lien must not only have been obtained, but that it must have been "permitted" by the bankrupt, by some positive act of consent or assistance in its procurement, in order to work that result. The court does not so understand the law, but is of opinion that the word "permitted," in the section quoted, must be considered as synonymous with "suffered." The bankrupt "permitted" the lien to be obtained when, by not paying the debt, and otherwise, he suffered or allowed or permitted the grounds for the attachment to arise, and when he did not in good faith prevent, or at least resist, the effort of the creditor to obtain the lien by means of the attachment. As it is admitted that the bankrupt was insolvent at the time the lien was obtained, and that the result of the existence of the lien would be a preference to Foerg, the views of the referee were correct, and his ruling is approved.

UNITED STATES v. REISINGER.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 159.

CUSTOMS DUTIES—CLASSIFICATION—STICKS OF CARBON.

Carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which require to be cut into suitable lengths, the ends of which must be pointed or ground, before they can be so used, are dutiable under paragraph 97 of the tariff act of 1897, as articles or wares composed wholly of carbon, not specially provided for, and not under paragraph 98, as carbons for electric lighting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which reversed a decision of the collector of the port of New York touching the assessment of duty upon certain imported merchandise. The facts appear in the opinion.

D. Frank Lloyd, for the United States.

W. Wickham Smith, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This cause arises under the tariff act of 1897. The relevant paragraphs are found in Schedule B, "Earths, Earthenware, and Glassware," and read as follows:

"(97) Articles and wares composed wholly or in chief value of earthy or mineral substances or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem.

"(98) Gas retorts, three dollars each; lava tips for burners, ten cents per gross and fifteen per centum ad valorem; carbons for electric lighting, ninety cents per hundred; filter tubes, forty-five per centum ad valorem; porous carbon pots for electric batteries without metallic connections, twenty per centum ad valorem."

It is contended by the collector that the articles are covered by paragraph 98, as carbons, rods, or sticks for electric lighting. Inasmuch as they were 36 inches long, "which length," he asserts, "is equal to three carbons of the extreme length for electric lighting," the collector assessed them at the rate of \$2.70 per 100 sticks. The board of general appraisers held that they should be classified under paragraph 97. The circuit court held that the collector's classification was correct, but that he should have assessed them at 90 cents per 100 only. 91 Fed. 638. No testimony was taken in the circuit court. The findings of fact returned by the board of general appraisers are supported by the evidence before them, and read as follows:

"(1) The goods consist of sticks or rods of carbon, imported in lengths, respectively, of 36 inches.

"(2) The articles are not suitable or capable of being used for electric lighting in the lengths and condition in which they are imported, but, in order to adapt them for such use, it is necessary to cut them up into shorter lengths, to point some of them, and smooth or grind the ends of others.

"(3) Prior to July 24, 1897 (the date of the present tariff act), carbons of these lengths were not imported into this country. They were then imported commonly in lengths varying from 4½ to 14 inches, and occasionally as long as 16, and perhaps 20, inches; the greater number being 12 inches long."

Accepting these findings as correct, we concur in the conclusion of the board that, although ultimately intended for electric lighting, the fact that it is necessary to bestow further labor on them, in order to fit them for such use, precludes their inclusion in paragraph 98. Inasmuch as they are not specifically provided for in paragraph 98, they come within the general phraseology of paragraph 97, being "articles or wares composed wholly of carbon." This paragraph, it should be noted, is changed from the similar one, in the act of 1894 (paragraph 86), which was recently considered by us in *U. S. v. Reisinger* (Dec. 7, 1898) 33 C. C. A. 395, 91 Fed. 112, by the insertion of the word "carbon." The decision of the circuit court is therefore reversed, and that of the board of general appraisers is affirmed.

WELSBACH LIGHT CO. v. REX INCANDESCENT LIGHT CO.

(Circuit Court, S. D. New York. April 23, 1898.)

PATENTS—INCANDESCENT MANTLES FOR LIGHTS.

The Rawson patent, No. 407,963, for improvements in incandescent mantles for gaslights, *held* valid, and infringed, on motion for a preliminary injunction.

This was a suit in equity by the Welsbach Light Company against the Rex Incandescent Light Company for alleged infringement of a patent for incandescent mantles. The cause was heard on a motion for preliminary injunction.

John R. Bennett, for the motion.

Louis Hicks, opposed.

LACOMBE, Circuit Judge. This is a suit to prevent infringement of the first claim of United States patent No. 407,963, dated July 30, 1889, to Rawson and another, for production of incandescent mantles. This patent was before Judge Townsend, and the claim sustained, in the recent suit in this court of Same Complainant v. Sunlight Incandescent Co., 87 Fed. 221. It was held that the invention covered by the patent was a most meritorious one; that the patentees may be regarded as pioneers; that the patent should not be narrowly interpreted, but should be so construed as to cover a broad range of equivalents; and that it did cover mantles coated "by dipping or immersing them in a solution composed chiefly of collodion, with the addition of a small percentage of castor oil." Under familiar practice, that decision will be followed here unless some peculiar circumstances are shown. No patent, no prior publication, no authority not before Judge Townsend, is presented here. The proposition advanced upon the argument that no serious defense was made in the earlier suit finds no support in the record, in the briefs, or in the argument of counsel for the defendant in that case, a shorthand report of which has been submitted on this motion. Four affidavits (not properly verified for use in this action, but which may nevertheless be filed with the other papers) have been presented, asserting that affiants know of the use of the patented method prior to the patentee's application. This is what usually happens after a patent has been sustained at final hearing, and this court is slow to accept such ex parte statements as sufficient to do away with the presumption arising from a decree at final hearing sustaining the patent. Infringement is sufficiently shown. Indeed, when the patent is broadly construed, as Judge Townsend held it should be, it is hardly disputed. Motion granted.

WELSBACH LIGHT CO. v. APOLLO INCANDESCENT GASLIGHT CO.

(Circuit Court, S. D. New York. July 12, 1898.)

PATENTS—PRELIMINARY INJUNCTION—LAPSING OF FOREIGN PATENT.

The question whether or not the granting of an American patent is improper where a foreign patent for the same invention has lapsed between the application for and the granting of the American patent is of so doubtful a character, under the decisions of the supreme court, that it should not be decided on a motion for preliminary injunction, and such motion should accordingly be denied.

This was a suit in equity by the Welsbach Light Company against the Apollo Incandescent Gaslight Company for alleged infringement of letters patent No. 407,963, granted July 30, 1889, to F. W. & W. S. Rawson, for improvements in incandescent mantles for lights. The cause was heard on a motion for preliminary injunction.

John R. Bennett and Joseph H. Choate, for the motion.
Edmund Wetmore, opposed.

LACOMBE, Circuit Judge. Upon this application the question is raised whether or not, by reason of the circumstance that a prior foreign patent for the same invention lapsed subsequent to the application, but before the issue of the United States patent, such United States patent was improperly issued. Under decisions of the supreme court there is so much doubt as to the correct answer to this question that it should not be decided upon preliminary motion, but upon final hearing, so that the party who may be defeated upon appeal may be in a position to apply to that court for a certiorari, should it be so advised. Motion denied.

WELSBACH LIGHT CO. v. REX INCANDESCENT LIGHT CO.

(Circuit Court, S. D. New York. August 1, 1898.)

PATENTS—PRELIMINARY INJUNCTION.

The fact that a prior foreign patent lapsed between the date of the application and the date of issuance of the American patent renders the latter of such doubtful validity that a preliminary injunction thereon should not be continued.

This was a suit in equity by the Welsbach Light Company against the Rex Incandescent Light Company for alleged infringement of letters patent No. 407,963, issued July 30, 1889, to F. W. & W. S. Rawson, for improvements in incandescent mantles for lights. A preliminary injunction was heretofore granted. See 94 Fed. 1004. The defendant now moves to vacate said preliminary injunction on the ground that a French patent for the same invention had lapsed between the date of the application for the patent in suit and the date of its issuance.

Louis Hicks, for the motion.
John R. Bennett, opposed.

LACOMBE, Circuit Judge. At the time motion for preliminary injunction was made (94 Fed. 1004) defendant knew nothing about expiration of the French patent, and introduced no evidence on that point. Since then the case against the Apollo Company (Welsbach Light Co. v. Apollo Incandescent Gaslight Co., 94 Fed. 1005) came on to be heard, and the defense of expiration of such patent was fully presented. This court found that it raised objections to complainant's relief which should not be passed upon in preliminary motion, and therefore refused injunction pendente lite. Defendant now presents affidavits setting up the facts as to French patent as they were developed on the Apollo Case. Although this defense comes to light rather late, there is no good reason why this particular defendant should be enjoined while others are left free to infringe, and the motion to vacate preliminary injunction is granted, for the reason stated.

WELSBACH LIGHT CO. v. REX INCANDESCENT LIGHT CO.

(Circuit Court, S. D. New York. May 26, 1899.)

1. PATENTS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

When a patent has been established by a decision of a circuit court after careful consideration upon a full record, another judge sitting subsequently in the same court in a different case, upon an application for preliminary injunction on ex parte papers, may well deem himself constrained to adopt the rulings in the prior case, even against his own judgment, when the facts are substantially the same.

2. SAME—EFFECT OF FOREIGN DECISION.

Where a patent has been sustained on final hearing by an American court, the fact that since such decision an English court, construing a British patent for the same invention, has reached a different conclusion, is no reason why the same American court, in a subsequent suit, and on a motion for preliminary injunction, should refuse to follow the earlier American decision, especially when the language of the two patents is not identical.

3. SAME.

The Rawson patent, No. 407,963, for improvements in incandescent mantles for lights, intended to make such mantles stronger, so that they can be handled and transported without breaking, was not anticipated by the French patent to Welsbach, No. 172,064, nor by the English patent to the same inventor, dated December 12, 1885. *Held*, therefore, on motion for preliminary injunction, that the Rawson patent was valid, and infringed.

This is an application for a preliminary injunction against defendant to restrain continued infringement of United States letters patent No. 407,963, for production of incandescent mantles, granted July 30, 1889 (upon application filed August 21, 1888), to F. W. & W. S. Rawson, and subsequently assigned to complainant. The patent states that the invention was patented in England September 1, 1886, in Germany July 24, 1887, and in France November 2, 1887.

John R. Bennett, for the motion.

Louis Hicks, opposed.

LACOMBE, Circuit Judge. The Welsbach incandescent mantle is a light hood or frame, which is suspended over the flame of a Bunsen burner so as to become heated by it to incandescence, causing it to

emit a large body of brilliant light. The hood itself is made of light network fabric,—such as muslin,—which, after being impregnated with solutions of salts of the earthy oxides of rarer metals (such as zirconium, lanthanum, etc.), is exposed to the heat of a flame. “The material of the fabric—generally cotton—is soon consumed, leaving a skeleton hood or frame, consisting of the incombustible or infusible products of the salts that were employed for impregnating the fabric, and this skeleton hood or frame will remain effective as an illuminant for hundreds of hours.” Although strong enough to resist the movements of the ignited gas and the distortions produced by ignition and extinguishment, the hood or mantle is in fact but an ash, extremely fragile, and liable to go to pieces if handled, or allowed to come into contact with any hard body. This peculiarity precludes transportation of the mantles from manufacturer to consumer after the cotton has been burned out, and the article put in the condition for use in which the consumer wishes to have it. To meet this condition, it used to be the practice (and, according to defendant’s affidavits, it is still the practice in Austria) to send the mantles impregnated with the solution of Welsbach, but not burned out at the factory, to the agents of the company, to be by them burned out at their shops, and then placed upon the gas burner in the house of the consumer. It was the object of the Rawsons’ invention to dispense with this method of distribution, and to put the mantles into such a condition that they could, after being burned out, be transported in convenient packages, like other merchandise. The specification sets forth:

That “the object of our improvement is to render these mantles, after ignition, sufficiently hard and resistant to allow of packing and handling without fear of breakage in the transport. * * * Difficulty has been found heretofore in the transport of these mantles without breakage, and various methods have been proposed. This difficulty our invention is designed to overcome by dipping the mantles, after they have been given their proper shape, into a liquid which will thoroughly penetrate the pores of the material, and will afterwards set to such a degree of hardness as to protect the material from danger of breakage in packing or handling, and which can afterward be removed without mechanical injury to the mantles, or without leaving any objectionable residue. * * * We have found that a very satisfactory method of carrying out our invention consists in dipping the cone into a hot solution of volatile hydrocarbon—such as benzine—mixed with paraffine wax or paraffine alone. By these means the mantle is covered with a thin coating of wax, which becomes sufficiently hard on cooling to allow of packing and handling without fear of breakage. The paraffine is capable of burning away without any residue except carbon, which will always be burned completely away by the flame of the Bunsen burner. * * * Other materials may be employed as long as they set hard at ordinary temperatures, and burn away without mechanical destruction to the mantle, and without leaving any residue, which would injure the light-giving properties of the mantle. The materials referred to as being capable of use in lieu of paraffine may be any solid hydrocarbon of a high boiling point, and many resins and gums soluble in spirit, such as alcohol, etc. Shellac will serve the same purpose, but not quite as advantageously.”

The claim is:

“(1) The herein-described improvement in strengthening incandescent mantles, consisting in coating the completed mantle with paraffine or other suitable material, substantially as set forth.”

The patent now in suit came before this court in the case of Welsbach Light Co. v. Sunlight Incandescent Gas Lamp Co., and at final

hearing upon pleadings and proofs, and after a three days' argument, was carefully considered by Judge Townsend. His opinion will be found in 87 Fed. 221. The matters discussed upon that hearing and disposed of in the opinion were anticipation, state of the art, construction of the patent, range of equivalents, and infringement. Reference may be had to the report, but it may be said briefly that the court found that there was no anticipation in the patents of Bright, Gwynn, Toppan, or Clamond; that the state of the art was such that the Rawson invention was a highly meritorious one; that the evidence indicated "not only the presence of inventive genius, but claimed for the invention the rank of a pioneer"; that because the invention was of such rank the patent should not be narrowly interpreted, but should be so construed as to cover a broad range of equivalents; that the process of the Sunlight Company, which consisted in dipping or immersing the burned out mantles in a solution composed chiefly of collodion, with the addition of a small percentage of castor oil, was an infringement, because, although such a collodion solution was not specifically mentioned in the patent, its mode of operation was well known, and it was fairly within the words of the specification, "Other materials may be employed as long as they set hard at ordinary temperatures, and burn away without mechanical destruction to the mantle." In this state of affairs the granting of a preliminary injunction against a defendant using substantially the same collodion mixture, and producing no new evidence of anticipation or as to the state of the art, would seem to be a foregone conclusion; and the writer so held when this application was first made in April, 1898. *Welsbach Light Co. v. Rex Incandescent Co.*, 94 Fed. 1004. Whatever may be the practice in other circuits, there has been here no departure from that laid down in *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229, which indicates that when a patent has been established by a decision of a circuit court, after careful consideration upon a full record, another judge sitting subsequently in the same court upon application for preliminary injunction on ex parte papers might well deem himself constrained, contrary, even, to his own judgment, to adopt the rulings of his own court, since he does not sit as a court of review to reverse upon substantially the same record, the decision of a judge of co-ordinate jurisdiction. A re-examination of the rulings made upon the original hearing is to be sought not in the circuit court, but in the circuit court of appeals. It is not the practice, upon subsequent motions of this character, to go over the entire record before the judge who heard the original cause at final hearing. His statements of fact are assumed to be accurate, and his rulings of law sound. In the case at bar, however, there has been a most persistent reiteration of the proposition that there was to be presented new evidence as to the state of the art, which would be of such a character as to throw a new light upon the record presented to Judge Townsend, and to show that he was entirely misled as to the bearing of the evidence which he considered. With considerable doubt as to the accuracy of this suggestion, this court has again carefully examined the entire record in the Sunlight Case (including the briefs of counsel therein),

and has given close attention to the opinion of Justice Wills in *Sun-light, etc., Co. v. Incandescent, etc., Co.*, 14 Pat. Des. & Trade-Mark Cas. 757, upon which so much stress has been laid. The result has been an entire concurrence in all of Judge Townsend's conclusions. It is difficult to see how, upon the record before him, he could have decided otherwise. Indeed, it is quite apparent that Mr. Justice Wills also regarded the Rawsons' invention as a highly meritorious one, involving "so much of invention and independent thought and consideration that it may very well stand, notwithstanding the anticipation of the idea in the rough," and thought that the alleged anticipations relied on were, as he expresses it, "miles off." It is true that he held a collodion solution not to be an infringement of the English patent which was before him, partly, perhaps, because the English courts are not quite so liberal as our own in applying the doctrine of equivalency in favor of a pioneer patent; but principally because of the phraseology of the specification, which is not identical with that of the American patent. He found that the patentee had a right to claim a large number of substances; that there are substances which "set" by cooling and which "set" by evaporation, both of which they could have included; but that, inasmuch as they used the phrase, "set hard at ordinary temperatures," and did not anywhere in the patent refer to a single substance which would "set" otherwise than by reduction of temperature, they must be confined to a hot-process coating. In the United States patent, however, the patentees mention shellac, which may be used hot, but is usually used cold. It is thought that, in view of the different phraseology of the two patents, there is no conflict between Judge Townsend and Justice Wills; but, if there were, the proposition that this court should follow the English decision as to the range of equivalents rather than that of Judge Townsend, is preposterous.

The next question is, what new evidence, not presented at final hearing, is now before the court? Besides an English patent to Paget, the application for which is subsequent in date to the Rawsons' application for their English patent, two patents to Welsbach have been introduced. The first is a French patent, No. 172,064, deposited November 4, 1885, to which a certificate of addition was deposited April 22, 1886, and published during the third three months of 1886. The part of said certificate of addition relied on reads as follows:

"To protect the tissue, and in particular to prevent it from being injured by the jet of gas, one can introduce into it some stronger threads, as is shown in figure 7. Likewise, in order to strengthen the parts of the finished mantle which are exposed to the first contact with the flame when it is in use, they are covered, by means of a small brush, with a certain quantity of the same solution in a rather concentrated state, or, rather, one plunges them into the solution which, when one heats them anew to incandescence, is also converted to earthy substance. In order to make the finished mantle adhere very firmly to the platinum wire forming a support, the parts in contact with the metallic wire are treated in the same manner. For this purpose one can employ the same solution of salt, or, in preference, a solution of about equal parts of nitrate of magnesium and nitrate of aluminium, to which one can add phosphoric acid. One can also, for this purpose, employ nitrate of beryllium. The mantles can be plunged into the said solutions either before or after the combustion of the fibrous structure."

The second new patent is the English patent to Welsbach, No. 15,266, December 12, 1885, published April 24, 1886. It contains these clauses:

"In order to protect the fabric, and prevent its rupture when it is exposed to a strong current of gas, stronger threads can be added to the fabric before it is converted into ashes. Also the fabric can be painted with, or dipped into, a concentrated solution of the salts, so as to provide a fresh layer of the metallic salts, which become fully oxidized soon after the fabric has become incandescent. In order to strengthen the connection of the cone of earths to the platinum wire, those parts of the fabric which are next the wire are more fully impregnated with the solution, or with a solution of about equal parts of nitrates of magnesium and aluminium."

Exactly what this process of Welsbach's was may be made clearer by quotation from the patents which were before Judge Townsend. The German patent to Welsbach, issued April 15, 1887 (No. 39,612), says: "To protect the tissue, mainly to prevent a bursting of the same by the emanating gases of the flame, stronger threads may be inserted before incineration. For the same purpose, to strengthen the parts of the finished mantle exposed to the first attack of the gases, said parts are covered with a rather concentrated solution of the salts mentioned by means of a little brush, or covered with a new coating by immersing them. Thereafter, through an incandescence of the whole tissue for a second of time, the earths are again set free. To attach the finished earth mantle very firmly to the supporting platinum wire, so that the mantle can withstand any vibration, the parts of the mantle in contact with the platinum wire are treated in the same manner. For this purpose the same solution is used, or, preferably, a solution of about equal parts of nitrates of magnesium and aluminium with an addition of phosphoric acid. Nitrate of beryllium can be used in the same way for the fixation. The mantles may be covered with the above solutions either before or after the incineration. In producing the 'Zirconia mantles,' the mantle is gradually lifted when its upper part is fully incandescent."

In the other German patent, issued to him December 17, 1887 (No. 41,945), Welsbach, by an amendment suggested October 20, 1886, added the following:

"As an incinerated mantle is very delicate, and quite readily destroyed, although knit mantles can even be touched by hand and deformed by gentle pressure, without being destroyed, but will return to their original shape after the pressure is removed, yet such an incandescent mantle cannot stand any longer transportation, especially when exposed to uneven and violent shocks. If, however, such an incinerated mantle is coated with a substance which is not brittle, and can be burned with perfect ease, and which will permit of the single particles being displaced only within their limit of elasticity, the incandescent body, even in its incinerated condition, will stand without danger any transportation. To produce this coating, the ready incinerated mantle is dipped for a moment into a very dilute solution of caoutchouc, or into collodion, or some like substance, and is then slowly dried. At the first moment of the subsequent incandescence of the mantle, this coating is completely destroyed by the flame, and the mantle is left behind in its original shape."

For this no claim is made in No. 41,945. These two patents last quoted from, it will be noted, are subsequent to Rawsons' invention as disclosed in the English patent of September 1, 1886.

It is quite apparent that the process set forth in the two new patents is not the same as that described in those last quoted from, which were before Judge Townsend; and it seems entirely clear that it involves a different invention from that covered by the patent in suit. What Welsbach disclosed in those earlier patents was a subsidiary treatment, which lay closely within the lines of his original invention.

By substantially repeating his original process, he reinforced his mantle so that it might the better withstand the strains to which it might be subjected while in use. He had no intention thereby to protect such mantle, and there is not a scintilla of evidence to show that he did by such process in fact protect his mantle, against the rough handling of transportation. Subsequent to the dates of these early patents, he refers to his mantle as too fragile to withstand contact with hard substances. That he himself regarded the two processes as involving different inventions is apparent from the history of the abandoned application for United States patent, which he made with Haitinger, March 31, 1888. In this both processes are described separately, and separately claimed. The process of strengthening by dipping in a very dilute solution of caoutchouc, collodion, and the like, etc., was rejected upon the Rawsons' English patent. Thereupon the application was abandoned, and Welsbach subsequently applied for and obtained United States patent for his process of re-enforcement by re-immersion in his original solution. The new patents therefore do not impair in any way the soundness of Judge Townsend's conclusion as to the novelty and meritoriousness of the patent. The suggestion of lack of utility is wholly without weight. If the "soft mantles"—that is, mantles from which the cotton has not been burned out—are quite as convenient for distribution and use as those which have been treated according to the process of the patent, defendant may freely use them. But the exhibition on the argument inclines the court to the opinion that the consumer is likely to prefer the improved article.

Defendant has introduced four affidavits to show prior use at the laboratory of one Charles M. Lungren. Lungren himself, however, in an answering affidavit, fixes the date (by reference to the formation of the Lungren Incandescent Gas Light Company) too late to affect the validity of the patent. Accepting the conclusion in the Sunlight Case that the patentees are entitled to a liberal application of the doctrine of equivalents, it is unnecessary to discuss the question of infringement. The solution of the defendant in this case is substantially the same as in the Sunlight Case (collodion and castor oil), with a slight admixture of water. Preliminary injunction may issue.

HAWGOOD & AVERY TRANSIT CO. v. DINGMAN et al.

BARRY TOWING & WRECKING CO. et al. v. INTER-OCEAN COAL & COKE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1899.)

Nos. 1,149, 1,150.

1. MARITIME LIEN—SUIT TO ENFORCE—EFFECT OF RELEASE ON BOND.

A release to a claimant under an appraisal and stipulation or bond, not made under the limited liability act, of a part of the res seized under a libel in admiralty has the same effect upon the liens upon the part released that a discharge of the entire res under a like appraisal and stipulation or bond would have had upon the liens upon the whole thing, which

is to discharge the liens of those who were parties to the proceeding when the release was made, but no others.

2. SAME—INCONSISTENT CLAIMS.

An intervener in a suit to enforce liens against a vessel, who claims ownership of a part of the property libeled, and obtains its release on appraisal and bond, cannot, by subsequently setting up a claim to a lien in his own behalf, become entitled to share in the proceeds of the bond and the remaining property.

3. SAME—NECESSITY OF CROSS LIBEL.

Respondents in a suit to enforce maritime liens are required to file cross libels, to take out process, and have it served in the usual way, if they have liens which they wish to enforce, and cannot obtain such relief by merely pleading their claims in their answers.

Appeals from the District Court of the United States for the District of Minnesota.

These are appeals from two decrees in admiralty rendered in proceedings against the steamer Belle P. Cross. On December 14, 1896, Gustave Herman, Ralph E. Herman, and Edward G. Ashley filed a libel in the court below against this steamer, her engine, boilers, tackle, apparel, and furniture. This libel was in the usual form, except that it contained an allegation that, after the supplies on account of which it was filed had been furnished, the owner of the vessel had taken her engine, boilers, and machinery out of her hull, and had placed them in the steam tug G. A. Tomlinson. A monition issued on the libel, and the marshal arrested the hull of the Belle P. Cross, and also her engine, boilers, and machinery, which he found in the G. A. Tomlinson. On March 8, 1897, the appellant the Hawgood & Avery Transit Company petitioned the court for an appraisal of the engine, boilers, and machinery in the Tomlinson. An appraiser was appointed, and an appraisal thereof was made pursuant to a stipulation signed by the transit company, and all those who had then filed libels against the steamer Belle P. Cross or its engine, boilers, and machinery. This stipulation recited that it was made "for the purpose of fixing a value thereto, and to enable said property to be released under the provisions of rule 17 of this court and the statute in such case made and provided." The appraiser fixed the value of the engine, boilers, and machinery at \$2,000. The transit company executed and filed a bond for this amount for the benefit of "whom it may concern," conditioned that if that company should abide by all the orders of the court, and pay the amount awarded by the final decree, the bond should be void. Upon the filing of this bond, and on March 10, 1897, the engine, boilers, and machinery were released and surrendered to the transit company pursuant to an order of the court to that effect. But the hull of the steamer Belle P. Cross remained in the possession of the marshal. After this release, and on April 3, 1897, the Inter-Ocean Coal & Coke Company filed an intervening libel against the Belle P. Cross and her boilers, engine, and machinery, and caused the engine, boilers, and machinery to be again arrested in the tug Tomlinson under a monition issued upon this libel. On September 4, 1897, the Barry Towing & Wrecking Company, which had succeeded to the title of the transit company, filed a claim for this engine, these boilers, and this machinery, and gave a bond in the sum of \$2,329.66 to R. T. O'Connor, the marshal of the district, which recited the filing of the intervening libel and the seizure of the engine, boilers, and machinery thereunder, and was conditioned that the wrecking company should abide by and perform the decree of the court in relation to the claim of the coal and coke company. On September 11, 1895, the wrecking company filed an answer to the intervening libel, in which it set forth the prior proceedings, which we have detailed, alleged that it had bought the engine, boilers, and machinery for value, and without notice, on April 1, 1897, that it was the owner thereof, and that the release of March 10, 1897, discharged this property from all maritime liens. Meanwhile the hull of the steamer Belle P. Cross had been condemned and sold, and the proceeds of the sale, which were only \$310,

had been paid into the registry of the court. Upon the final hearing the court below entered two decrees, one to the effect that the money in the registry of the court and the proceeds of the bond of the transit company of March 4, 1897, should be distributed among those who had filed their libels prior to March 10, 1897, and the other to the effect that N. J. Trodo, who had become the assignee of the coal and coke company, should have summary judgment for \$1,333.53 and interest, the amount of that company's claim, against the Barry Towing & Wrecking Company and the sureties upon its bond of September 4, 1897. From these decrees the transit company and the wrecking company have appealed.

Harvey D. Goulder (F. E. Searle and H. R. Spencer, on the brief), for appellants.

Isaac N. Huntsberger and Roger M. Lee (John H. Norton and Francis W. Sullivan, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above, delivered the opinion of the court.

The questions presented in this case turn upon the legal effect of the discharge of the engine, boilers, and machinery upon the appraisal and bond on March 10, 1897. If that discharge released this property from the maritime liens of those who had not then filed their libels in the court below, the decrees were erroneous; but if it left these liens unimpaired, and discharged the property from the liens of those who were then parties to the proceedings only, they were right. The theory of the appellants is that the bond of March 4, 1897, became a substitute for the engine, boilers, and machinery as to all who claimed maritime liens upon this property, whether they had presented their liens in the court below or not when the bond was given and the machinery was released. Upon this theory they insist that the court erred in refusing to include the Inter-Ocean Coal & Coke Company, or its assignee, and the Hawgood & Avery Transit Company, among the distributees of the proceeds of that bond, although neither of them had filed any libel against or pleaded any lien upon the machinery or the vessel when this bond was given, and they contend that the seizure of the machinery under the subsequent libel of the coal and coke company and the decree that the wrecking company and the sureties on its bond shall pay the claim of that company are erroneous, because, as they say, the machinery was discharged of all maritime liens by the substitution of the earlier bond in its place on March 10, 1897. When a ship which has been arrested under a libel is released upon an appraisal and a deposit, or a bond, or a stipulation, not given under the limited liability act, the deposit or bond or stipulation is substituted for the vessel as to all those who have then filed their libels and become parties to the proceeding, but as to no other parties. The proceeds of the deposit, bond, or stipulation inure to the benefit of those who were parties to the proceeding when the release was made. But they inure to the benefit of no others. The vessel is discharged from the liens of these parties, and from their liens only. Lienholders who have not filed their libels, and have not become parties to the proceeding when the ship is discharged, may not be permitted to share in the

proceeds of the deposit or bond or stipulation, and their liens are neither detached nor affected by the release. The vessel returns to the claimant subject to the maritime liens of all who were not parties to the proceeding before the discharge was made, and they may libel and arrest her to enforce their liens to the same extent and with the same effect as though she had never been seized before. Rev. St. §§ 940, 941; Adm. Rules, 11, 26; *The Langdon Cheves*, 2 Mason, 58, Fed. Cas. No. 8,063; *The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346; *The Antelope*, 1 Ben. 521, Fed. Cas. No. 481; *The Haytian Republic*, 57 Fed. 508, 509; *Id.*, 154 U. S. 118, 14 Sup. Ct. 992; *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804. If the transit company in the case at bar had claimed both the hull and the machinery of the steamer, and had procured the appraisal and given the bond for the entire res, and the vessel and machinery had both been discharged thereunder, the right of the coal and coke company to subsequently libel her and to enforce its lien by seizure and sale of every part of the vessel and of the machinery could not have been successfully questioned under these authorities. The reason for this rule is that the maritime lien of that company had attached to every part of the ship and to every part of her machinery before any libel was filed against her, and the acts of third parties in seizing her and releasing her on an appraisal and bond could not affect the right and lien of this company in its absence, and without its consent. On this ground all the authorities are that, if the entire thing had been libeled and discharged here, the lien of the coal and coke company would have remained untouched. How, then, could a discharge of a part of this thing have a greater effect than the release of the whole? Every reason which tends to support the lien of the absent holder when the entire thing is discharged pleads with equal cogency for its maintenance when only a part is released. The lien attaches to every part as much as to the whole. If one-half, two-thirds, or any other portion of the res is destroyed, the maritime lien still adheres to the remnant that has escaped, and no persuasive reason occurs to us why it should not hold as firmly every part which has been released from a seizure made by strangers to pay their debts. Any other rule would permit the first libelants and the owner to destroy the value of the liens of all others by an appraisal and discharge of the valuable part of the thing seized, leaving, as in this case, nothing but a worthless remnant for their satisfaction. Every consideration of reason and of equity demands that the same rule should apply to a discharge of a part which governs the release of the whole. Our conclusion is that a release to a claimant under an appraisal and stipulation or bond, not made under the limited liability act, of a part of the res seized under a libel in admiralty, has the same effect upon the liens upon the part released that a discharge of the entire res under a like appraisal and stipulation or bond would have had upon the liens upon the whole thing. The result of this conclusion is that there was no error in the decrees of the court below. The coal and coke company was not entitled to share in the distribution of the proceeds of the bond given by the transit company on March 4, 1897, as the claimant of the engine, boilers, and machinery, because it had not

filed its libel when they were discharged under that bond. The transit company had no right to share in the proceeds of that bond as the assignee of the maritime lien of the Phenix Iron Works, because it had not filed any libel to enforce that lien, nor had it pleaded the same, or made any claim upon it in any way, when the engine, boilers, and machinery were discharged under that bond on March 10, 1897. The course of the transit company was this: It appeared on March 5, 1897, and filed a claim for the engine, boilers, and machinery, in which it alleged that it was the owner thereof. On March 6, 1897, it filed a petition for leave to intervene, in which it pleaded that it had an interest in the vessel by reason of a mortgage. But it was not until May 8, 1897, that it first presented to the court below the claim that it had a maritime lien which it had derived from the Phenix Iron Works. The engine, boilers, and machinery had then been discharged under the bond of March 4, 1897, and it was too late for the transit company to present a claim to share with the libelants who were parties to the cause on March 10, 1897, in the proceeds of a bond which they had secured for their own benefit. Not only this, but the transit company was prevented from asserting such a claim as against those libelants by the fact that it had induced them to accept its bond, and to return to it the engine, boilers, and machinery, by its silence regarding the maritime lien it now urges, and by its positive averment in its claim to the property that it was the owner of it. *Chase v. Driver*, 92 Fed. 780. Moreover, the transit company did not present its claim to enforce this maritime lien in a libel or a cross libel. It merely pleaded it in its answer. When the machinery was released by the order of March 10, 1897, it undoubtedly went back to this company, subject to all the maritime liens that had not been presented to the court below before the property was discharged. That company might have filed a libel or a cross libel, and it might have caused this machinery to be arrested upon the maritime lien it now presses. But it could not have acquired any right to enforce that lien, or to share in the distribution of the proceeds of the engine, boilers, and machinery, or in the proceeds of a bond or a stipulation taken for them by other parties, by simply setting it forth in its answer. Respondents in a libel suit are required to file a cross libel, to take out process, and have it served in the usual way, if they have maritime liens which they desire to enforce. *Ward v. Chamberlain*, 21 How. 572, 574. The coal and coke company pursued the proper and legal course to enforce its lien. After the machinery had been released from the liens of all the libelants who had appeared in court before March 10, 1897, it caused the engine, boilers, and machinery to be arrested upon a monition issued upon a libel against the ship and its machinery, which it filed subsequent to that date. The decree of the court below that its lien existed, and that the wrecking company and its sureties were liable upon the bond which they gave to abide by and perform the decree upon this libel, was in accordance with the rules and principles of law to which we have referred, and both the decrees below must be affirmed. It is so ordered.

THE HAXBY.

(District Court, E. D. Pennsylvania. June 27, 1899.)

No. 15.

ADMIRALTY JURISDICTION—SUIT FOR INJURY TO PIER.

A "pier," in the ordinary meaning of the word, is a projection of the land, and is to be treated as land for purposes of jurisdiction; hence a suit for an injury to a pier by a vessel, where the libel uses the word without any qualifying adjective, is not within the jurisdiction of a court of admiralty.

In Admiralty. On exceptions to libel.

John G. Johnson, for libellant.

Convers & Kirlin, for respondent.

McPHERSON, District Judge. This is an action in rem, to enforce a maritime lien. The libellant avers that the steamship was so negligently managed that she crashed into and injured a "pier" in the navigable waters of the Delaware river, thereby doing the damage complained of. The exceptions raise the question whether the case is within the admiralty jurisdiction; the point being whether the pier is to be regarded as land or as water. It is unnecessary to cite authorities in support of the proposition that the jurisdiction of admiralty to redress a tort depends upon the point in space where the injury was done. In the case now before the court the injury was done to a pier, and the only matter for consideration is whether or not this structure is, for the present purpose, a part of the land. In the sense in which the word is used in the libel, I have no doubt that it means a part of the land. The Century Dictionary defines a pier to be "a projecting quay, wharf, or other landing place"; and, without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land, and for purposes of jurisdiction it should be so treated. It is conceivable, of course, that a pier might also be built to float upon the surface of the water; but it is then a floating pier, and needs the adjective before the description is complete. In the case now in controversy, it is not denied that the pier was an immovable, and not a floating, structure. It seems clear to me, therefore, that in legal contemplation it was land, and that the injury sued for must be redressed by the common law, and not by the admiralty. The exceptions are sustained, and the libel is dismissed.

THE FRED M. LAWRENCE et al.

(Circuit Court of Appeals, Second Circuit. May 25, 1899.)

No. 153.

ADMIRALTY—SUIT IN REM—PROCEDURE ON INSOLVENCY OF SURETY ON RELEASE BOND.

In a suit in rem for collision, where the vessel attached had been released on stipulation, on the insolvency of claimant's sureties an order was made pursuant to a rule of court requiring the claimant to furnish additional security, and, on a failure to comply with such order, the claimant's answer was stricken out, and a decree entered pro confesso for an amount of damages ascertained on a reference by a commissioner. *Held*, that the striking out of the answer and entry of the decree could not be deemed a punishment of the claimant for failure to obey the court's order, but was a proper procedure to bring to an end a proceeding in rem in which, through the fault of the claimant, the libellant had neither the res nor security.

Appeal from the District Court of the United States for the Eastern District of New York.

On September 30, 1893, a libel in rem was filed in the district court for the Eastern district of New York against the canal boat Fred M. Lawrence by the Union Marine Insurance Company to recover damages for a collision, and the vessel was attached, whereupon Elizabeth E. Hickok filed her claim as owner, and the value of the vessel was fixed by consent at \$3,400. The said Hickok, Alfred Hamilton, and Edward M. Clarkson entered into a stipulation that, in case of default or contumacy on the part of the claimant or her sureties, execution for the agreed value, with interest thereon, might issue against their goods, chattels, and lands, and the vessel was released. The condition of the stipulation was, in substance, that, if the stipulators should at any time upon the interlocutory or final order or decree of the district court or appellate court, and upon notice to the proctors for the claimant, pay the money awarded by the final decree, the stipulation should be void. The claimant filed her answer on December 16, 1893. Nothing more was done in the case until April 16, 1898, when a motion was made, which was granted on June 8, 1898, that, by reason of the insolvency of the sureties, the claimant or her sureties should furnish better and sufficient security at a specified time, and, if not furnished, the answer should be deemed stricken out. This order was made by authority of rule 23 of the district court, which was made pursuant to section 913 of the Revised Statutes. Rule 23 is as follows: "In all cases of stipulations in civil and admiralty causes, any party having an interest in the subject-matter may at any time, on two days' notice, move the court on special cause shown for greater or better security; and any order made thereon may be enforced by attachment or otherwise." The order was not complied with, and on June 25th it was ordered that the answer should be deemed stricken out, and that the libel should be taken pro confesso against the claimant and her sureties, and should be referred to a commissioner to report the damages. Counsel for the claimant attended upon the reference and upon the commissioner's report, which found the damage to have been \$3,266.39, and the interest thereon to be \$970.65. A decree was entered that the libellant recover from the Fred M. Lawrence, the claimant, and the stipulators the amount thus found and costs, and that, unless the decree was satisfied within a specified time, the stipulators for costs and value on the part of the owner show cause within a specified time why execution should not issue against them. From this decree the claimant and the sureties have appealed, upon the ground that the district court was without authority to order that the answer should be stricken out, or that the libel should be taken pro confesso.

Philip Carpenter, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. It is true that a court cannot deprive a defendant of the opportunity to appear, or, after a seasonable appearance, to defend, either as a punishment, or because he may be deemed to have forfeited such rights by any misconduct. In such case, "a sentence of a court pronounced against a party without giving him an opportunity to be heard is not a judicial determination of his rights." *Windsor v. McVeigh*, 93 U. S. 274; *McVeigh v. U. S.* 11 Wall. 259. The power of a court, which can punish for contempt, to strike the answer of a defendant from the files and render judgment against him, because he has been guilty of an aggravated contempt of court, was exhaustively examined and was denied in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841.

In this case the order that the libel be taken *pro confesso* was not a punishment, but was an order made upon the default of the claimant and her sureties, and the decree was upon an ascertainment of damages after the default. This is manifest from the nature of the proceeding and of the stipulation. In a suit in admiralty in rem, the vessel, which is the offending thing, is the defendant. "The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly." *The Moses Taylor*, 4 Wall. 411. Throughout the entire proceedings she is acting either in conformity with the rules of court or is in default. When the vessel, which is in the custody of the marshal, is permitted to be restored to the claimant upon his entering into a stipulation in a sum equal to the appraised value of the property, the stipulation "becomes a substitute for the thing itself, and, if judgment passes for the libellant, it is entered on the bond or stipulation, and execution issues accordingly," and the stipulators are liable for the consequences of a default. *Lane v. Townsend, Ware*, 289, Fed. Cas. No. 8,054; *The Nied Elwin*, 1 Dod. 53. The discharge of the vessel is so absolute that it was held by Justice Nelson that the court cannot order a rearrest when she has been fairly discharged on the customary stipulation (*The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346; *The White Squall*, 4 Blatchf. 103, Fed. Cas. No. 17,570); but the English authorities are not uniform on this subject (*The Hero*, Brown & L. 447; *The Freedom*, L. R. 3 P. C. 594). Therefore, when the vessel has been discharged, and the stipulation becomes worthless, the libellant is remediless, unless new security can be given, and the power of the district court to make a rule for the relief of libellants who are in this situation cannot be properly questioned. *The Virgo*, 13 Blatchf. 255, Fed. Cas. No. 16,976; *The City of Hartford*, 11 Fed. 89. In pursuance of the rule, an order was made in this case, with the result that the inability of the claimant and sureties to furnish better security was admitted and she was in default. The order for the ascertainment of damages was not a punishment, but was to enable the libellant to bring to an end a proceeding in rem in which, through the default of the claimant, it had neither res nor substitute. The undertaking of the stipulators was to answer for

the default of the claimant, and they are liable accordingly. *Todd v. The Tulchen*, 2 Fed. 600. The decree of the district court is affirmed, with costs.

THE F. W. DEVOE.

(District Court, E. D. New York. June 9, 1899.)

COLLISION—NEGLIGENT NAVIGATION OF TUG ALONG PIERS.

Laws N. Y. 1897, c. 378, § 879, making it unlawful for vessels to obstruct navigation in the East and North rivers by lying outside the piers, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier, does not affect the right of a vessel lying beyond the end of a pier to recover for an injury caused by a collision with it of a passing tow through the negligent navigation of the tug, which was neither entering nor leaving an adjacent dock.

This was a suit in rem to recover damages for collision.

Wilcox, Adams & Green, for libellant.

Peter S. Carter, for claimant.

THOMAS, District Judge. At about 7:15 p. m. on the 5th day of August, 1898, a scow in the tow of the claimant's tug collided with the libellant's lighter, which was lying outside of two other lighters at the end of pier 8, Brooklyn. For this no sufficient excuse is offered, and hence the negligence of the tug is established. However, the claimant answers that the lighter was lying off the end of the pier, in violation of section 879, c. 378, Laws N. Y. 1897, which provides:

"It shall not be lawful for any vessel, canalboat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East rivers, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; and any vessel, canalboat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

It does not appear that the claimant's tug or tow was "entering or leaving any adjacent dock or pier," but that the tug had passed the lighter, and that several of the scows in the tow struck the same. The excuse of the master of the tug is that he had orders to go to pier 7 to pick up another scow; that in fact the order related to pier 7 New York, instead of pier 7 on the Brooklyn side; and that, to effect his mistaken purpose, it was necessary for the tug with her tow to pass near to, and along the outer end of, pier 8, to pier 7, where the scow lay. The court is disinclined to believe, from the course pursued, that the tug had any such purpose in view. It was doing nothing that indicated a purpose to enter the slip, and the accident did not happen while it was doing any act within the meaning of the statute. The claim seems to be that a tug with a tow can navigate the river along the piers, and sweep away all the vessels in its path, at the peril of the destroyed or injured shipping. Such a disregard of the safety of property will not be sanctioned by this court. Let a decree be entered for the libellant, with costs.

MEMORANDUM DECISIONS.**THE ANDREW J. WHITE.**

(District Court, S. D. New York. June 29, 1890.)

COLLISION—EVIDENCE CONSIDERED.

In Admiralty. Collision.

Carpenter & Park, for libelant.
James J. Macklin, for respondent.

BROWN, District Judge. The libel charges that the libelant's canal boat, Michael E. Kiley, while lying inside the slip at the foot of Sixty-Second street, North river, was run into by a car float, which was in charge of the steam tug Andrew J. White and which had broken loose and been allowed to run into the slip and damage the libelant's boat. The damage occurred early in the morning of February 16, 1898, probably about 5 o'clock, during a storm of wind and rain.

Notwithstanding the very diligent effort of libelant's counsel to make out a case against the White and her float, I am satisfied from a careful consideration of all the circumstances and testimony that there is not satisfactory evidence that the damage was done by the White, so as to warrant a decree in the libelant's favor. All the witnesses from the tug and float testify that the float did not break loose after getting out in midriver opposite about Seventieth street, but came down in midriver or a little to the westward, nearer to the Jersey shore, and so on around the Battery, and that at no time were they anywhere near the slip at the foot of Sixty-Second street, where the libelant's boat lay. The libelant seeks to meet this testimony in part by the direct evidence of two or three persons in the slip who claimed to recognize the float and the tug White, and in part by hearsay evidence or impeaching testimony. The argument is mainly upon hypothesis; and I think imagination plays too large a part in the case. The first witness called was a woman of 70, who swore to the identity of the float by seeing distinctly names which were never upon it. The libelant claims that because the float was let loose from the tug at one time while backing from the center of the float bridge at Sixty-Eighth street, and in shifting before going down river, that the float broke loose and drifted down river in the ebb tide and was carried by the wind into the slip. This is theory only. It is contradicted by the evidence that it was not high water at Governor's Island until 3:30; and as the current runs flood in the North river at least two hours after high water or about two and one-half hours at Seventieth street, the tug could not have drifted down at that time as supposed, but on the contrary she would drift up somewhat while she was shifting, as the witnesses for the float testify. The injury to the rill of the float it seems to me is clearly shown not to have arisen from the supposed collision.

Without going further into the numerous particulars which have been most industriously argued, I am satisfied that the evidence is insufficient to warrant a decree, and the libel should, therefore, be dismissed, without costs.

ASCHE et al. v. UNITED STATES. (Circuit Court, S. D. New York. May 27, 1899.) No. 2,762. Edward Hartley, for importers. H. P. Disbecker, Asst. U. S. Atty.

TOWNSEND, District Judge. The contention herein arises over certain "feathers and down" for beds, classified for duty, under paragraph 425 of the act of 1897, as "dressed or otherwise advanced or manufactured in any manner," at 50 per cent. ad valorem, and protested as "crude or not dressed," at

15 per cent. ad valorem, under said paragraph. Upon the hearing I reached the conclusion that the merchandise was crude feathers and downs, and made an oral statement to that effect. I have since thoroughly examined all the conflicting testimony and the opinion of the board of appraisers thereon, and am of the opinion that the evidence justified the finding of the board "that the goods are feathers and downs, advanced in value and condition above the condition of crude feathers and downs." The decision of the board of general appraisers therefore should not be disturbed. *White v. U. S.*, 18 C. C. A. 541, 72 Fed. 251.

BADISCHE ANILIN & SODA FABRIK v. MATHESON et al. (Circuit Court, S. D. New York. June 8, 1899.) Motion for Preliminary Injunction. Livingston Gifford, for the motion. Henry P. Wells, opposed.

LACOMBE, Circuit Judge. Judge Coxe has held this patent valid, having before him the very evidence as to the Casella German patent and as to the publications in this country on which defendant seems to rely. 94 Fed. 163. This court therefore starts with the proposition that the patent is valid, and, since it is not disputed that defendant's product responds to all the tests of the patent, it must be held to be an infringement.

BRADDOCK v. LOUCHHEIM et al. (Circuit Court of Appeals, Third Circuit. May 5, 1899.) No. 35. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Dismissed pursuant to the sixteenth rule. See 87 Fed. 287.

FAYERWEATHER et al. v. RITCH et al. (Circuit Court, S. D. New York. June 26, 1899.) Motion to Amend Bill of Complaint. Roger M. Sherman, for the motion. James L. Bishop and C. N. Bovie, opposed.

LACOMBE, Circuit Judge. The motion to amend is granted as prayed. This practically reopens the whole case, and all parties defendant will have 20 days' time after service of the amended bill to plead, answer, or demur thereto. The case being thus reopened, a plea or a demurrer, if interposed, will be considered as a first dilatory pleading, and, in the event of its being overruled, the party interposing it will be allowed to answer. The defendants trustees of Hamilton College may have 20 days to elect whether it will plead, answer, or demur to the amended bill, or whether it will stand on the evidence already taken on the issues raised by its present plea and replication thereto, and the submission thereof heretofore made to this court.

HUI GNOW DOY v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. May 17, 1899.) No. 542. Appeal from the District Court of the United States for the Northern District of California. Dismissed pursuant to the sixteenth rule. See 91 Fed. 1006.

KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO. v. CONVERSE. (Circuit Court of Appeals, Seventh Circuit. June 30, 1899.) No. 572. In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. Charles C. Aldrich, for plaintiff in error. Clark Varnum, for defendant in error. Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

PER CURIAM. The questions now presented, it is conceded, are concluded by the decision rendered upon a prior writ of error in the case. See 60 U. S. App. 288, 93 Fed. 148. The judgment is therefore affirmed. The clerk is directed to withhold mandate until the further order of the court.

KNOWLES LOOM WORKS v. RYLE. (Circuit Court, E. D. Pennsylvania. July 10, 1899.) Motion by Defendant for Judgment Notwithstanding the Verdict. J. Martin Rommel and J. G. Johnson, for plaintiff. Hampton L. Carson and Shiland & Honeyman, for defendant.

McPHERSON, District Judge. Two questions are raised by this motion:

1. Is the defendant a bona fide purchaser for value of the silk company's bonds, so that he is at liberty to question the legal validity of the so-called "lease" made by the plaintiff to the silk company? There is no dispute upon this point. The question must be answered in the affirmative.

2. Was the contract between the plaintiff and the silk company a bailment or a conditional sale? To this question I think the answer must be that the contract was a conditional sale; the consequence being that it cannot be enforced against the defendant. It is unnecessary to discuss the testimony upon this point. I have read the notes of both trials, and see no essential difference between what appeared then and what appears now. There was a larger volume of testimony upon the second trial, but there is nothing to take the case out of the decision of the circuit court of appeals. 31 C. C. A. 340, 87 Fed. 976. The letter of March 16th summed up the preliminary negotiations between the parties, and constituted, as the court of appeals has said, "the original contract relating to this machinery." The parties may now insist that the contract was verbal, but, in view of the uncontradicted testimony, I am of a different opinion. With respect to the paper signed upon July 12, 1895, I do not think that the testimony taken upon the second trial in any degree changes the situation as it was presented to the court of appeals. It is still necessary to say, as the court then said: "Regarding the two instruments of March 16th and July 12th as parts of one and the same transaction,—which is the most favorable view that can be taken for the Knowles Loom Works,—the conclusion is irresistible, that the transaction is not a bailment, but a sale of the machinery, with the lease as security for the price." Of course, if the above conclusions are correct, the plaintiff's argument that the looms were not fixtures, because the parties to the contract did not intend them to be fixtures, need not be considered. If the looms were sold, and not leased, the plaintiff had no further interest in them, and has no standing to insist now that they did not become fixtures. We direct judgment to be entered for the defendant upon the reserved point notwithstanding the verdict. Exception to the plaintiff.

MORGAN et al. v. EMPIRE RUBBER MFG. CO. (Circuit Court, S. D. New York. June 26, 1899.) Motion to Punish for Contempt. D. W. Cooper, for the motion. Edward P. Lyon, opposed.

LACOMBE, Circuit Judge. Neither the decree nor the injunction contain any reservation to defendant of the right to sell any of the old stock on hand. Upon the record, then, defendant is guilty of contempt. It is contended in its behalf that there was at the time of the entry of the decree some verbal agreement to allow it to dispose of the few infringing articles it then possessed. This contention is disputed, but apparently defendant's officers believed such agreement was made. A nominal fine of \$25 seems sufficient penalty, under these circumstances, for disobedience of the injunction.

THE PAVONIA. GEORGE et al. v. CUNARD S. S. CO. (Circuit Court of Appeals, First Circuit. June 13, 1899.) No. 106. Appeal from the District Court of the United States for the District of Massachusetts. Charles T. Rus-

sell, William E. Russell, and Arthur H. Russell, for appellants. George Putnam and Thomas Russell, for appellee. Dismissed, without costs, pursuant to stipulation of parties.

PATCH MFG. CO. v. TINSMAN et al. (Circuit Court, E. D. Pennsylvania. June 30, 1899.) Motion for New Trial. Candor & Munson, for plaintiff. James M. Beck, for defendant.

MCPHERSON, District Judge. I have considered all the reasons for a new trial that were pressed upon the argument of this motion, but they do not convince me that another trial should be had. With reference to my apparent failure to say to the jury that the foundations were to be put up according to the plaintiff's plans, I think I need only say that the point does not seem of great importance; but, if it is thought worthy of serious attention, it is enough to add that the jury had just heard the defendants' argument, in which this matter was urged upon them, and that the contract was taken out by the jury, and was, no doubt, read and considered. I have a distinct recollection, also, of having mentioned this fact to the jury, although the stenographer's notes do not show it. Moreover, the amount of the verdict shows conclusively that the machinery had been accepted by the defendants, and therefore it is less important to weigh scrupulously other matters complained of. There was positive evidence upon both sides of this question, and the verdict has abundant support. A new trial is refused, and judgment is directed upon the verdict.

SARRAZIN v. PRESTON et al.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1899.)

TRADE-MARKS—TRANSFER—EFFECT OF ASSIGNMENT IN INSOLVENCY.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. For the reasons given in *Sarrazin v. Tobacco Co.* (recently decided) 93 Fed. 624, the judgment of the circuit court is affirmed.

SAVINGS BANK OF EAST SAGINAW v. HOWRY et al. (Circuit Court of Appeals, First Circuit. June 7, 1899.) No. 274. Appeal from the District Court of the United States for the District of Massachusetts. Charles P. Searle, for appellant. William C. Wait, for appellees. Dismissed for failure to print record.

UNITED STATES v. PING YIK. (District Court, N. D. New York. June 14, 1899.) Wesley C. Dudley, Asst. U. S. Atty. Richard Crowley, for defendant.

COXE, District Judge. Although there is a difference in some particulars between this and the preceding case (94 Fed. 824), the facts are so nearly similar that I think an order of discharge should be entered.

END OF CASES IN VOL. 94.